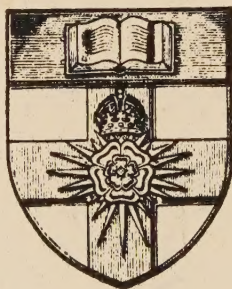


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THE ALL ENGLAND LAW REPORTS REPRINT

DERRY AND OTHERS *v.* PEEK

E [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord FitzGerald and Lord Herschell), March 28, 29, April 5, 9, 11, July 1, 1889]

[Reported 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148;
38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292]

F *Misrepresentation—Deceit—Need to prove fraud—Proof of fraud—Relevance of reasonable ground for believing truth of statement made—Relevance of motive—Defence of honest belief.*

G To sustain an action for deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, not caring whether it be true or false. To succeed in an action for deceit it is not sufficient to prove that the defendant had no reasonable ground for believing the statement which he made, but, at the same time, when a false statement has been made, a consideration of the grounds of belief in its truth is an important aid in ascertaining whether the belief was really entertained and whether the author of the statement really did believe in the truth of what he stated. If fraud is proved, the motive of the person guilty of it is immaterial. An honest belief in the truth of the statement made affords a defence to an action.

H *Contract—Rescission—Misrepresentation—Rescission on ground of innocent misrepresentation.*

I Per LORD HERSCHELL: I think it important that it should be borne in mind that the common law action of deceit differs essentially from an action brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

Notes. Followed: *Angus v. Clifford*, [1891] 2 Ch. 449. Considered: *Low v. Bouverie*, [1891-1894] All E.R. Rep. 348. Applied: *Thiodon v. Tindall and Lloyd's Register of British and Foreign Shipping Committee* (1891), 60 L.J.Q.B. 526;

Knox v. Hayman (1892), 67 L.T. 137. Considered: *Le Lievre v. Gould*, [1893] 1 Q.B. 491; *Oliver v. Bank of England*, [1902] 1 Ch. 610. Applied: *E. Hulton & Co. v. Jones*, [1908-10] All E.R. Rep. 29; *Parson v. Barclay and Goddard* (1910), 103 L.T. 196. Followed: *Tackey v. McBain*, [1911-13] All E.R. Rep. 616. Considered: *Heilbut, Symons & Co. v. Buckleton*, [1911-13] All E.R. Rep. 83; *Nocton v. Ashburton*, [1914-15] All E.R. 45; *Banbury v. Bank of Montreal*, [1917] 1 K.B. 409; *Armstrong v. Strain*, [1952] 1 All E.R. 139. Explained: *Hedley Bryne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575. Referred to: *Glasier v. Rolls* (1889), 42 Ch.D. 436; *Re Druce and Druce, Ex parte Druce* (1889), 6 Morr. 299; *Bishop v. Balkis Consolidated Co.* (1890), 25 Q.B.D. 512; *London and North Western Rail. Co. v. Boulton* (1890), 63 L.T. 727; *Scholes v. Brook* (1891), 63 L.T. 837; *Scott v. Snyder Dynamite Projectile Co.* (1892), 67 L.T. 104; *Balkis Consolidated v. Tomkinson* (1893), 42 W.R. 204; *Re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618; *McKeown v. Boudard-Peveril Gear Co.* (1896), 65 L.J.Ch. 735; *Davis v. Ohrly* (1898), 14 T.L.R. 260; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421; *Whittington v. Seale-Hayne* (1900), 82 L.T. 49; *Pritty v. Child* (1902), 71 L.J.K.B. 512; *Cackett v. Keswick*, [1902] 2 Ch. 456; *Broome v. Speak*, [1903] 1 Ch. 586; *McConnel v. Wright*, [1903] 1 Ch. 546; *Sheffield Corp'n. v. Barclay*, [1903] 1 K.B. 1; *Starkey v. Bank of England*, [1903] A.C. 114; *Exploring Land and Minerals Co. v. Kolckmann* (1905), 94 L.T. 234; *Nash v. Calthorpe*, [1905] 2 Ch. 237; *Dawson & Co. v. Bingley U.D.C.*, [1911-13] All E.R. Rep. 596; *Mair v. Rio Grande Rubber Estates*, [1913] A.C. 853; *Armstrong v. Jackson*, [1916-17] All E.R. Rep. 1117; *First National Reinsurance v. Greenfield*, [1921] 2 K.B. 260; *Edward v. Porter*, [1925] A.C. 1; *Greer v. Downs Supply Co.*, [1927] 2 K.B. 28; *Clark v. Urquhart, Stracey v. Urquhart*, [1930] A.C. 28; *Lancashire Loans, Ltd. v. Black*, [1933] A.C. 201; *United Motor Finance Co. v. Addison & Co.*, [1937] 1 All E.R. 425; *Bradford Third Equitable Benefit Building Society v. Borders*, [1941] 2 All E.R. 205; *Williams Bros. Direct Supply Stores, Ltd. v. Coote* (1944), 60 T.L.R. 270; *Thorne v. Smith*, [1947] 1 All E.R. 39; *Gilchester Properties, Ltd. v. Gomm*, [1948] 1 All E.R. 493; *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426; *Simpson v. Simpson*, [1951] 1 All E.R. 955; *R. v. Bates*, [1952] 2 All E.R. 842; *R. v. Mackinnon*, [1958] 3 All E.R. 657; *Akerhielm v. De Mare*, [1959] 3 All E.R. 485.

As to the action for deceit and the defences to it, and the rescission of a contract induced by misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 862 et seq., 877-880. For cases see 35 DIGEST 24 et seq., 57 et seq., 65 et seq.

Cases referred to:

- (1) *Reese River Silver Mining Co., Ltd. v. Smith* (1869), L.R. 4 H.L. 64; 39 L.J.Ch. 849; 17 W.R. 1042, H.L.; 35 Digest 35, 274.
- (2) *Collins v. Evans* (1844), 5 Q.B. 820; 1 Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex. Ch.; 35 Digest 30, 211.
- (3) *Chandelor v. Lopus* (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandler*, 1 Dyer 75, n.; Ex. Ch.; 35 Digest 29, 200.
- (4) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, 163.
- (5) *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 35 Digest 30, 214.
- (6) *Brownlow v. Lock* (1805), 10 Ves. 470; 32 E.R. 927; 35 Digest 34, 261.
- (7) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, 24.
- (8) *Arkwright v. Newbold* (1880), 17 Ch.D. 301; 49 L.J.Ch. 684; 42 L.T. 759; 28 W.R. 828; on appeal (1881), 17 Ch.D. 313; 50 L.J.Ch. 372; 44 L.T. 393; 29 W.R. 455, C.A.; 35 Digest 20, 114.
- (9) *Smith v. Chadwick* (1882), 20 Ch.D. 27; 51 L.J.Ch. 597; 46 L.T. 702; on appeal (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 35 Digest 18, 106.
- (10) *Baily v. Merrell* (1615), 3 Bulst. 94; 81 E.R. 81; 35 Digest 59, 549.

- A** (11) *Cross v. Gardner* (1689), 1 Show. 68; Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 89 E.R. 453; 35 Digest 29, 203.
- (12) *Risney v. Selby* (1704), 1 Salk. 211; 91 E.R. 189; sub nom. *Lysney v. Selby*, 2 Ld. Raym. 1118; 35 Digest 13, 66.
- (13) *Haycraft v. Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest 9, 26.
- B** (14) *Foster v. Charles* (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S. C.P. 32; 131 E.R. 40; 35 Digest 36, 290.
- (15) *Corbett v. Brown* (1831), 8 Bing. 33; 1 Moo. & S. 85; 1 L.J.C.P. 13; 131 E.R. 312; 35 Digest 35, 282.
- (16) *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 35 Digest 40, 338.
- C** (17) *Crawshay v. Thompson* (1842), 4 Man. & G. 357; 5 Scott, N.R. 562; 11 L.J.C.P. 301; 134 E.R. 146; 35 Digest 36, 283.
- (18) *Moens v. Heyworth* (1842), 10 M. & W. 147; H. & W. 138; 10 L.J.Ex. 177; 35 Digest 17, 96.
- (19) *Taylor v. Ashtor* (1843), 11 M. & W. 401; 12 L.J.Ex. 363; 7 Jur. 978; 152 E.R. 860; 35 Digest 31, 222.
- D** (20) *Evans v. Edmonds* (1853), 13 C.B. 777; 1 C.L.R. 653; 22 L.J.C.P. 211; 21 L.T.O.S. 155; 17 Jur. 883; 1 W.R. 412; 138 E.R. 1407; 35 Digest 32, 235.
- (21) *Peek v. Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, 119.
- (22) *Weir v. Bell* (1878), 3 Ex.O. 238; 47 L.J.Q.B. 704; sub nom. *Weir v. Barnett, Bell, etc.*, 38 L.T. 929; 26 W.R. 746, C.A.; 35 Digest 29, 196.
- E** (23) *Edgington v. Fitzmaurice* (1884), 29 Ch.D. 459; 53 L.T. 369; 32 W.R. 848; affirmed (1885), 29 Ch.D. 476; 55 L.J.Ch. 650; 53 L.T. 375; 50 J.P. 52; 33 W.R. 911; 1 T.L.R. 326, C.A.; 35 Digest 32, 240.
- (24) *Arnison v. Smith* (1889), 41 Ch.D. 348; 61 L.T. 63; 37 W.R. 739; 5 T.L.R. 413; 1 Meg. 388, C.A.; 35 Digest 42, 374.

F **Appeal** by the defendants in the action from a decision of the Court of Appeal (COTTON, L.J., SIR JAMES HANNEN and LOPES, L.J.), reported 37 Ch.D. 541, reversing a decision of STIRLING, J.

The action was brought by the respondent, Sir Henry Peek, to recover from the appellants, the directors of the Plymouth, Devonport, and District Tramways Co., Ltd., damages for misstatements alleged to have been contained in a prospectus issued by them, by which he asserted that he was induced to act to his prejudice by taking shares in the company. The misrepresentation in the prospectus complained of was that the company had the right to use steam or other mechanical power, when in fact they had no such right, but only a contingent possibility of obtaining that right dependent on the consents of the Board of Trade and of the corporations of Plymouth and Devonport, which consents were subsequently refused as to a most material portion of the line. The respondent, on the faith of the prospectus, applied for 400 shares in the company, which were allotted to him, and in respect of which he paid £4000. The company was compulsorily wound-up in May, 1885. At the trial of the action in March, 1887, STIRLING, J., dismissed it with costs on the ground that the appellants had made the statements in the prospectus bona fide and not with any intention to deceive. The Court of Appeal held that, the statements in the prospectus being untrue and the appellants knowing them to be untrue or having no reasonable ground for believing them to be true, it was immaterial whether they had any intention to deceive the public, and that they were responsible to any person who in fact acted on their statements. The directors appealed to the House of Lords.

Sir Horace Davey, Q.C., Fletcher Moulton, Q.C., and Muir Mackenzie for the appellants.

Bompas, Q.C., E. W. Byrne, Q.C., and Pattullo for the respondent.

Their Lordships took time for consideration.

July 1, 1889. The following opinions were read.

LORD HALSBURY, L.C.—I have so recently expressed an opinion in the Court of Appeal on the subject of actions of this character that I do not think it necessary to do more than say that I adhere to what I there said (*Arnison v. Smith* (24), 41 Ch.D at p. 367). To quote the language now some centuries old in dealing with actions of this character, "fraud without damage or damage without fraud" does not give rise to such actions. I have had also the opportunity of reading the opinion of LORD HERSCHELL, and I could desire to add nothing to his exhaustive and lucid treatment of the authorities.

When I turn to the question of fact I confess I am not altogether satisfied. In the first place, I think the statement in the prospectus was untrue in fact, and to the minds of such persons as were likely to take shares well calculated to mislead. I think such persons would have no idea of the technical division between tramways that had rights to use mechanical means and tramways that had not. What I think they would understand would be that this particular tramway was in an exceptionally advantageous position; that the statement was of a present existing fact; and that it had at the time of the invited subscription for shares the right to use steam. I think such a statement, if wilfully made with the consciousness of its inaccuracy, would give rise to an action for deceit, provided that damage had been sustained, if a person had acted upon a belief induced by such a prospectus. But upon the question that these statements were made with a consciousness of their misleading character, I cannot but be influenced by the opinions entertained by so many of your Lordships that they are consistent with the directors' innocence of any intention to deceive. The learned judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned judge below, they appear to me to have justified their decision upon grounds which, as I have already said, I do not think tenable, namely, that they (the directors) were liable because they had no reasonable ground for the belief which nevertheless it is assumed they sincerely entertained. I think it would have been satisfactory to have had a more minute and exact account of how this prospectus was framed, the actual evidence of the draftsman of it, and the discussion which took place upon the alteration in form, which alteration gave such marked and peculiar prominence to the special feature of this particular tramway, in respect of the possession of power to use steam. Nevertheless, if, as I have said, the facts are reconcilable with the innocence of the directors and with the absence of the mens rea which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England.

As to the question whether Sir Henry Peek was induced to take his shares by reliance on the misleading statement, I admit that I have very considerable doubt. On the one hand, I do not believe that anyone can so far analyse his mental impressions as to be able to say what particular fact in the prospectus induced him to subscribe. On the other hand, the description of Sir Henry Peek even now that the question has been pointedly raised and brought to his mind, of what did or did not induce him to take his shares, is hardly reconcilable with his having been substantially induced by the statement in question to take them. On the whole I acquiesce in the judgment which one of your Lordships is about to move, namely, that the judgment appealed from be reversed.

LORD WATSON.—I agree with STIRLING, J., that, as a matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned judges of the Court of Appeal meant to differ from that conclusion; but they have held

A that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England. But I shall not trouble your Lordships with any observations of mine, because I accept without reserve the opinion about to be delivered by LORD HERSCHELL.

LORD BRAMWELL.—I am of opinion that this judgment should be reversed. I am glad to come to this conclusion, for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud, which, with all submission, I think wholly unfounded—a charge supported on such materials as to make all character precarious. I hope this will not be misunderstood, and that promoters of companies will not suppose that they can safely make inaccurate statements with no responsibility. I should much regret any such notion; for the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over-sanguine, that it requires all the protection that the law can give it. Particularly should I regret if it was supposed that I did not entirely disapprove of the conduct of those directors who accepted their qualification from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give him a good price, as high a price as they can, while their duty to their shareholders is to give him one as low as they can. But there is another thing. The public, seeing these names, may well say: “These are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same,” little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful. The only shade of doubt I have in the case is that this safety from loss in the directors may have made them less careful in judging of the truth of any statements they have made.

There is another matter I wish to dispose of before going into the particular facts of the case. I think we need not trouble ourselves about “legal fraud,” nor whether it is a good or bad expression; because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase “legal fraud” except when actual fraud cannot be established. “Legal fraud” is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for SIR JAMES HANNEN, I cannot think the expression “convenient” very clearly conveys an idea—at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. But with these remarks I have done with it, and will proceed to consider whether the law is not that actual fraud must be proved, and whether that has been done.

I really am reluctant to cite authorities to show that actual fraud must be established in such a case as this. It is one of the first things one learned, and one has never heard it doubted until recently. I am very glad to think that LORD HERSCHELL has taken the trouble to go into the authorities fully; but to some extent I deprecate it, because it seems to me somewhat to come within the principle, *Qui s'excuse s'accuse*. As I have said, I never heard a doubt on the subject until very recently. When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by

fraud. Warrantizando vendidit gives a cause of action if the warranty is broken; knowingly and fraudulently stating a material untruth which brings about, wholly or partly, the contract, also gives a cause of action. To this may now be added the equitable rule (which is not in question here), that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there must be a contract and breach, or fraud. The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common law lawyer, to the contrary; none has been cited, though there may be some incautious, hesitating expressions which point that way. Every case from the earliest in COMYN'S DIGEST to the present day alleges it. Further, the learned judges of the Court of Appeal hardly deny it. There is indeed an opinion to the contrary of SIR GEORGE JESSEL, M.R.; but it must be remembered that his knowledge of actions of deceit was small, if any. I cannot think, then, that it is necessary to cite cases to show that, to maintain this action, fraud in the defendant must be shown. As to the evidence. The plaintiff's case is, that the defendants made an untrue statement, which they knew to be untrue, and likely to influence persons reading it, and, therefore, they were fraudulent. It is not necessary to consider whether a prima facie case was made out by the plaintiff. We have all the evidence before us, and must judge on the whole. The alleged untrue statement is, that "the company has the right to use steam or mechanical power instead of horses," and that a saving would be thereby effected.

This is certainly untrue; because it is stated as an absolute right, when in truth it was conditional on the approval of the Board of Trade, and the sanction or consent of two local boards, and a conditional right is not the same as an absolute right. It is also certain that the defendants knew what the truth was, and, therefore, knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true, as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to knowing the truth, a man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say yes, without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods to be made required a writing like a contract for goods in existence. If he was writing on the subject he would of course state the exception or qualification. Consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very last they cannot see the fraud. There is their oath, their previous character unimpeached, and there is, to my mind, this further consideration, the truth would have suited their purpose as well: "We have power to use steam, etc., of course with the usual conditions of the approval of the Board of Trade and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." The plaintiff's own answer shows that he would have been content with that statement. During the argument I said I am not sure that I should not have passed the prospectus. I will not say so now, because certainly I would not pass it after knowing the unfortunate use made of the

A statement, and no one can tell what would have been the state of his mind if one of the factors influencing it was wanting. But I firmly believe it might have been, and was, honestly done by these defendants. STIRLING, J., saw and heard them, and was of that opinion. It is difficult to say that the plaintiff was not. The report of Nov. 6, 1884, showed that the consent of the Board of Trade was necessary, showed also that the corporation of Devonport would not consent, B showed, therefore, the "untruth;" and yet the plaintiff "had every confidence in the directors."

I now proceed to consider the judgments that have been delivered. It is not necessary to declare my great respect for those who have delivered them. STIRLING, J., refuses to say whether actual fraud must be shown, and deals with the case on the footing that the question is whether the defendants had reasonable grounds C for making the statement they did. He holds, as I do, that they thought the company had the right, as put in the prospectus, to use steam. Then he says he must

"come to the conclusion that they had reasonable ground for their belief: at all events, their grounds were not so unreasonable as to justify me in D charging them with having been guilty of fraud."

It is singular that the learned judge seems to consider that unreasonableness must be proved to such an extent as to show fraud. He then proceeds, for what seem to me unanswerable reasons, to show that they did everyone believe that they had the right stated in the prospectus. He refers to what he saw of them in the box. He says he cannot come to the conclusion that their belief was so unreasonable E and so unfounded, and their proceedings so reckless or careless, that they ought to be fixed with the consequences of deceit. He makes an excellent remark, that

"mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that those things would come about, and when they did not come about, F make them liable in an action of fraud."

My only variation of this would be that it may be that the objection did not, and naturally did not, occur to them. It has not been argued, and I will say no more on the question whether, had the plaintiff known the contents of the Act, he would or would not have applied for the shares, than that I agree with STIRLING, J.

G COTTON, L.J., says the law is

"that where a man makes a statement to be acted on by others which is false and is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is without any reasonable ground for believing it to be true,"

H he is liable to an action for deceit. I agree to all before "that is," and I agree to what comes after, if it is taken as equivalent to what goes before, viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained by "without care whether it is true or false." For a man who makes a statement without care and regard for its truth or falsity commits a fraud: he is a rogue. For every man who makes a statement says, "The truth is so and so, I I and I know it or believe it." I say I agree to this as I understand it. It seems to me, with great respect, that the learned lord justice lost sight of his own definition, and glided into a different opinion. He says:

"There is a duty cast upon a director who makes that statement to take care that there are no statements in it which in fact are false; to take care that he has reasonable grounds for the material statements which are contained in that document [prospectus], which he intends should be acted on by others. And although in my opinion it is not necessary there should be what

I should call fraud, there must be a departure from duty, and he has violated the right which those who received the statements have to have true statements only made to them." A

This seems to be a most formidable matter. I agree there is some such duty. I agree that not only directors in prospectuses, but all persons in all dealings, should tell the truth. If they do not, they furnish evidence of fraud; they subject themselves to have the contract rescinded. But to say that there is "a right to have true statements only made," I cannot agree, and I think it would be much to be regretted if there was any such right. Mercantile men, as STIRLING, J., says, would indeed cry out. No qualification is stated. If this is law, the statement may be reasonably believed to be true by him who makes it, but, if untrue, there is to be a cause of action; and that although he may have refused a warranty. I hope not. There is a duty to tell the truth; but it is a duty of imperfect obligation. It is a duty for non-observance of which the law gives no remedy if there is no fraud. His Lordship says: B C

"Where a man makes a false statement without reasonable ground to suppose it to be true, he is liable civilly as much as a person who commits what is usually called fraud." D

I say I agree if that means making a statement of which he knows or believes not the truth. His Lordship proceeds to examine whether the defendants had reasonable ground for believing what they said, and comes to the conclusion that they had not, and so holds them liable, not because they were dishonest, but because they were unreasonable. I say they never undertook to be otherwise. He says: E

"It is not that I attribute to them any intention to commit fraud, but they have made a statement without any sufficient reason for believing it to be true."

SIR JAMES HANNEN says that he agrees with COTTON, L.J.'s, statement of the law, and adds: F

"If a man takes upon himself to assert a thing to be true, which he does not know to be true, and has no reasonable ground to believe to be true,"

it is sufficient in an action of deceit. I agree, if he knows he has no such reasonable ground; otherwise with great respect I differ. He cites LORD CAIRNS, that,

"if persons take upon themselves to make assertions as to which they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue:" G

Reese River Silver Mining Co., Ltd. v. Smith (1) (L.R. 4 H.L. at pp. 79, 80). So say I; but this does not support SIR JAMES'S proposition. Nor does he deal with what he quotes from LORD CRANWORTH. But further he speaks of legal fraud as meaning H

"that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility."

But if there is moral culpability, I agree there is responsibility. But to believe without reasonable grounds is not moral culpability, but (if there is such a thing) mental culpability. He says: I

"The word fraud is in common parlance reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty."

I agree the law applies it to all breaches of the moral duty to tell the truth in dealing with others; but cannot that duty be honestly broken? To be actionable, a breach of that duty must be dishonest. Nay, it is a man's duty sometimes to tell an untruth. For instance, when asked as to a servant's character, he must say what he believes is the truth, however he may have formed his opinion, and however

A wrong it may be. His Lordship says he cannot think the directors had any reasonable ground for believing the prospectus to be true. But had they the matter present to their minds? Even if this were the question, I should decide in their favour.

As to the judgment of LOPES, L.J., I quite agree with what he says :

B "I know of no fraud which will support an action of deceit to which some moral delinquency does not belong."

I think that shows the meaning of what he says "fourthly," though that is made doubtful by what he says elsewhere.

C I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action. I have examined these judgments at this length owing to my sense of their importance and the importance of the question they deal with. I think it is most undesirable that actions should be maintainable in respect of statements, made unreasonably perhaps, but honestly. I think it would be disastrous if there was "a right to have true statements only made." This case is an example. I think that in this kind of case, as in some others, courts of equity have made the mistake of disregarding a valuable general principle in the desire to effect what is, or is thought to be, justice in a particular instance. It might, perhaps, be desirable to enact that in prospectuses of public companies there should be a warranty of the truth of all statements except where it was expressly said there was no warranty. The objection is to exceptional legislation, and to the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither. In this particular case I hold that, unless fraud in the defendants could be shown, the action is not maintainable. I am satisfied there was no fraud. Further, if an unreasonable misstatement were enough, I hold there was none. Still further, I do not believe that the plaintiff was influenced by the misstatement, though I am entirely satisfied that he was an honest witness.

F LORD FITZGERALD.—The pleadings and the facts have been already referred to by the noble Lords who have addressed the House. The action is for deceit. The writ was sued out in February, 1885, and originally claimed rescission of the contract with the company. It was subsequently amended by striking out the company as defendants and also the prayer for rescission, and it assumed the character of an action for deceit against the present appellants (five of the directors), and claimed "damages for the fraudulent misrepresentations of the defendants." The statement of claim, which is sufficient in form to raise the real question, alleged the misrepresentation to exist in the prospectus issued in January, 1883, and to consist of the paragraph that the company had a right to use steam or other mechanical motive power; and it was further alleged

"that the defendants intended thereby to represent that the company had an absolute right to use steam and other mechanical power,"

I and that such representation was made fraudulently, and with the view to induce the plaintiff to take shares in the company. So far, the real issue seems to have been raised fairly and clearly, and to depend on matters of fact. There were circumstances connected with the promotion of the company, and the procuring of four of the defendants to act as directors, which tended to create suspicion as to their statements and their bona fides, and attracted directly the attention of the learned judge before whom the case was tried. The defendants, who were severally produced as witnesses at the trial, were exposed to a very lengthened and searching cross-examination by counsel for the plaintiff, and were also carefully examined by the judge as to these transactions, with the result apparently of freeing them from any imputations therein of moral misconduct.

The question which I am about to examine in the first instance, and excluding A
for the present the element of fraud, is whether the impugned statement in the
prospectus was a false statement in the sense of being untrue. That it was
inaccurate so far as it purported to give the legal effect of the special Act I do
not doubt; but was it untrue as representing the position of the company in a
popular and business sense? The general Tramways Act, 1870, which regulates B
tramways generally, but subject to the provisions of the special Act, if any, of
each company, places them under the supervision of the Board of Trade with a
view to public safety, and for public protection generally, and by s. 34 it provides

“ that all carriages used on tramways shall be moved by the power prescribed
by the special Act.”

The special Act of this company became law on July 24, 1882, and by s. 4 the C
company incorporated by the Act is empowered to make the seven tramways in
question in all respects in accordance with the plans and sections. Section 15
provides minutely for their formation, subject to the orders of the Board of Trade,
and by s. 16 the tramway is not to be opened for public traffic until it shall have
been inspected and certified by the Board of Trade to be fit for such traffic. D
Before referring to s. 35 of the special Act we may glance at s. 37 of that Act, which
empowers the Board of Trade to make byelaws as to any of the tramways on which
steam may be used under the authority of the Act; and s. 44, which provides that
where the company intends to use steam they shall give two months' notice. There
are several other sections providing for the use of steam power if the company should
elect to use it as the motor.

In the light of those sections of the special Act and of s. 34 of the general Act, E
let us now look at the particular paragraph of the prospectus, and s. 35 of the special
Act. By that section Parliament has done that which Parliament could do, and
which the Board of Trade could not do. It has conferred on the company authority
to use steam as its motive power. It has not imposed on the company the use of
steam power, but it says that they may use it if they elect to do so. Before dealing F
with the consent of the Board of Trade, I desire to call attention to the proviso
in s. 35 :

“ that the exercise of the powers hereby conferred with respect to the use of
steam shall be subject to the regulations in Sched. A, and to any regulations
which may be added thereto or substituted therefor by the Board of Trade
for securing to the public all reasonable protection against danger, in the
exercise of the powers by this Act conferred, with respect to the use of steam.” G

Schedule A, referred to in s. 35, contains no less than ten regulations for the
direction of the company in the exercise of the right so conferred to use steam
power. Turning back to the words “ with the consent of the Board of Trade ” in
s. 35 of the special Act, that consent could not confer, nor would its absence take H
away, the right conferred by the legislature to use steam as a motor. Its true
character is that of a precaution imposed by the legislature to defer the actual
exercise of the right conferred until the supervision of the Board of Trade secures
to the public all reasonable protections against danger. To attain these objects the
legislature provides that the powers it has conferred should not be actually exercised I
without the consent of the Board of Trade.

I have, though with difficulty, arrived at the conclusion that the statement in
the prospectus, that by the special Act the company had the right to use steam
power, was not untrue in a popular or business sense. Let us see for a moment in
what way and with what meaning General Hutchinson used similar expressions.
In his report of July 12, 1884, he says :

“ The Act of 1882 gives, however, power to the company to use mechanical
power over all their system, and I think it would be most objectionable that this

A power should be exercised on parts of Tramway No. 1, on account of the narrowness of three of the roads."

The remainder of the incriminated paragraph of the prospectus is :

B "and it is fully expected that by means of [the use of steam], a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses."

This was not untrue; there had been a division of opinion in the directory on the subject, which was finally and before the issue of the prospectus resolved in favour of steam. The conclusion I have arrived at is that this paragraph of the prospectus, though inaccurate in point of law in one particular, seems on the whole to have been morally true.

C If this view is correct, it is an answer to the action; but assuming that it is not correct, or that your Lordships are not prepared to adopt it, I proceed to express my opinion on the remaining substance of the action. COTTON, L.J., describes the action as "an action of deceit, a mere common law action." The description is accurate, and I proceed to deal with it as a mere common law action. It has not
D been in the least altered in its characteristics by having been instituted in the Chancery Division, or tried by a judge without the aid of a jury; nor are your Lordships necessarily driven to consider in the present appeal some of the subtle and refined distinctions which have been engrafted on the clear and simple principles of the common law. The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since
E *Collins v. Evans* (2) in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue; or, to adopt the language of the learned editors of SMITH'S
F LEADING CASES, that

"the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation, or to have made it fraudulently without belief that it was true."

The leading counsel for the respondent met the argument fairly on the allegations of fact. He alleged "that the defendants were not honest; that they stated in the
G prospectus a definite lie, and knew that it was a lie." That is the very issue, in fact, in the case. The whole law and all the cases on the subject will be found in the notes to *Chandelor v. Lopus* (3) (SMITH'S LEADING CASES (9th Edn.), vol. 1, p. 186) and *Pasley v. Freeman* (4) (SMITH'S LEADING CASES (9th Edn.), vol. 2, p. 74). There is also a clear and able summary of the decisions both in law and in equity,
H brought down to the present time, in the recent edition of BENJAMIN ON SALE, by PEARSON-GEE and BOYD. I desire to make an observation on *Chandelor v. Lopus* (3). The report in CRO. JAC. 4 would seem to have but little direct bearing on the present case, were it not for the opinion attributed to ANDERSON, J.; but there is a valuable note in 1 DYER, by VAILLANT (at p. 75a), which is as follows :

I "Lopus brought an action upon the case against Chandelor, and showed that, whereas the defendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone called a bezoar stone, etc., upon which the plaintiff bought it, etc. There the opinion of POPHAM, C.J., was that if I have any commodities which are damaged (whether victuals or otherwise), and I, knowing them to be so, sell them for good and affirm them to be so, an action upon the case lies for the deceit; but although they be damaged, if I, knowing not that, affirm them to be good, still no action lies without I warrant them to be good."

The action seems originally to have been on a warranty which failed in fact, as there had been no warranty, and it was then sought to support it as an action for deceit; but it was not alleged in the court that the defendant knew the representation to be untrue. It was in reference to that that the observation of POPHAM, C.J., was made. He had the reputation of being a consummate lawyer. The note in 1 DYER, at p. 15a, was probably by MR. TREBY, afterwards TREBY, C.J. He edited an edition of DYER published in 1688. I have not had an opportunity of referring to it, but it is said that he gave the public some highly authoritative notes in that edition. I have quoted from MR. VAILLANT's edition published in 1794.

The whole evidence given on this appeal has been laid before your Lordships, and we have to deal with it as a whole. That evidence has been already so fully stated and criticised that it is not necessary for me to do more than to state the conclusions of fact which, in my opinion, are reasonably to be deduced from it, viz., that the several defendants did not know that the incriminated statement in the prospectus was untrue, and that, on the contrary, they severally and in good faith believed it to be true. The conclusions in fact at which I have arrived render it unnecessary for me to consider the long and rather bewildering list of authorities to which your Lordships were referred, or to criticise the reasons given in the Court of Appeal for their decision in the present case.

I desire, however, to make a single observation. There is one characteristic which, as it seems to me, pervades each of the several judgments in the Court of Appeal, viz., that the bona fide belief of the defendants in the truth of the representation was unavailing unless it was a reasonable belief resting on reasonable grounds. If this is correct, it seems to me that in an action for "deceit" it would be necessary to submit to the jury (if tried before that tribunal) not only the existence of that belief bona fide, but also the grounds on which it was arrived at, and their reasonableness. I am by no means satisfied that such is the law, and if now driven to express an opinion on it, I would prefer following the opinion of LORD CRANWORTH, in *Western Bank of Scotland v. Addie* (5), in which he said (L.R. 1 Sc. & Div. at p. 168):

"I confess that my opinion was, that in what his Lordship [LORD CHELMSFORD] thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless or negligent or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of bona fides. I am of opinion that the decision of the Court of Appeal should be reversed.

LORD HERSCHELL.—In the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants in a prospectus issued by them made certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and that they made the representations

A fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action."

B This is the description of it given by COTTON, L.J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of the contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, C however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite.

D I lay stress upon this, because observations made by learned judges in actions for rescission have been cited and much relied upon at the Bar by counsel for the respondents. Care must obviously be observed in applying to an action of deceit the language used in relation to such actions. Even if the scope of the language used extended beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety E the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make F good the assurance he has given. *Burrowes v. Lock* (6) may be cited as an example, where a trustee had been asked by an intended lender upon the security of a trust fund, whether notice of any prior encumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. LORD SELBORNE pointed out, in *Brownlie v. Campbell* (7) (5 App. G Cas. at p. 935), that these cases were in an altogether different category from actions to recover damages for false representation such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships.

H "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the common law divisions, there being, in my opinion, no such thing as an equitable action for deceit."

I This was the language of COTTON, L.J., in *Arkwright v. Newbold* (8) (17 Ch.D. at p. 320); it was adopted by LORD BLACKBURN in *Smith v. Chadwick* (9), and is not, I think, open to dispute. In the court below COTTON, L.J., said:

"What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of anyone to whom it was addressed, or anyone of the class to whom it was

addressed, and who was materially induced by the misstatement to do an act to his prejudice."

About much that is here stated there cannot, I think, be two opinions. But when the learned lord justice speaks of a statement made recklessly or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and, therefore, without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief.

I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. That the learned lord justice thought that, if a false statement were made without reasonable ground for believing it to be true, an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated among persons in order to induce them to take shares,

"there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable grounds for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned judge proceeds to say :

"Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty; that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and, in my opinion, when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have, to have true statements only made to them."

I have first to remark on these observations that the alleged "right" must surely be here stated too widely if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For, if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe, that the lord justice distinctly says that, if there be such a departure from duty, an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers which have led to the use of such expressions as "legal fraud" or "fraud in

A law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. SIR JAMES HANNEN says :

B "I take the law to be that, if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain action for deceit."

C Again, LOPES, L.J., states what, in his opinion, is the result of the cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement intended to be and in fact relied on by the person to whom it is made may be sued by the person damaged thereby.

"Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

E It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true; but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds.

F It will be seen further that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed LOPES, L.J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary. I need go no further back than the leading case of *Pasley v. Freeman* (4). If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished judge, GROSE, J., differing from his brethren on the Bench, held that such an action was not maintainable. BULLER, J., who held that the action lay, adopted in relation to it the language of CROKE, J., in *Baily v. Merrell* (10), who said (3 Bulst. at p. 95) :

"Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies."

I In reviewing *Cross v. Gardner* (11) he says (3 Term Rep. at p. 57): "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and further, after pointing out that in *Risney v. Selby* (12) the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds (*ibid.* at p. 60) :

"The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so,"

the latter words being specially emphasised. LORD KENYON, C.J., said (*ibid.* at p. 65) :

"The plaintiffs applied to the defendant telling him that they were going to deal with Falck, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" A

In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false. B

Haycroft v. Creasy (13) was, again, an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were :

"I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." C

All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. LORD KENYON, C.J., thought that fraud had been proved because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges, thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made it essential to the maintenance of the action, and that belief in its truth affords a defence. D E

I may pass now to *Foster v. Charles* (14). It was there contended that the defendant was not liable even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the court, TINDAL, C.J., saying (7 Bing. at p. 107) : F

"It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad."

This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterised as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood intending that another shall be led to act upon it as if it were the truth may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made. G H

Foster v. Charles (14) was followed in *Corbett v. Brown* (15), and shortly afterwards in *Polhill v. Walter* (16). The learned counsel for the respondent placed great reliance on this case because, although the jury had negatived the existence of fraud in fact, the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was, that the defendant was not actuated by any corrupt or improper motive, for LORD TENTERDEN says (3 B. & Ad. at p. 123) : I

"It was contended that . . . in order to maintain this species of action it is not necessary to prove that the false representation was made from a

A corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud, and for this position was cited *Foster v. Charles* (14), to which may be added the recent case of *Corbett v. Brown* (15). The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshaw v. Thompson* (17) MAULE, J., explains *Polhill v. Walter* (16) (4 Man. & G. at p. 382):

"If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill v. Walter* (16)."

In the same case, CRESSWELL, J., defines "fraud in law" in terms which have often been quoted. He says (*ibid.* at p. 387):

"The cases may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens v. Heyworth* (18), which was decided in the same year as *Crawshaw v. Thompson* (17), LORD ABINGER, C.B., having suggested that an action of fraud might be maintained where no moral blame was to be imputed, PARKE, B., said (10 M. & W. at p. 157):

"To support that count [*viz.*, a count for fraudulent representation] it was essential to prove that the defendants knowingly by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series (*Taylor v. Ashton* (19)) is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict entitled the plaintiff to judgment. PARKE, B., however, in delivering the opinion of the court, said (11 M. & W. at p. 415):

"It is insisted that even that [the gross negligence which the jury had found], accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made. . . . But then it was said that, in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue if they communicated that fact for a deceitful purpose, and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was true for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

It is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than

fraud will do. I can find no trace of the idea that it would suffice if it were A shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them. B

All the cases I have hitherto referred to were in courts of first instance. But in *Collins v. Evans* (2) they were reviewed by the Exchequer Chamber. The judgment of the court was delivered by TINDAL, C.J. After stating (5 Q.B. at p. 827) the question at issue to be

"whether a statement or representation which is false in fact, but not known to be so by the party making it, but on the contrary, made honestly and in the full belief that it is true, affords a ground of action," C

he proceeds to say (*ibid.*):

"The current of authorities from *Pasley v. Freeman* (4) downwards has laid down the general rule of law to be, that fraud must concur with the false statement in order to give a ground of action." D

Is it not clear that the court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true?"

In *Evans v. Edmonds* (20) MAULE, J., expressed an important opinion often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said (13 C.B. at p. 786): E

"If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." F

The foundation of this proposition manifestly is that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes, it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true. G

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland v. Addie* (5) the Lord President told the jury H

"that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe, to be true, that would be misrepresentation or deceit." I

Exception having been taken to this direction without avail in the Court of Session, LORD CHELMSFORD in this House said (L.R. 1 Sc. & Div. at p. 162):

"I agree in the propriety of this interlocutor. . . . In the argument upon this exception the case was put of an honest belief being entertained by the directors of the reasonableness of which it was said the jury upon this direction would have to judge. But supposing a person makes an untrue

- A statement which he asserts to be the result of a bona fide belief of its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit."
- B I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence
- C of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that, though the belief was really entertained, yet, if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous
- D authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley v. Freeman* (4) down to that with which I am now dealing. Even when the expression "fraud in law" has been employed,
- E there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of LORD CRANWORTH. In delivering his opinion in *Western Bank of Scotland v. Addie* (5) he said (L.R. 1 Sc. & Div. at p. 168):

- F "I confess that my opinion was that, in what his Lordship [the Lord President] then stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the court thinks, or your
- G Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be a consequence, not of their having stated as true what they had not reasonable
- H ground to believe to be true, but of their having stated as true what they did not believe to be true."

SIR JAMES HANNEN, in his judgment in the court below in the present case, seeks to limit the application of what LORD CRANWORTH says to cases where the statement made is a matter of opinion only. With all deference I do not

- I think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by SIR JAMES HANNEN are looked at, it becomes to my mind obvious that LORD CRANWORTH did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by LORD CAIRNS in two well-known cases have been cited as though they supported the view that an action of deceit might be main-

tained without any fraud on the part of the persons sued. I do not think they bear any such construction. In *Reese River Silver Mining Co. v. Smith* (1) he said (L.R. 4 H.L. at pp. 79, 80) : A

"If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." B

This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For, if not, it might be said of anyone who innocently makes a false statement that he must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of LORD CAIRNS in the sense I have indicated, it is no more than an adoption of the opinion expressed by MAULE, J., in *Evans v. Edmonds* (20). It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When LORD CAIRNS speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure. C

In *Peek v. Gurney* (21) the same learned Lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say (L.R. 6 H.L. at pp. 409, 410) : D

"They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." E F

In the case then under consideration it was clear that, if there had been a false statement of fact, it had been knowingly made. LORD CAIRNS certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial; that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was, therefore, but an affirmation of the law laid down in *Forster v. Charles* (14), *Polhill v. Walter* (16), and other cases I have already referred to. G

I now come to very recent cases. In *Weir v. Bell* (22) LORD BRAMWELL vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reason for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure. In the same case COTTON, L.J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge in *Arkwright v. Newbold* (8) laid down the law somewhat differently, for he said (17 Ch.D. at p. 320) : H

"In an action of deceit the representation to found the action must not be innocent; that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." I

A His exposition of the law was substantially the same in *Edgington v. Fitzmaurice* (23). In this latter case BOWEN, L.J., defined (29 Ch.D. at p. 481) what the plaintiff must prove in addition to the falsity of the statement, as:

"Secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

B It only remains to notice the case of *Smith v. Chadwick* (9). SIR GEORGE JESSEL, M.R., there said (20 Ch.D. at p. 44):

"A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions, and did not intend to defraud."

C This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie. It must be remembered that it was not requisite for SIR GEORGE JESSEL, M.R., in *Smith v. Chadwick* (9) to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms (*ibid.* at p. 67):

"On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

F I may further note that, in the same case, LINDLEY, L.J., said (*ibid.* at p. 75):

"The plaintiff has to prove . . . first of all that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or at all events that they did not believe the truth of it."

G This appears to me to be a different statement of the law from that which I have just criticised, and one much more in accord with the prior decisions.

Smith v. Chadwick (9) was carried to your Lordships' House. LORD SELBORNE thus laid down the law (9 App. Cas. at p. 190):

H "I conceive that in an action of deceit . . . it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract."

I It will be noticed that the noble and learned Lord regards the proof of actual fraud as essential; all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. LORD BLACKBURN indicated that, although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed; but it is impossible to read his judgment

in this case, or in that of *Brownlie v. Campbell* (7) without seeing that in his opinion proof of actual fraud, of a wilful deception, was requisite. A

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. B C

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman* (4) down to *Addie's Case* (5) in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by LORD CRANWORTH, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of LORD CHELMSFORD's view until *Weir v. Bell* (22), where it seems to be involved in COTTON, L.J.'s enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The dictum of SIR GEORGE JESSEL, M.R., that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still farther. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal. In my opinion, making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed COTTON, L.J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed, and *Taylor v. Ashton* (19) appears to me to be in direct conflict with the dictum of SIR GEORGE JESSEL, M.R., and inconsistent with the view taken by the learned judges in the court below. I observe that SIR FREDERICK POLLOCK, in his able work on TORTS (1st Edn. p. 243, n.), referring I presume to the dicta of COTTON, L.J., and SIR GEORGE JESSEL, M.R., says that the actual decision in *Taylor v. Ashton* (19) is not consistent with the modern cases on the duty of directors of companies. I think he is right. But, for the reasons I have given, I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit. D E F G H I

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable founda-

A tion would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by LORD BLACKBURN in *Brownlie v. Campbell* (7), a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

B I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene and expressly give a right of action in respect of such a departure from duty [see now Companies Act, 1948, s. 44 (3 HALSBURY'S STATUTES (2nd Edn.) 452)]. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

E It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is, that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants except Wilde with the inclination to scrutinise their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, one who was under no similar pressure, the case assumes, I think, a different complexion. I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and after carefully considering the evidence, I see no reason to dissent from STIRLING, J.'s, conclusion. I shall, therefore, assume the truth of their testimony.

H I agree with the court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were; but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the Tramways Act, 1870, it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. In order, therefore, to enable the company to use steam power an Act of Parliament had to be obtained empowering its use. This had been done, but the power was

clogged with the condition that it was only to be used with the consent of the Board of Trade. It was, therefore, incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was, therefore, a mere question of expenditure and care. The provision might seem to them analogous to that contained in the general Tramways Act of 1870, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purposes of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar and director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the standing orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse power, and, no objection having been raised by the Board of Trade and the Bill obtained, he took it for granted that no objection would be raised afterwards provided the works were properly carried out. He considered, therefore, that practically and substantially they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would have had in the case of a railway; that they might have required the making of additions or alterations, but that on any reasonable requirements being complied with they could not refuse their consent. It never entered his thoughts that, after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of s. 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the Board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt of it. It never occurred to him to say anything about the consent of the Board of Trade, because, as they had got the Act of Parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that, though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that, the company having obtained their Act, the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time it was correct to say they had the right to use steam.

As I have said, STIRLING, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the

- A Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was, therefore, inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. It is not unworthy of note that, in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says :

“The Act of 1882 gives the company authority to use mechanical power over all their system.”

- D I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold; the probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form, and by asking ourselves whether a reasonable man would be likely under the circumstances so to believe.
- E I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe and consider that the representation made was substantially true. Adopting the language of SIR GEORGE JESSEL, M.R., in *Smith v. Chadwick* (9) (20 Ch.D. at p. 67) I conclude
- F by saying that on the whole I have come to the conclusion that the statement, “though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit.”

I think the judgment of the Court of Appeal should be reversed.

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Appeal allowed.

Solicitors : *Linklater, Hackwood, Addison & Brown; Tamplin, Tayler & Joseph.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

R. v. TOLSON

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Denman, J., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Shephen, Cave, Day, A. L. Smith, Wills, Grantham and Charles, JJ.), January 26, May 11, 1889]

B

[Reported 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629]

Criminal Law—Mens rea—Generally ingredient of criminal offence—Statute making act criminal without proof of mens rea—Construction—Defence to charge involving mens rea—Absence of guilty intention.

C

It is a principle of the criminal law that, ordinarily speaking, a crime is not committed if the mind of the person doing the allegedly criminal act is innocent. Generally, proof of mens rea is a necessary ingredient of an offence. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. A statute may, however, be so framed as to make an act criminal whether there has been an intention to break the law or otherwise do wrong or not. Whether an Act is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, namely, that there must be a guilty mind, must depend on the subject-matter of the Act and the circumstances of the case which may make the one construction or the other reasonable or unreasonable. It is within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right, but such a result seems so revolting to the moral sense that the clearest evidence is required that such is the meaning of the Act. At common law an honest and reasonable belief in the existence of circumstances which, if true, would make an act for which a person is indicted an innocent act, or proof that such a person had made an honest and reasonable mistake, has always been held to be a good defence to a charge involving the existence of mens rea, and the principle applies equally in the case of statutory offences unless it is excluded expressly or by necessary implication.

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Criminal Law—Bigamy—Defence—Bona fide and reasonable belief in death of spouse—Meaning of proviso to Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 57.

A bona fide belief, held on reasonable grounds, in the death of one party to a marriage is a defence to a charge of bigamy against the other party who has married again, whether or not the second marriage has taken place within the seven years prescribed by the proviso to s. 57 of the Offences Against the Person Act, 1861. That proviso is intended absolutely to exempt from the operation of the section (which provides that "whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony") any person who does not have any actual knowledge of his or her former wife or husband being alive within seven years before the second marriage, and not to deprive a person who is indicted for bigamy of any defence which would have been open to him or her if the proviso had never been introduced at all.

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I

Notes. Considered: *R. v. Wheat*, *R. v. Stocks*, [1921] All E.R. Rep. 602. Referred to: *Blaker v. Tillstone* (1894), 70 L.T. 31; *Sherras v. De Rutzen* (1895), 59 J.P. 440; *Burrows v. Rhodes*, [1895-9] All E.R. Rep. 117; *R. v. Bayley*

- A** (1908), 1 Cr. App. Rep. 86; *Pearks' Dairies v. Tottenham Food Control Committee* (1918), 88 L.J.K.B. 623; *R. v. Denyer*, [1926] 2 K.B. 258.

As to mens rea, disproof of mens rea, and bigamy, see 10 HALSBURY'S LAWS (3rd Edn.) 272-274, 283-286, 663-665, and for cases see 14 DIGEST (Repl.) 31-40, 51-57, 15 DIGEST (Repl.) 881-891. For the Offences Against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 786.

B Cases referred to :

(1) *Fowler v. Padget* (1798), 7 Term Rep. 509; 101 E.R. 1103; 4 Digest (Repl.) 78, 668.

(2) *R. v. Sleep* (1861), Le. & Ca. 44; 30 L.J.M.C. 170; 4 L.T. 525; 25 J.P. 532; 7 Jur. N.S. 979; 9 W.R. 709; 8 Cox, C.C. 472, C.C.R.; 14 Digest (Repl.) 32, 35.

C (3) *Hearne v. Garton* (1859), E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur. N.S. 648; 7 W.R. 566; 121 E.R. 26; 14 Digest (Repl.) 37, 76.

(4) *Taylor v. Newman* (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L.J.M.C. 186; 8 L.T. 424; 27 J.P. 502; 11 W.R. 752; 9 Cox, C.C. 314; 122 E.R. 393; 2 Digest (Repl.) 302, 95.

D (5) *Watkins v. Major* (1875), L.R. 10 C.P. 662; 44 L.J.M.C. 164; 33 L.T. 352; 39 J.P. 808; 24 W.R. 164; 25 Digest (Repl.) 388, 148.

(6) *R. v. Bishop* (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox, C.C. 404, C.C.R.; 14 Digest (Repl.) 37, 77.

E (7) *Bowman v. Blyth* (1857), 7 E. & B. 26; 27 L.J.M.C. 21; 29 L.T.O.S. 312; 22 J.P. 5; 3 Jur. N.S. 886; 119 E.R. 1158, Ex. Ch.; 33 Digest (Repl.) 267, 931.

(8) *R. v. Banks* (1794), 1 Esp. 144.

(9) *R. v. Willmet* (1848), 11 L.T.O.S. 495; 3 Cox, C.C. 281; 15 Digest (Repl.) 863, 8293.

F (10) *R. v. Cohen* (1858), 8 Cox, C.C. 41; 15 Digest (Repl.) 863, 8294.

(11) *R. v. O'Brien* (1866), 15 L.T. 419; 15 Digest (Repl.) 863, 8296.

(12) *R. v. Turner* (1862), 9 Cox, C.C. 145; 15 Digest (Repl.) 889, 8573.

(13) *R. v. Horton* (1871), 11 Cox, C.C. 670; 15 Digest (Repl.) 889, 8574.

(14) *R. v. Gibbons* (1872), 12 Cox, C.C. 237; 15 Digest (Repl.) 889, 8575.

G (15) *R. v. Prince* (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138, C.C.R.; 14 Digest (Repl.) 52, 181.

(16) *R. v. Bennett* (1877), 14 Cox, C.C. 45; 15 Digest (Repl.) 890, 8576.

(17) *R. v. Moore* (1877), 13 Cox C.C. 544; 15 Digest (Repl.) 890, 8577.

(18) *Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86.

H (19) *R. v. Shipley* (1784), 4 Doug. K.B. 73; 21 State Tr. 847; 99 E.R. 774; sub nom. *R. v. Dean of St. Asaph*, 3 Term. Rep. 428, n.; 32 Digest 71, 1006.

(20) *Levett's Case* (1638), cited Cro. Car. p. 538; 1 Hale, P.C. 474; 79 E.R. 1064; 15 Digest (Repl.) 978, 9525.

I (21) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town. St. Tr. 314; 1 Car. & Kir. 130, n.; sub nom. *Insane Criminals*, 8 Scott, N.R. 595, H.L.; 14 Digest (Repl.) 60, 246.

(22) *R. v. Gray* (1864), Le. & Ca. 365; 3 New Rep. 441; 33 L.J.M.C. 78; 9 L.T. 733; 28 J.P. 104; 10 Jur. N.S. 160; 12 W.R. 350; 9 Cox, C.C. 417, C.C.R.; 15 Digest (Repl.) 1219, 12441.

(23) *R. v. Robins* (1844), 1 Car. & Kir. 456; 15 Digest (Repl.) 1031, 10,117.

(24) *R. v. Mycock* (1871), 12 Cox, C.C. 28; 15 Digest (Repl.) 1031, 10,127.

Also referred to in argument :

R. v. Hibbert (1869), L.R. 1 C.C.R. 184; 38 L.J.M.C. 61; 19 L.T. 799; 33 J.P. 243; 17 W.R. 384; 11 Cox, C.C. 246; C.C.R.; 15 Digest (Repl.) 1081, 10, 131.

Mullins v. Collins (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 888; 38 J.P. 629; 22 W.R. 207; 14 Digest (Repl.) 49, 161.

Dickenson v. Fletcher (1873), L.R. 9 C.P. 1; 43 L.J.M.C. 25; 29 L.T. 540; 38 J.P. 88; 14 Digest (Repl.) 44, 120.

A.-G. v. Bradlaugh (1885), 14 Q.B.D. 667; 54 L.J. Q.B. 205; 52 L.T. 589; 49 J.P. 500; 33 W.R. 673, C.A.; 14 Digest (Repl.) 29, 16.

Case Stated by STEPHEN, J., upon the trial of an indictment for bigamy, under s. 57 of the Offences Against the Person Act, 1861.

On July 6, 1888, at the assizes at Carlisle, Martha Ann Tolson was convicted before the learned judge of bigamy. On September 11, 1880, the accused was married to one Tolson. On Dec. 13, 1881, he deserted her. She and her father made inquiries about him, and learned from his elder brother, and from general report, that he had been lost on a vessel bound for America, which went down with all hands on board. On Jan. 10, 1887, the accused, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were well known to the second husband, and the ceremony was in no way concealed. In December, 1887, Tolson returned from America. STEPHEN, J., directed the jury that a belief in good faith and on reasonable grounds that her husband was dead would not be a defence to a charge of bigamy. He stated that, in so holding, his object was, if possible, to obtain the decision of the Court for Crown Cases Reserved on the point, as there were conflicting *nisi prius* decisions. The jury convicted the prisoner, stating, however, in answer to questions by the judge, that they thought that she in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage. The judge sentenced her to one day's imprisonment. The question for the court was whether the direction of the learned judge was right.

By s. 57 of the Offences Against the Person Act, 1861 :

"Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony. . . . Provided that nothing in this section contained shall extend to any . . . person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time. . . ."

Henry for the accused.

No counsel appeared for the Crown.

Cur. adv. vult.

May 11, 1889. The following judgments were read, with the exception of that delivered orally by LORD COLERIDGE, C.J.

WILLS, J.—In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she, upon reasonable grounds, believed to be true. A few months after the second marriage he re-appeared. The statute upon which the indictment was framed is the Offences Against the Person Act, 1861, s. 57. There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years then last past.

A It is, however, undoubtedly a principle of English criminal law, that, ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. LORD KENYON, C.J., said :

B "It is a principle of natural justice and of our law that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime :"

C *Fowler v. Padget* (1), 7 Term. Rep. at p. 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute,—fornication or seduction for instance—which nevertheless no one would hesitate to call wrong, and the intention to do an act wrong in this sense at the least must, as a general rule, exist before the act done can be considered crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice, and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

F Although, *prima facie* and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Byelaws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such byelaws are enforced by the sanction of penalties, and the breach of them constitutes an offence, and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the byelaw that the person committing it had bona fide made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

I Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by Acts of Parliament which made the unauthorised possession of government stores a crime, and the language used in byelaws which say that if a man builds a house or a wall so as to encroach upon a space protected by the byelaw from building, he shall be liable to a penalty. Yet, in *R. v. Sleep* (2), it was held that a person in possession of government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked, while the mere infringement of a building byelaw would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from

the pavement in front of his house before a given hour in the morning and if he fail to do so shall pay a penalty and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet, I suppose, that in the first case the penalty would attach if the thing were not done, while in the other case it has been held, in *Hearne v. Garton* (3), that where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked.

There is no difference between the language by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the daytime in pursuit of game," he shall be liable to a penalty, and yet, in the first case it has been held that his state of mind is material (*Taylor v. Newman* (4)) and in the second that it is immaterial (*Watkins v. Major* (5)). So, again, there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanour, under which the contrary has been held: *R. v. Bishop* (6). A statute provided that any clerk to justices who should, under colour and pretence of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit £20. It was held that where a clerk to justices bona fide and reasonably but erroneously believed that there were two sureties bound in a recognisance besides the principal, and accordingly took a fee as for three recognisances when he was only entitled to charge for two, no action would lie for the penalty. LORD CAMPBELL said (in *Bowman v. Blyth* (7), 7 E. & B. at p. 43):

"Actus non facit reum, nisi mens sit rea. Here the defendant very reasonably believing that there were two sureties bound, besides the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offence.' If, therefore, the table allowed him to charge for three recognisances where there are a principal and two sureties, he has not committed an offence under the Act":

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought aliunde, and that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and among such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account.

In a case in which a woman was indicted under s. 2 of the [repealed] Embezzlement of Public Stores Act, 1697, for having in her possession without a certificate from the proper authority government stores marked in the manner described in the Act, it was argued that by the Act the possession of the certificate was made the sole excuse, and that, as she had no certificate, she must be con-

A victed. FOSTER, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration, otherwise a law calculated for wise purposes might be made a hand-
B maid to oppression, and directed the jury that, if they thought the defendant came into possession of the stores without any fraud or misbehaviour on her part, they ought to acquit her: FOSTER'S CROWN LAW (3rd Edn.), App., pp. 439, 440.
C This ruling was adopted by LORD KENYON in *R. v. Banks* (8), who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind instead of its being necessary for the Crown to show the existence of the guilty mind.
D Prima facie the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned.

E Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler v. Padget* (1) the question was
F whether it was an act of bankruptcy for a man to depart from his dwelling-house whereby his creditors were defeated and delayed, although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was the [repealed] Bankrupts Act, 1603, which made it an act of bankruptcy (among other things) for a man to depart his dwelling-house "to the intent or whereby his creditors may be defeated and delayed." The Court of King's Bench, consisting of LORD KENYON, C.J., and ASHURST and GROSE, JJ., held that there was no act of bankruptcy. LORD KENYON said (7 Term Rep. at p. 514):

"Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice and of our law, that actus non facit reum, nisi mens sit rea."

G The court went so far as to read "and" in the statute, in place of "or," which is the word used in the Act, in order to avoid the consequences, which appeared to them unjust and unreasonable. In *R. v. Banks* (8), LORD KENYON referred to FOSTER, J.'s ruling in this case as that of "one of the best Crown lawyers that ever sat in Westminster Hall."

H These decisions of FOSTER, J., and LORD KENYON have been repeatedly acted upon: see *R. v. Willmet* (9), *R. v. Cohen* (10), *R. v. Sleep* (2), in the Court for the Consideration of Crown Cases Reserved, *R. v. O'Brien* (11). In the present instance one consequence of holding that the offence is complete if the husband or wife is de facto alive at the time of the second marriage, although the defendant had, at the time of the second marriage, every
I reason to believe the contrary, would be that, though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead, who had married six years and eleven months after the last time that she had known him to be alive, would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had, in the meantime, distributed his personal estate, should be guilty of larceny. It seems to me to be a

case to which it would not be improper to apply the language of LORD KENYON, when dealing with a statute which, literally interpreted, led to what he considered an equally preposterous result (*Fowler v. Padgett* (1), 7 Term Rep. at p. 514):

"I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences."

Again, the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Offences Against the Person Act, 1861, to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great; but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without necessity to multiply instances in which people shall be liable to conviction upon very grave charges when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect of the offence now under discussion, that the proviso in s. 57 of the Act of 1861 that nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time, points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party, without any further inquiry, from criminal liability; and I think it is an argument of considerable weight, in this connection, that under s. 2 of the [repealed] Embezzlement of Public Stores Act, 1697, where a similar contention was founded upon the specification of one particular circumstance under which the possession of government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have treated it, to use the words of LORD KENYON, as a matter that "could not bear a question" that the defendant might show in other ways that his possession was without fraud or misbehaviour on his part: *R. v. Banks* (8), 1 Esp. at p. 147.

Upon the point in question in the present case there are conflicting decisions. It was held by MARTIN, B., in *R. v. Turner* (12), and by CLEASBY, B., in *R. v. Horton* (13), that bona fide belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead was a defence. In *R. v. Gibbons* (14) it is said that it was held by BRETT, J., after consulting WILLES, J., that such a belief was no defence. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *R. v. Prince* (15) BRETT, J., gave a very elaborate judgment containing his matured and considered opinion upon a similar question, which it is quite impossible to reconcile with the supposed ruling in *R. v. Gibbons* (14). In *R. v. Bennett* (16), BRAMWELL, L.J., is

A reported to have followed *R. v. Gibbons* (14), and to have said that he always refused to act upon *R. v. Turner* (12). But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offences, forgery and obtaining money by false pretences, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that B the prisoner was, and so emphasising the fact that he deserved condign punishment, the bigamy trial might have been omitted. In *R. v. Moore* (17) DENMAN, J., after consultation with AMPHLETT, L.J., directed the acquittal of a woman charged with bigamy, the jury having found that, although seven years had not elapsed since she last knew that her husband was living, she had, when she married a second time, a reasonable and bona fide belief that he was dead—C saying that in his opinion, and that of AMPHLETT, L.J., such a belief was a defence. He added, however, that his opinion was not to be taken as a final one; and that, had the circumstances been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction and reserved the question.

D There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the court of fifteen judges in *R. v. Prince* (15) is an authority in favour of a conviction in this case. I do not think so. In *R. v. Prince* (15) the prisoner was indicted under s. 55 of the Offences Against the Person Act, 1861 [see now E s. 20 of Sexual Offences Act, 1956: 36 HALSBURY'S STATUTES (2nd Edn.) 227] for

"unlawfully taking an unmarried girl, being then under the age of sixteen years, out of the possession and against the will of her father."

F The jury found that the prisoner bona fide believed, upon reasonable grounds, that she was eighteen. The court (dissentiente BRETT, J.) upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, while three of them, DENMAN, J., POLLOCK, B., and QUAIN, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter G of the enactment, to the group of sections among which it is found, and to the history of legislation on the subject, the intention of the legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the H two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind," as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not I sixteen, even then, in taking her out of the possession of the father against his will was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the mens rea" (L.R. 2 C.C.R. at p. 175). *R. v. Prince* (15), therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, while, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind preponderate greatly over any

that point to its exclusion. In my opinion, therefore, this conviction ought to be quashed. **CHARLES, J.**, authorises me to say that this judgment expresses his views as well as my own. A

CAVE, J.—In this case the prisoner was convicted of bigamy. She was married on Sept. 11, 1880, and was deserted by her husband on Dec. 13, 1881. From inquiries which she and her father made about him from his brother, she was led to believe that he had been lost in a vessel bound for America, which went down with all hands. In January, 1887, she married again, supposing herself to be a widow. Her first husband returned from America in December, 1887. The jury found that the prisoner in good faith, and on reasonable grounds, believed her husband to be dead at the time of her second marriage. At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always be held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *Actus non facit reum, nisi mens sit rea*. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. B C

Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication. In *R. v. Prince* (15), in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offences, whether existing at common law or created by statute. As I understand the judgments in that case the difference of opinion was as to the exact extent of the exception, **BRETT, J.**, the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that in order to make the defence available in that case the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act, not only not criminal, but also not immoral. Whether the majority held that the general exception is limited to cases where there is an honest belief not only in facts which would make the act not criminal, but also in facts which would make it not immoral, or whether they held that the general doctrine was correctly stated by **BRETT, J.**, and that the further limitation was to be inferred from the language of the particular statute they were then discussing, is not very clear. It is immaterial in this case, as the jury have found that the accused honestly and reasonably believed in the existence of a state of circumstances, viz., in her first husband's death, which, had it really existed, would have rendered her act not only not criminal, but also not immoral. D E F G H

It is argued, however, that assuming the general exception to be as stated, yet the language of the Offences Against the Person Act, 1861, is such that that exception is necessarily excluded in this case. It is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right, just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act. It is said that this inference necessarily arises from the language of the section in question, and particularly of the proviso. The section (omitting immaterial parts) is in these words: I

“Whosoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony; provided that nothing

A in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

B It is argued that the first part is expressed absolutely; but, surely, it is not contended that the language admits of no exception, and, therefore, that a lunatic who, under the influence of a delusion, marries again, must be convicted; and, if an exception is to be admitted where the reasoning faculty is perverted by disease, why is not an exception equally to be admitted where the reasoning faculty, although honestly and reasonably exercised, is deceived? But it is said that the proviso is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it follows that the legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defence shall not operate within the seven years, because it has provided that a less limited defence shall only come into operation at the expiration of those years.

What must the accused prove to bring herself within the general exception? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again. What must she prove to bring herself within the proviso?

E Simply that her husband has been continually absent for seven years; and, if she can do that, it will be no answer to prove that she had no reasonable grounds for believing him to be dead, or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from knowing him to be so, the prosecution must fail. The proviso, therefore, is far wider than the general exception; and the intention of the legislature that a wider and more easily established defence should be open after seven years from the disappearance of the husband, is not necessarily inconsistent with the intention that a different defence, less extensive and more difficult of proof, should be open within the seven years. Some difficulty in seeing that the proviso is wider than the general exception has arisen from the establishment of the presumption of a man's death after he has not been heard of for seven years, and from the increased facilities for transmitting intelligence which are due to modern science.

F If we turn to the [repealed] Bigamy Act, 1603, the first statute which made bigamy an offence punishable by the courts of common law, we find an enactment

H substantially the same as that now in force:

"If any person being married do marry any person, the former husband or wife being alive, every such offence shall be felony, and the person offending shall suffer death: provided always that neither this Act nor anything therein contained shall extend to any person whose husband or wife shall

I absent him or herself, the one from the other by the space of seven years together in any part within his Majesty's dominion, the one of them not knowing the other to be living within that time."

When this Act was passed the presumption of a man's death after he had not been heard of for seven years had not been established. In *Doe d. Knight v. Nepean* (18) (5 B. & Ad. at p. 94), it is expressly stated by LORD DENMAN, C.J., that that period was adopted as the ground for such presumption in analogy to the statute of 1603, relating to bigamy, and the statute 18 & 19 Car. 2, c. 11, relating to the continuance of lives on which leases were held. In the absence of such

presumption it would have been difficult at that time for the accused to prove, even when her husband had been away seven years, that she had reasonable grounds for believing him to be dead; while, on the other hand, if she had succeeded in satisfying judge and jury that she honestly so believed on reasonable grounds and had married in such belief after he had gone away six years only, if the contention on behalf of the Crown is right, the jury must have convicted her, and the judge must have sentenced her to death, for doing what they were satisfied she honestly and reasonably believed she had a perfect right to do. For these reasons I am of opinion that the conviction cannot be supported. In this judgment **DAY, J.**, and **A. L. SMITH, J.**, concur.

STEPHEN, J.—For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury at the trial of the accused woman that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defence to the charge of bigamy against the other who married again within the seven years. I passed a nominal sentence on the accused, and I stated, for the decision of this court, a case which reserved the question whether my decision was right or wrong. I am of opinion that the conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defence raised for the prisoner was valid.

My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase *non est reus, nisi mens sit rea*. Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman, without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea* or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in *R. v. Shipley* (19) proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the *regulae juris* in the *Digest*. The earliest case of its use which I have found is in the *LEGES HENRICI PRIMI*, V. s. 28, in which it is said :

"Si quis per coactionem abjurare cogatur quod per multos annos quiete tenuerit non in jurante set cogente perjurium erit. Reum non facit nisi mens rea."

In *BROOM'S MAXIMS* the earliest authority cited for its use is the *THIRD INSTITUTE*, ch. i., fo. 10. In this place it is contained in the marginal note, which says that

A when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "pro timore mortis et quod recesserunt quam cito potuerunt" the judges held that this was to be adjudged no treason because it was for fear of death. COKE adds: "Et actus non facit reum, nisi mens sit rea." This is only COKE's own remark, and not part of the judgment. COKE's scraps of Latin in this, and the following chapters are sometimes contradictory. Notwithstanding the passage just

B quoted, he says in the margin of his remarks on opinions delivered in Parliament by THYRNING, and others in the 21st R. 2: "Melius est omnia mala patri quam malo consentire" (22-3) which would show that Sir John Oldcastle's associates had a mens rea, or guilty mind, though they were threatened with death, and thus contradicts the passage first quoted. It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion.

C The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the

D present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general—I might, I think, say the invariable—practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are

E assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. The meaning of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder; another in relation to the Malicious Mischief Act [? Malicious Damage Act, 1861], and a third in relation to libel, and so of fraud and negligence.

F With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of facts is to some extent an element of criminality as much as competent age and sanity. To make an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism,

G would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Levett's Case* (20) decides that a man who making a thrust with a sword at a place where, upon reasonable grounds, he supposes a burglar to be, killed a person who was not a burglar was held not to be a felon though he might be (it was not decided that he was) guilty of killing

H per infortunium, or possibly, *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in *M'Naghten's Case* (21), it is stated that if under an insane delusion one man kills another and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to

I a sane mistake. A bona fide claim of right excuses larceny, and many of the offences against the Malicious Mischief Act [? Malicious Damage Act, 1861]. Apart, indeed from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

A very learned person suggested to me the following case. A constable, reasonably believing a man to have committed murder, is justified in killing him to prevent

his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter [see 10 HALSBURY'S LAWS (3rd Edn.) 709]. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the present case falls under the general rule as to mistakes of fact, and that the conviction ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result. It is said, first, that the words of the Offences Against the Person Act, 1861, s. 57, are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted, and this it is said is confirmed by the express proviso in the section—an indication which is thought to negative any tacit exception. It is also supposed that *R. v. Prince* (15) decided on s. 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of s. 57 of the Act of 1861. Much was said to us in argument on the old statute, the Bigamy Act, 1603. I cannot see what this has to do with the matter. Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case. In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the consolidation Acts of 1861, in passing over the general mental elements of crime which are pre-supposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this cannot be said. Such are s. 55, on which *R. v. Prince* (15) was decided, s. 56, which punishes the stealing of "any child under the age of fourteen years," s. 49, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *R. v. Prince* (15). To these I may add some of the provisions of the Criminal Law Amendment Act, 1885 [repealed by Sexual Offences Act, 1956]. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under ss. 5, 6, and 7, but this is not provided for as to an offence against s. 4, which is meant to protect girls under thirteen.

It seems to me that as to the construction of all these sections *R. v. Prince* (15) is a direct authority. It was the case of a man who abducted a girl under sixteen, believing, on good grounds, that she was above that age. BRETT, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows (L.R. 2 C.C.R. at p. 170):

"That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

LORD BLACKBURN, with whom nine other judges agreed, and LORD BRAMWELL, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not

A all. The judgment delivered by LORD BLACKBURN proceeds upon the principle that the intention of the legislature in s. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse." LORD BRAMWELL's judgment proceeds upon this principle (*ibid.* at p. 175):

B "The legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute."

C All the judges, therefore, in *R. v. Prince* (15) agreed on the general principle, though they all, except BRETT, J., considered that, the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not), it was to be supposed that they intended that the wrongdoer should act at his peril.

D As another illustration of the same principle, I may refer to *R. v. Bishop* (6). The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on the [repealed] Lunacy Act, 1845, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that

E this was immaterial, having regard to the scope of the Act, and the object for which it was apparently passed, and this court upheld that ruling. The application of this to the present case appears to me to be as follows. The general principle is clearly in favour of the prisoner, but how does the intention of the legislature appear to have been against her? It could not be the object of Parliament to treat the marriage of widows as an act to be, if possible, prevented as

F presumably immoral. The conduct of the woman convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the fact to be as she supposed, the infliction of more than a nominal punishment on her would have been a scandal. Why, then, should the legislature be held to have wished to subject her to punishment at all? If such a punishment is legal, the following among many other cases might occur: A number of men

G in a mine are killed, and their bodies are disfigured and mutilated, by an explosion; one of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which

H showed, in the opinion of the judges in *R. v. Prince* (15), that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude.

I It is argued that the proviso, that a re-marriage after seven years' separation shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases; in the absence of explicit proof of death. But it seems to me to show, not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death, caused by other evidence, would have at any time. It would, to my mind, be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the

purpose of recovering on a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. A

It remains only to consider cases upon this point decided by single judges. As far as I know there are reported the following cases:—*R. v. Turner* (12) (1862). In this case MARTIN, B., is reported to have said (9 Cox, C.C. at p. 145):

“In this case seven years had not elapsed, and beyond the prisoner’s own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead.” B

In *R. v. Horton* (13) (1871) CLEASBY, B., directed the jury that if the prisoner reasonably believed his wife to be dead he was entitled to be acquitted. He was convicted. In *R. v. Gibbons* (14) (1872), BRETT, J., after consulting WILLES, J., said (12 Cox, C.C. at p. 238): “Bona fide belief as to the husband’s death was no defence unless the seven years had elapsed,” and he refused to state a Case, a decision which I cannot reconcile with his judgment three years afterwards in *R. v. Prince* (15). In *R. v. Moore* (17) (1877) DENMAN, L.J., after consulting AMPHLETT, L.J., held that a bona fide and reasonable belief in a husband’s death excused a woman charged with bigamy. In *R. v. Bennett* (16) (1877) LORD BRAMWELL agreed with the decision in *R. v. Gibbons* (14). The result is that the decisions in *R. v. Gibbons* (14) and *R. v. Bennett* (16) conflict with those of *R. v. Turner* (12), *R. v. Horton* (13) and *R. v. Moore* (17). I think, therefore, that these five decisions throw little light on the subject. The conflict between them was in fact the reason why I reserved the case. GRANTHAM, J., E authorises me to say that he concurs in this judgment.

HAWKINS, J.—The Offences Against the Person Act, 1861, s. 57, enacts:

“Whosoever, being married, shall marry any other person during the lifetime of the former husband or wife, shall be guilty of felony.” F

Undoubtedly the defendant, being married, did marry another person during the life of her former husband. But she did so believing in good faith and upon reasonable grounds that her first husband was dead; and the sole question now raised is whether such belief afforded her a valid legal defence against the indictment for bigamy upon which she was tried.

I am clearly of opinion that it did, and that she ought to have been acquitted. G The ground upon which I have arrived at this conclusion is simply that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded her a complete justification, both legally and morally, there was an absence of that mens rea which is an essential element in every charge of felony. In *HAWKINS, P. C.*, book 1, c. 25, s. 3, OF FELONY, it is said:

“It is always accompanied with an evil intention, and, therefore, shall not be imputed to a mere mistake or misanimadversion.” H

In *HALE’S P. C.*, vol. 2, p. 184, it is said:

“an indictment of felony must always allege the fact to be done felonice.” I

To the same effect is the language of *HAWKINS, P. C.*, book 2, c. 25, s. 55, and many cases are to be found in the books which put it beyond doubt that an indictment for felony is bad if it omits to aver the act charged to have been done “feloniously,” and this whether the felony be one at common law or created by statute: *R. v. Gray* (22) [but see now Indictments Act, 1915; 5 HALSBURY’S STATUTES (2nd Edn.) 993]. As to the meaning of the term “feloniously” I do not think I can better define my understanding of it when introduced into an indictment as descriptive of the act charged than by saying that I look upon it as meaning that

A such act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind. As to this I may refer to *HAWKINS*, P. C., c. 7, s. 1, where it is said that the term "felony" ex vi termini signifies "Quodlibet crimen felleo animo perpetratum."

B In support of this view a whole list of authorities might be quoted. I shall, however, content myself by citing the most recent of them, viz. *R. v. Prince* (15), in which most of the cases bearing on the subject are very carefully reviewed by BRETT, J., whose language I cheerfully adopt as expressive of my own views touching the principles of law which govern such questions as that now before us. He says (L.R. 2 C.C.R. at p. 162):

C "It would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or mens rea, in every offence really charged as a crime . . . in some cases the proof of the committal of the acts may prima facie, either by reason of their own nature, or by reason of the form of statute, import the proof of the mens rea. But even in those cases it is open to the prisoner to rebut the prima facie evidence, so that if in the end the jury are satisfied that there was no criminal mind, or mens rea, there cannot be a conviction in England for that which is by the law considered to be a crime."

D In this view of the law, so stated by BRETT, J., all the other judges, fifteen in number, before whom the matter was heard, practically acquiesced. They differed, however, in the application of the law to the facts of the particular case, E BRETT, J., thinking that there was in the prisoner no such mens rea as was necessary to constitute a crime; the rest of the court thinking that the act of abduction of which the prisoner was guilty, being a morally wrong act, afforded abundant proof of his criminal mind.

F It has, however, been suggested that the intention of the legislature to make a second marriage during the life of the former husband or wife a crime, whatever may have been the circumstances attending it, unless the case is brought within the proviso which follows in the same section, is proved by the introduction of that proviso, which runs as follows:

G "Provided that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time."

I cannot take that view of the proviso. It seems to me to be far more reasonable to look upon that portion of the section as intended simply and absolutely to exempt from the operation of it any person who should not have had actual H knowledge of his or her former wife or husband being alive within seven years before the second marriage, and not to deprive a person indicted for bigamy of any defence which would have been open to him or her had the proviso never been introduced at all. I cannot for a moment suppose that the legislature ever contemplated that a woman who within seven years from the day she last knew her husband to be living, bona fide trusting and relying upon a body of evidence I overwhelmingly sufficient to satisfy the best of judges and juries that he was dead, and honestly believing upon such evidence that he was so, married again, feeling that in so doing she was doing a perfectly legal and moral act, should nevertheless be liable to be indicted for the felony of bigamy, and convicted and condemned to a long term of penal servitude, upon mere proof that, though honestly and reasonably believed by her to be dead, her former husband was in fact alive.

A thousand illustrations to demonstrate the cruelty and injustice of such a state of the law might be suggested, but I cannot think that even one is necessary.

If the views of those who support this conviction could be upheld, no person could with absolute certainty of immunity marry a second time until seven years had elapsed after the supposed death of a former husband or wife, no matter how strong and cogent the proof of such death might be. I do not think it will assist in the solution of the question to refer to the conflicting opinions of single judges upon the point, beyond calling attention to the fact that *R. v. Gibbons* (14), in which BRETT, J. (after consulting WILLES, J.), ruled that such circumstances as are relied on in the present case afforded no defence, occurred in the year 1872, whereas *R. v. Prince* (15), in which the same learned judge delivered the judgment to which I have referred, was not decided till three years later. After the latter judgment I doubt if that learned judge would have adhered to the opinion expressed by him in the year 1872. I am, for the reasons above expressed, of opinion that the conviction ought to be reversed.

MANISTY, J.—I am of opinion that the conviction should be affirmed. The question is, whether if a married woman marries another man during the life of her first husband and within seven years of his leaving her she is guilty of felony, the jury having found as a fact that she had reason to believe and did honestly believe that her first husband was dead. Section 57 of the Offences Against the Person Act, 1861, is as express and as free from ambiguity as words can make it. It does not say if the accused shall feloniously or unlawfully or knowingly commit the act he or she shall be guilty of felony, but the enactment is couched in the clearest language that could be used to prohibit the act and to make it a felony if the act is committed. If any doubt could be entertained on the point it seems to me the proviso which follows the enactment ought to remove it. Such being the plain language of the Act, it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the legislature to alter the law if it thinks it ought to be altered. Probably, if the law was altered, some provision would be made in favour of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the court to consider the reasons which induced the legislature to pass the Act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the lifetime of his or her first wife or husband, in which case it might and in many cases would be that several children of the second marriage would be born and all would be bastards. The proviso is evidently founded upon the assumption that after the lapse of seven years and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the lifetime of the first husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several Acts of Parliament, and is now governed by s. 57 of the Act of 1861. No doubt, in construing a statute the intention of the legislature is what the court has to ascertain, but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it. The cases of insanity, etc., on which reliance is placed, stand on a totally different principle, viz., that of an absence of mens rea. Ignorance of the law is no excuse for the violation of it, and if a person chooses to run the risk of committing a felony he or she must take the consequences if it turn out that a felony has been committed.

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony and punishable with penal servitude or imprisonment with or without hard labour for any term not exceeding two years. If the crime had been declared

A to be a misdemeanour punishable with fine or imprisonment, surely the construction of the statute would have been, or ought to have been, the same. It may well be that the legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case, but that is a very different thing from disregarding and contravening the plain words of the Act of Parliament.

C The case is put by some of my learned brothers of a married man leaving his wife and going into a foreign country intending to settle there, and it may be afterwards to send for his wife and children, and the ship in which he goes is lost in a storm with, as is supposed, all on board, and after the lapse of say a year and no tidings received of anyone having been saved, the underwriters pay the insurance on the ship, the supposed widow gets probate of her husband's will, marries, and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked: Would it not be shocking that in such a case the wife could be found guilty of bigamy? My answer is that the Act of Parliament says in clear and express words, for very good reasons as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that someone for some purpose of his own had instituted the prosecution. I need not say that no Public Prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my brother STEPHEN did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge) accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate, who would of course take nominal bail, and in appearing to take her trial. Be it so; but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if in the vast number of cases where men in humble life leave their wives and go abroad it would be a good defence for a woman to say and give proof, which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon and her husband was alive.

G What operates strongly on my mind is that, if the legislature intended to prohibit a second marriage in the lifetime of a husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in s. 57 of the Act of 1861. In this view I am fortified by several sections of the same Act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in s. 23), by a comparison of them with the section in question (s. 57), where no such words are to be found. I especially rely upon s. 55, by which it is enacted that

I "whosoever shall unlawfully [a word not used in s. 57] take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour."

Fifteen out of sixteen judges held in *R. v. Prince* (15) that, notwithstanding the use of the word "unlawfully," the fact of the prisoner believing, and having reason to believe, that the girl was over sixteen afforded no defence. This decision is approved of upon the present occasion by five judges, making in all twenty against the nine who are in favour of quashing the conviction. To the twenty

I may, I think, fairly add *TINDAL*, C.J., in *R. v. Robins* (23) and *WILLES*, J., in *R. v. Mycock* (24). A

I rely also very much upon s. 5 of the Criminal Law Amendment Act, 1885, passed for the better protection of women and girls, by which it was enacted :

“any person who unlawfully and carnally knows . . . any girl being of or above the age of thirteen years and under sixteen years . . . shall be guilty of a misdemeanour,” B

but to that is added a proviso that

“it shall be a sufficient defence . . . if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years” : C

[see now Sexual Offences Act, 1961, s. 6: 36 HALSBURY'S STATUTES (2nd Edn.) 219]. It is to be observed that, notwithstanding the word “unlawfully” appears in this section, it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into s. 57 of the Act of 1861 the proviso which is in s. 5 of the Act of 1885, contrary, as it seems to me, to the decision in *R. v. Prince* (15), and to the hitherto undisputed canons for construing a statute. It is said that an indictment for the offence of bigamy commences by stating that the accused feloniously married, etc., and consequently the principle of mens rea is applicable. To this I answer that it is to the language of the Act of Parliament, and not to that of the indictment, the court have to look. I consider the indictment would be perfectly good if it stated that the accused, being married, married again in the lifetime of his or her wife or husband contrary to the statute, and so was guilty of felony. I am very sorry we had not the advantage of having the case argued by counsel on behalf of the Crown. My reason for abstaining from commenting upon the cases cited by counsel for the accused is because the difference of opinion among some of the judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen judges in *R. v. Prince* (15). So far as I am aware, in none of the cases cited by my learned brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish *R. v. Prince* (15) from the present case, and looking to the names of the eminent judges who constituted the majority, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed. The only observation which I wish to make is (speaking for myself only), that I agree with my learned brother STEPHEN in thinking that the phrases “mens rea” and “non est reus nisi mens sit rea” are not of much practical value, and are not only “likely to mislead,” but are “absolutely misleading.” Whether they have had that effect in the present case on the one side or the other it is not for me to say. I think the conviction should be affirmed. My brothers, **DENMAN, J., I POLLOCK, B., FIELD, J., and HUDDLESTON, B.,** agree with this judgment, but DENMAN, J., has written a short opinion of his own, with which FIELD, J., agrees. D
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DENMAN, J. (read by MANISTY, J.)—Having done my best to form a correct judgment as to the real intention of the statute on which the question turns, I have come to the conclusion, notwithstanding the reasons which have been given to the contrary, that it was intended to provide, and does provide, that any

A person who marries another (his or her wife or husband, as the case may be, being at the time alive) does so at his or her peril, and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years; and that even such an absence will not be a defence if the prosecution can prove knowledge on the part of the accused within seven years of the second marriage that the first wife or husband, as the case may be, was still alive. I am desired by my brother FIELD to add that he agrees in this view, but that he also agrees with me that it is not necessary to give any detailed reasons for dissenting from the judgment of the majority.

LORD COLERIDGE, C.J.—At the conclusion of the arguments in this case I was one of those who was inclined to dissent from the opinion of the majority, and if the statute had not contained the proviso which it does contain, I should not have at that time dissented from that opinion. My reasons were—as has been very well put by the judges who differ from the conclusion at which I have now arrived—that the enactment of the statute being positive, and there being in the very same section a proviso limiting the positiveness of that construction, the whole section must be read together, as if it lay upon the prosecution to show that the case did not lie within the proviso. If that were so, I should have maintained my opinion, and I am very far indeed from saying that there is no considerable ground and reason for maintaining that view. But I have had the great advantage of reading the judgment of my brother CAVE in this case, and I have found myself unable to answer satisfactorily to my own mind the view which he puts forward as to the effect of the proviso upon the positive enactment of the statute. If there had been no proviso, I confess I should have thought that this statute was to be read like any other statute, and that it was to be shown, or evidence was to be given, of the felonious intention with which the act in question was performed. That might be an inference to be drawn from the mere fact of the marriage being contracted, but it might also well be an inference that might be rebutted, as it might in any other case, by the distinct and absolute proof that the intention to violate the statute—I do not mean the intention to do the particular act, and the intention to violate any particular statute, but what has been defined, and for all purposes sufficiently defined, as the *mens rea*—existed in the person who was indicted. If that had been so, I should have thought at the beginning that the majority were right. I did not think so for the reason that I have given. I am unable to answer the view of the proviso which has been put forward by my brother CAVE, and I have, therefore, perhaps with some reluctance, come to the conclusion that the reasoning of the judgment of the majority is in this case correct. I think it desirable to all, that, as far as I understand, none of the learned judges in this case differs from the judgments in *R. v. Prince* (15). I certainly have no intention of differing from those judgments. An effort has been made, apparently not satisfactory to my brother MANISTY, to distinguish this case from *R. v. Prince* (15); but it would be unbecoming in a single judge, and unbecoming in any judge, to presume to overrule the decision arrived at by so powerful a court, by a single—no doubt very able—dissenting judge. I accept it, in my view of it, as fully as my learned brother, and I believe that all my learned brethren would concur with me in saying that, though they may perhaps be wrong in taking the view of that decision that they do take (nobody can be infallible), they intend to accept the decision of the majority of the judges in *R. v. Prince* (15). I am, therefore, of opinion that this conviction should be quashed.

Conviction quashed.

Solicitor: Atter, Whitehaven.

[Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.]

TREVOR AND ANOTHER v. WHITWORTH AND OTHERS

[HOUSE OF LORDS (Lord Watson, Lord FitzGerald, Lord Herschell and Lord Macnaghten), March 18, 21, 22, 24, July 11, 1887]

[Reported 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457;
36 W.R. 145; 3 T.L.R. 745]

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Company—Shares—Purchase by company of its own shares—Legality—Legality of forfeiture and surrender of shares.

A company formed and registered under the Companies Acts has no power to purchase its own shares even though authority to do so is conferred by its memorandum or articles of association. Persons who deal with and give credit to a limited company rely on the fact that the company is trading with a certain amount of capital already paid and also on the responsibility of its members for the capital remaining at call, and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been paid out except in the legitimate course of business. This does not affect the legality of the forfeiture or surrender of shares, for when a share is forfeited or surrendered the amount which has been paid for it remains with the company and is not returned to the shareholder, and so the capital of the company is not reduced.

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Notes. A limited company, if authorised by its articles, may now issue preference shares which are liable to be redeemed: Companies Act, 1948, s. 58 (1).

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Considered: *Re Walker and Hacking* (1887), 57 L.T. 763; *Re Almada and Tiritto Co.* (1888), 38 Ch.D. 415. Applied: *Re London Celluloid Co.*, *Bayley and Hanbury's Cases* (1888), 59 L.T. 109. Considered: *Re Mersina and Adana Construction Co.* (1889), 5 T.L.R. 680. Applied: *Eichbaum v. City of Chicago Grain Elevators*, [1891] 3 Ch. 459. Considered: *Ooregum Gold Mining Co. of India v. Roper*, *Wallroth v. Roper*, [1892] A.C. 125; *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9. Applied: *Re Denver Hotel Co.*, [1893] 1 Ch. 495. Distinguished: *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242. Explained: *British and American Trustee and Finance Corp'n. v. Couper*, [1891-4] All E.R. Rep. 667. Applied: *Bellerby v. Rowland and Marswood Steamship Co.*, [1902] 2 Ch. 14. Considered: *Rowell v. Rowell*, [1912] 2 Ch. 609; *Kirby v. Wilkins*, [1929] All E.R. Rep. 356. Applied: *Re Walters' Deed of Guarantee, Walters' "Palm" Toffee, Ltd. v. Walters*, [1933] All E.R. Rep. 480. Referred to: *Faure Electric Accumulator Co. v. Phillipart*, post; *Lee v. Neuchâtel Asphalte Co.* post; *Re Railway Timetables Publishing Co.*, *Ex parte Sandys* (1889), 58 L.J.Ch. 504; *Re West London Commercial Bank, Whiteley's Case* (1889), 60 L.T. 807; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; *Re Sovereign Life Assurance Co.*, [1892] 3 Ch. 279; *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Metropolitan Coal Consumers' Association v. Scrimgeour* (1895), 44 W.R. 35; *Re Lamson Store Service Co.*, *Re National Reversionary Co.* (1895), 2 Mans. 537; *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] 1 Ch. 397; *Welton v. Saffery*, [1895-9] All E.R. Rep. 567; *Mother Lode Consolidated Gold Mines v. Hill* (1903), 19 T.L.R. 341; *Bury v. Famatina Development Corp'n.*, [1909] 1 Ch. 754; *Hopkinson v. Mortimer, Harley & Co.*, [1917] 1 Ch. 646; *I.R. Comrs. v. Blott, I.R. Comrs. v. Greenwood*, [1921] 2 A.C. 171; *Investment Trust Corp'n., Ltd. v. Singapore Traction Co.*, [1935] All E.R. Rep. 348; *I.R. Comrs. v. Universal Grinding Wheel Co.*, [1953] 2 All E.R. 133; *Re Castiglione's Will Trusts, Hunter v. Mackenzie*, [1958] 1 All E.R. 480.

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As to a purchase by a company of its own shares and the surrender and forfeiture of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 264-268, and for cases see

A 9 DIGEST (Repl.) 435-451, 649-653. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to :

- (1) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 648, 4309.
- B** (2) *Re Dronfield Silkstone Coal Co.* (1880), 17 Ch.D. 76; 44 L.T. 361; sub nom. *Re Dronfield Silkstone Coal Co., Ltd., Ex parte Ward*, 50 L.J.Ch. 387; 29 W.R. 768, C.A.; 9 Digest (Repl.) 650, 4320.
- (3) *Re County Palatine Loan and Discount Co., Teasdale's Case* (1873), 9 Ch.App. 54; 43 L.J.Ch. 578; 29 L.T. 707; 22 W.R. 286, L.J.J.; 9 Digest (Repl.) 436, 2849.
- C** (4) *Hope v. International Financial Society* (1876), 4 Ch.D. 327; 35 L.T. 623; 25 W.R. 67; affirmed, 4 Ch.D. 332; 46 L.J.Ch. 200; 35 L.T. 924; 25 W.R. 203, C.A.; 9 Digest (Repl.) 650, 4318.
- (5) *Guinness v. Land Corpn. of Ireland, Ltd.* (1882), 22 Ch.D. 349; 52 L.J.Ch. 177; 47 L.T. 517; 31 W.R. 341, C.A.; 9 Digest (Repl.) 629, 4199.
- D** (6) *Phosphate of Lime Co. v. Green* (1871), L.R. 7 C.P. 43; 25 L.T. 636; 9 Digest (Repl.) 664, 4396.
- (7) *Re Balgooley Distillery Co.*, 17 I.Ch.R. 239.
- (8) *Harben v. Phillips* (1883), 23 Ch.D. 14; 48 L.T. 741, C.A.; 9 Digest (Repl.) 462, 3018.
- (9) *Re Joint Stock Discount Co., Sichell's Case* (1867), 3 Ch.App. 119; 37 L.J.Ch. 373; 17 L.T. 363; 16 W.R. 292, L.J.; 10 Digest (Repl.) 916, 6253.
- E**

Also referred to in argument :

- Calder v. Dobell* (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 19 W.R. 978, Ex. Ch.; 1 Digest (Repl.) 669, 2353.
- Re County Palatine Loan and Discount Co., Cartmell's Case* (1874), 9 Ch. App. 691; 43 L.J.Ch. 588; 31 L.T. 52; 22 W.R. 697, L.J.J.; 9 Digest (Repl.) 402, 2574.
- F** *Cree v. Somervail* (1879), 4 App. Cas. 648; 41 L.T. 353; 28 W.R. 34, H.L.; 9 Digest (Repl.) 528, 3482.
- Re St. James's Bank, Colville's Case* (1879), 48 L.J.Ch. 633; 41 L.T. 177; 9 Digest (Repl.) 438, 2859.
- G** *Re London, Hamburg and Continental Exchange Bank, Zulueta's Claim* (1870), 5 Ch. App. 444; 39 L.J.Ch. 598; 18 W.R. 778, L.J.. 9 Digest (Repl.) 649, 4313.
- Re London and Mediterranean Bank, Wright's Case* (1868), L.R. 12 Eq. 334, n.; 17 L.T. 635; on appeal, L.R. 12 Eq. 335, n.; 37 L.J.Ch. 529, L.J.J.; 9 Digest (Repl.) 438, 2858.
- H** *Re Natal Investment Co., Snell's Case* (1869), 5 Ch. App. 22; 21 L.T. 445; 18 W.R. 30, L.J.; 9 Digest (Repl.) 438, 2857.
- Re United Service Co., Hall's Case* (1870), 5 Ch. App. 707; 39 L.J.Ch. 730; 23 L.T. 331; 18 W.R. 1058, L.J.J.; 9 Digest (Repl.) 93, 413.
- Marshall v. Glamorgan Iron and Coal Co.* (1868), L.R. 7 Eq. 129; 28 L.J.Ch. 69; 19 L.T. 632; 17 W.R. 435; 9 Digest (Repl.) 439, 2867.
- I** *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 9 Digest (Repl.) 526, 3461.
- Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch.D. 268; 53 L.J.Ch. 856; 50 L.T. 480; 33 W.R. 134; 9 Digest (Repl.) 596, 3947.

Appeal from a decision of the Court of Appeal (COTTON, BOWEN, and FRY, L.J.J.) reversing an order of the Vice-Chancellor of the County Palatine of Lancaster (BRISTOWE, Q.C.), made in the winding-up of a company named "James Schofield and Sons, Ltd."

The company in question was formed in 1865 to take over the business of James Schofield & Sons, flannel manufacturers, of Rochdale. By the articles of association the company were empowered to purchase their own shares for the purpose of selling them again or of extinguishing them, but no such power was given by the memorandum of association. In May, 1880, the company bought from the respondents shares of the value of £3,305, of which a sum of £2,800 was allowed by the latter to remain in the hands of the company as a loan, bearing interest at 5 per cent. per annum. In May, 1884, an order of the Vice-Chancellor of the County Palatine of Lancaster was made for the voluntary winding-up of the company, and later the liquidators objected to the respondents ranking as creditors for the sum of £2,800, the amount standing to their credit in the books of the company in respect of the purchase money of their shares. The Vice-Chancellor held that the respondents were not entitled to rank as creditors in respect of that sum, but his decision was reversed by the Court of Appeal. The liquidators appealed to the House of Lords.

Rigby, Q.C., and O. L. Clare for the appellants.

Romer, Q.C., and Maberley for the respondents.

Their Lordships took time for consideration.

July 11, 1887. The following opinions were read.

LORD HERSCHELL.—Three questions are raised by this appeal: First, whether certain shares in James Schofield & Sons, Ltd., were purchased by G. W. Schofield on his own account or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and, thirdly, whether the company had power to purchase the shares.

James Schofield & Sons, Ltd., was incorporated under the Companies Acts on May 31, 1865, with a capital of £150,000, in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company on May 6, 1884, it was resolved that the company should be wound-up voluntarily, and on May 15 following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding-up should be continued under the supervision of the court. By an affidavit filed on Oct. 1, 1884, the respondents claimed from the company in the winding-up £2,873 12s. A summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but upon appeal this decision was reversed. On May 1, 1880, G. W. Schofield had bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (28 fully paid up, 500 with £6 paid, and five with £5 paid) for the price of £3,305, the purchase money to be paid within three years then next, at such time as the buyers should appoint, and interest at 5 per cent. to be paid by the buyers until completion. Interest was accordingly paid in the meantime, and on May 3, 1883, a transfer of the shares was executed by the vendors and G. W. Schofield. On May 5 a receipt was given to G. W. Schofield for the sum of £3,305 for shares bought, but £505 only having in fact been paid, a promissory note was on the same day given to the appellants for £2,800 "deposited on loan at 5 per cent. per annum interest from date." This was signed "For J. Schofield & Sons, Ltd., G. W. Schofield, director."

The first question is, whether this transaction was entered into by G. W. Schofield on his own account or as agent for the company. If the former, it is clear that Schofield was guilty of a gross fraud. Upon a review of the evidence I see no ground for coming to such a conclusion. I think the purchase of the shares was in fact made by him on behalf of the company.

The question whether, assuming the company had power to purchase its own shares, this purchase was effected in accordance with the articles of the company

A is one of much greater difficulty. The article empowering the company to purchase its shares is as follows :

"Article 179. Any share may be purchased by the company from any person willing to sell it at such price, not exceeding the then marketable value thereof, as the board think reasonable."

B There is not the slightest evidence that the directors ever considered, either at a formal meeting of the board or otherwise, the question whether these shares should be purchased. The utmost that can be said to be established is that the directors other than G. W. Schofield, who negotiated the purchase, knew that the respondents had come to see him upon the subject. But, further, the only authority to buy was at such price, not exceeding the then market value, as the board should think reasonable. The par value of the shares was apparently given in this case, as in the case of the other purchases, as a matter of course, and I see no reason to believe that any judgment was exercised upon the point by the board. But although I think it far from clear that, even if it was competent for the company to purchase the shares, this transaction can be supported, I do not intend to pronounce an opinion upon this point, because, in consequence of the view which I believe all your Lordships entertain upon another part of the case, it is unnecessary to do so.

E I pass now to the main question in this case, which is one of great and general importance—whether the company had power to purchase the shares. The result of the judgment in the court below is certainly somewhat startling. The creditors of the company which is being wound-up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been and having ceased to be shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorise the purchase by the company of its own shares. It states as the objects for which the company is established the acquiring certain manufacturing businesses, and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith. It cannot be questioned, since *Ashbury Railway Carriage and Iron Co. v. Riche* (1), that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not, and could not be, impeached in the judgments of the Court of Appeal, but it is said to be settled by authority that, although a company could not under such a memorandum as the present by articles authorise a trafficking in its own shares, it might authorise the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is *COTTON*, L.J.'s expression, the latter that of *BOWEN*, L.J.

I I will first consider the question apart from authority, and then examine the decisions relied on. The Companies Act, 1862, required (s. 8) that, in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount [see s. 2 (4) (a) of Companies Act, 1948], and provided (s. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that, "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association" [see s. 61 (1) of Act of 1948]. What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a



company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorised. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders. Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Companies Act, 1867, provision was made enabling a company under strictly defined conditions to reduce its capital [Act of 1948, ss. 66-71]. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4,142 of its own shares—that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction would be idle if the company might purchase its own shares wholesale and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor whose interests, I think, ss. 8 and 12 of the Companies Act, 1867, were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorised. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be among this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors

A of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately spend the moneys of the company to any extent they pleased in the purchase of its shares. No doubt, if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

B It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which, in the absence of other provisions, regulate the management of a limited liability company [see Act of 1948, Table A, arts. 33-39]. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing [see 6 HALSBURY'S LAWS (3rd Edn.) 264, 265]. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by SIR GEORGE JESSEL, M.R., in *Re Dronfield Silkstone Coal Co. (2)* (17 Ch.D. at p. 85):

E "It is not for me to say what the limits of surrender are which are allowable by the Act . . . because each case as it arises must be decided upon its own merits."

F I turn now to the authorities. In *Teasdale's Case* (3) JAMES, L.J., said (9 Ch. App. at p. 58):

"There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares."

G But in the subsequent case of *Hope v. International Financial Society* (4) that learned judge said (4 Ch.D. at p. 336):

H "I am reported to have said in *Teasdale's Case* (3) that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But, however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept a surrender from the shareholder who cannot pay, and to release him from further liability—that might be good, although incidentally and to a small extent it may be said to diminish the capital."

I In the case which gave rise to these observations a company having 150,000 shares issued passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting. The Court of Appeal, affirming BACON, V.-C., held that this scheme was invalid. JAMES, L.J., said (*ibid.* at p. 335):

"Either this is a purchase of shares in the sense of trafficking in shares which is a purchase not authorised by the memorandum of association, or it is

an extinguishment of the shares, and, therefore, a reduction of the capital of the company."

BRETT, L.J., made the following observations (ibid. at pp. 339, 340):

"I agree with the lord justice that the dilemma is made perfect; for, if you assume that there was to be a re-issue of these shares, the shares are not cancelled; they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again I do deal in a horse. So then, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that there may not be a continuing business, but no more was that which was done in the case of the *Ashbury Rail. Carriage and Iron Co. v. Riche* (1). That was only to be one transaction, but, because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that, therefore, was the intention of that resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of BRETT, L.J., is strictly applicable to the circumstances of the present case.

Again, in *Guinness v. Land Corp. of Ireland, Ltd.* (5), COTTON, L.J., after referring to s. 38 of the Companies Act, 1862, said (22 Ch.D. at p. 375):

"From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal did not in the present case purport to depart from the views thus expressed, but their judgments were based upon the decision of that court in *Re Dronfield Silkstone Coal Co.* (2). In that case, disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March, 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound-up, and the question then arose whether Ward was liable to be placed on the list of contributories. SIR GEORGE JESSEL, M.R., held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase and prior to the

winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is inchoate, and the court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Co. v. Green* (6). In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Rail. Carriage and Iron Co. v. Riche* (1), that a transaction not within the scope of the memorandum is incapable of ratification. I move that the judgment appealed from be reversed and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.

LORD WATSON.—These points were discussed in the argument upon this appeal: Was the purchase of 533 shares of James Schofield & Sons, Ltd., from the respondents, in May, 1880, made by G. W. Schofield for behoof of the company, with the sanction of its directors? If so, was the transaction ultra vires the company? The order appealed from cannot stand if either of these questions be answered in the negative. I think it is established by the evidence that both parties to the agreement of May, 1880, understood, and acted upon the footing that the purchase was made by G. W. Schofield for the company, and that G. W. Schofield, after the shares were transferred to him in May, 1883, held, or at least intended to hold, them as trustee for the company. I doubt whether it is also proved that the purchase was submitted to and considered and approved by the board of direction, in terms of the articles of association; but I do not think it necessary to determine that point, because I am of opinion that, assuming the transaction to have been duly completed, in accordance with the articles, it was nevertheless ultra vires the company.

In order to appreciate the real character of the transaction, it is necessary to advert to the position of the concern, and its course of dealing in the purchase of its own shares. The company was registered with limited liability in the year 1865, for the purpose of carrying on the business of manufacturing flannel goods, and it continued to trade from that time until April, 1884, when it went into liquidation. Its nominal capital was £150,000 in 15,000 shares of £10 each. None of its shares was sold in the market after July, 1875, and no dividend was paid after the year ending Dec. 31, 1877; but at the date of the liquidation the company had acquired by purchase, and then owned, 4142 of its own shares, of which 3609 were entered in the register in the name of "Jas. Schofield & Sons," a firm which had no existence, and the remainder (the 533 shares in question) in the name of G. W. Schofield. All of these shares had been bought by the company at par, or, in other words, not at market value, but for the amount which had been paid upon them by previous holders; and 1389 shares were purchased on these terms between May, 1880, and the date of the liquidation. In the case of the 533 shares, the price was made payable three years after the date of the agreement of sale, in exchange for a transfer, the purchaser meantime paying interest at 5 per cent., and undertaking to indemnify the sellers from further calls. Interest was regularly paid from the funds of the company, and the transaction was closed in May, 1883, by a transfer of the shares to G. W. Schofield, the sellers giving a receipt for the full price (£3305) on receiving payment of £505 in cash and being credited in the books of the company with £2800, the amount of the unpaid balance, as a loan to the company. That is the sum which the

respondents claim in the liquidation, and for which the Court of Appeal has held A
that they are entitled to rank in competition with the creditors of the company.

The articles of association of James Schofield & Sons, Ltd., give the directors very extensive powers to purchase its own shares for the company; and it is provided (art. 181) that

“shares so purchased may at the discretion of the board be sold or disposed B
of by them, or be absolutely extinguished, as they deem most advantageous
for the company.”

These powers are, of course, unavailing, in so far as they may include pur-
chases which are either beyond the scope of the memorandum of association or
contrary to the provisions of the Companies Acts. But I assent to the respon- C
dents' argument that they must be construed ut magis valeant quam pereant,
and must be held to authorise all purchases of the company's shares effected
on its behalf by the directors, which can be shown to have been legitimate and
within the objects specified in the memorandum. In the case of a company
limited by shares, the Act of 1862 requires that the amount of its capital, and
the shares into which it is divided, shall be set forth in the memorandum
of association; and s. 12, which prescribes the extent to which the conditions D
contained in the memorandum may be modified, empowers the company to
increase, but not to diminish, its capital. The limitation has been so far relaxed
by the Act of 1867 as to permit a company to reduce its capital, with the sanction
of the court after due notice to creditors upon such terms as the court may think
fit to impose. The Act of 1877, upon the preamble that doubts had been enter- E
tained whether the power of reduction given by the preceding Act extended to
paid-up capital, enacts (s. 3) that the word “capital,” as used in that Act, shall
include paid-up capital [see now s. 66 of Act of 1948]. That declaration clearly
expresses the will of the legislature that neither the paid-up nor the nominal
capital of the company shall be reduced otherwise than in the manner permitted
by the statutes. One of the main objects contemplated by the legislature, in F
restricting the power of limited companies to reduce the amount of their capital
as set forth in the memorandum, is to protect the interests of the outside public
who may become their creditors.

In my opinion, the effect of these statutory restrictions is to prohibit every
transaction between a company and a shareholder, by means of which the money
already paid to the company in respect of his shares is returned to him, unless G
the court has sanctioned the transaction. Paid-up capital may be diminished or
lost in the course of the company's trading; that is a result which no legislation
can prevent; but persons who deal with and give credit to a limited company
naturally rely upon the fact that the company is trading with a certain amount
of capital already paid, as well as upon the responsibility of its members for
the capital remaining at call; and they are entitled to assume that no part of H
the capital which has been paid into the coffers of the company has been subse-
quently paid out except in the legitimate course of its business. When a share
is forfeited or surrendered the amount which has been paid upon it remains with
the company, the shareholder being relieved of liability for future calls,
while the share itself reverts to the company, bears no dividend, and may be
re-issued. When shares are purchased at par and transferred to the company I
the result is very different. The amount paid up on the shares is returned to the
shareholder; and in the event of the company continuing to hold the shares (as
in the present case) is permanently withdrawn from its trading capital.

It appears to me that, as SIR GEORGE JESSEL, M.R., pointed out in *Re Dronfield
Silkstone Coal Co.* (2) (17 Ch.D. at p. 83), it is inconsistent with the essential
nature of a company that it should become a member of itself. It cannot be
registered as a shareholder to the effect of becoming debtor to itself for calls,
or of being placed on the list of contributories in its own liquidation. Accordingly,

A when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares while the company is a going concern bring no addition to its capital.

B In *Teasdale's Case* (3) which was frequently referred to in the argument before us, JAMES, L.J., is reported to have said (9 Ch. App. at p. 58):

"There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares."

C There was no question of purchase in that case, which related to a surrender of original shares in exchange for new shares, by means of which the nominal capital of the company was largely increased while the paid-up capital remained intact.

D The learned lord justice took occasion to modify the opinion thus attributed to him in the subsequent case of *Hope v. International Financial Society* (4). In that case the purchase of its own shares was not one of the specified objects of the society; but the directors were authorised to purchase the shares of certain members who desired to withdraw from the concern by a special resolution of the society, which provided that shares purchased in terms thereof should not be re-issued by the board without the authority of a general meeting. The Court of Appeal, affirming the decision of BACON, V.-C., held that the scheme involved an improper application of its funds and was ultra vires the company. JAMES, L.J., said (4 Ch.D. at p. 335):

E "Mr. Kay, it appears to me, has succeeded in placing his opponents on the horns of a dilemma. This is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorised by the memorandum of association; or it is an extinguishment of the shares, and therefore a reduction of the capital of the company."

F He clearly distinguishes the case of purchase from that of surrender. After referring to his reported observations in *Teasdale's Case* (3) as being too wide a deduction from the authorities, and unnecessary for the decision of the case, G he says (ibid. at p. 336):

H "But, however that may be, when the company deals with an individual shareholder and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally, and to a small extent, it may be said to diminish the capital."

I BRETT and BAGALLAY, L.JJ., followed the same line of reasoning as JAMES, L.J. They agreed that the resolution of the company to purchase and hold its own shares, subject to the disposal of a general meeting, was in substance either a resolution to deal in the shares, which was outside the memorandum of association, or a resolution to reduce its capital, which was contrary to the provisions of the Companies Acts. The decision of the learned judges would, I apprehend, have been the same if the directors had been authorised to make the purchase by the articles of association. No authority thereby given could have enlarged the scope of the memorandum, or overcome the statutory prohibition.

Counsel in the course of his able argument for the respondents, impeached the soundness of the decision in *Hope v. International Financial Society* (4). He sought to extricate his clients from the dilemma presented in that case by endeavouring to show that the purchase of the 533 shares in question was, in a

reasonable sense, incidental to the carrying on of the proper business of James Schofield & Sons, Ltd., or was at least a legitimate piece of domestic management, and, therefore, within the scope of the memorandum; and, upon that assumption, he argued that the transaction was not in contravention of the Companies Acts, although it might lead to some diminution of capital. His argument was mainly rested upon *Re Dronfield Silkstone Coal Co. (2)*, an authority requiring consideration, because it is in respect of the principle said to be thereby established that the Court of Appeal has, in this case, given judgment for the respondents. Other authorities were relied on by the learned counsel, but these, with one exception, I think it unnecessary to notice, because they were cases either of surrender of shares or of cancellation of allotments, and did not involve any question of purchase.

In *Phosphate of Lime Co. v. Green* (6) a dispute had arisen between the company and two of its shareholders, which was eventually compromised. As stated by WILLES, J. (L.R. 7 C.P. at p. 54):

"An arbitration was proposed and negotiations took place between the directors and Green and Nicholls, which resulted in a compromise on or about July 24, 1866. That compromise in effect was that, instead of paying back the money advanced to them, and returning the debenture bonds, Green and Nicholls should give up to the company 400 shares on which £10 per share had been paid up to be cancelled; and it was agreed that this should be considered as a settlement of the claim of the company against them."

The learned judges, in delivering their opinions, assumed that the transaction had the character of a sale of the shares and was struck at by art. 19 of the company's articles of association, which expressly prohibited the purchase of its own shares under any circumstances; but they held that the shareholders, with full knowledge of the transaction, had ratified that which had been done by the directors. None of the learned judges seems to have considered whether the transaction was within the limits of the memorandum or consistent with the provisions of the Companies Acts, and neither of these points was raised by the arguments addressed to them.

In deciding *Re Dronfield Silkstone Coal Co. (2)* the Court of Appeal had fully in view the previous decisions of this House in *Ashbury Rail. Carriage and Iron Co. v. Riche* (1), and of their predecessors in *Hope v. International Financial Society* (4). It appears from the report that disputes had arisen between the board of directors and Ward, one of their number, from whom and his partner Addy the company had a sublease of coal mines which it worked, and that these disputes seriously interfered with the business of the company. In order to terminate their differences the parties entered into an agreement sanctioned by a special resolution of the company, in terms of which Ward, on March 25, 1872, transferred his shares to the company for £5000, and of the same date executed, along with Addy, a separate indenture, by which they assigned to the company their whole interest as lessees for the sum of £10000. The company was registered as owner of the shares shortly after the execution of the transfer in 1872, and retained them until 1879, when a winding-up order was obtained. At the time of the transfer, and for several years following, the business of the company was prosperous, and large dividends were paid. The liquidators included Ward in the list of contributories, and, in an application for the removal of his name SIR GEORGE JESSEL, M.R., held that the transfer was void as being not only outside the objects of the memorandum, but a diminution of the paid-up capital forbidden by the Companies Acts, and consequently that Ward was still liable to contribute. His judgment was reversed by the Court of Appeal, who directed the applicant's name to be removed from the list. COTTON, L.J., was of opinion that, the purchase having been made in the interest of the company, and not being in any sense a traffic in shares, did not go beyond the memorandum, and

A that it was not such a diminution of capital as the statutes prohibit. Upon the latter point his Lordship observed (17 Ch.D. at p. 94) :

“The principal argument of the respondent against the validity of the transaction was, that it was a reduction of the capital of the company. If this transaction is to be held invalid on that ground, I do not see how a surrender or forfeiture of shares is ever to be supported.”

JAMES, L.J., was also of opinion that dealing with shares which did not amount to traffic was not beyond the scope of the memorandum, and he regarded the transaction as “a mere domestic matter,” which could not be questioned after the company had first confirmed it and had then acquiesced in it and taken the benefit of it.

C In *Guinness v. Land Corpn. of Ireland, Ltd.* (5) COTTON, L.J., thus explained the principle upon which *Re Dronfield Silkstone Coal Co.* (2) was decided (22 Ch.D. at p. 378) :

D “The article there empowered the directors in their discretion to apply money in purchasing shares so as to get rid of shareholders who caused difficulty in the internal management of the company, and as the power had been used, and reasonably used, for that purpose, and not as a means of diminishing the capital of the company, the shares not being in any way cancelled or put an end to, but being re-issuable, we were of opinion that the directors had the power which they purported to exercise.”

E When a company, in order to get rid of a troublesome shareholder, buys his shares and continues to hold them, as in *Re Dronfield Silkstone Coal Co.* (2) the object may be different, but the result, so far as regards the capital of the company, is precisely the same as if it had purchased the shares as an investment. If the shares are purchased with the view of being resold, that is simply a speculation with the funds of the company. If they are purchased with the view of their being retained by the company, that is a permanent withdrawal of the money invested in them from the trading capital of the company. I do not agree with F COTTON, L.J., in thinking that if such a transaction is invalid no forfeiture or surrender could be supported. When shares are forfeited or surrendered and not re-issued, that affects only the nominal amount of the shares so far as unpaid; when they are bought and not re-issued, that diminishes the paid-up as well as G the nominal capital. Notwithstanding the general prohibition of alterations upon the memorandum of association which diminish the capital, whether the paid-up or nominal, of a company limited by shares, the Companies Acts contemplate the possibility of diminution of unpaid capital in certain cases, although the memorandum remains unaltered. Section 26 of the Act of 1862 and the regulations of Table A (17 to 22) [Act of 1948, Sched. 6, Pt. I, para. (3) (i), and Table A, H arts. 33-39] show plainly that the legislature intended companies to have the power of forfeiting shares. There is no reference in the Acts to surrenders of shares, but these have been admitted by the courts, upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding in invitum, and the other a proceeding taken with the assent of the shareholder who is unable to retain and pay future I calls on his shares.

Whatever may be the case in regard to surrender, I do not think the purchase of its own shares by a company bears any analogy to forfeiture. It appears to me that a transaction by which, as in this case and in *Re Dronfield Silkstone Coal Co.* (2), the company gave back his money to the shareholder, and accepted and held the shares in his stead, in point of fact operates as a diminution of its paid-up as well as of its nominal capital; and I have been unable to discover any good reason why such diminution should be held to be legal, in the face of statutory enactment to the contrary. I am not prepared to say, nor is it necessary to say,

that the decree in *Re Dronfield Silkstone Coal Co.* (2) directing the removal of Ward's name from the list of contributories was erroneous. If his non-liability to contribute in the liquidation had been wholly dependent upon the original validity of the agreement of March, 1872, for the sale and purchase of his shares, I should have agreed with the decision of SIR GEORGE JESSELL, M.R.; but it appears to me that there were special circumstances in that case, which might have justified the order made by the Court of Appeal, although I am unable to concur in the reasoning upon which it was based. The respondents are not resisting an attempt by the liquidators to include them in the list of contributories; they are seeking to enforce, in a question with creditors, the contract under which their shares were transferred to the company, and their success must depend upon the validity of the contract.

In the present case, I should have been of opinion, even on the assumption that the reasoning of the lords justices in *Re Dronfield Silkstone Coal Co.* (2) was sound, that the purchase of the respondents' 533 shares was a transaction *ultra vires* of the company. It was not an isolated transaction with a single troublesome shareholder who was obstructing the business of the company, but was part and parcel of a scheme carried out by the directors under the articles of association, by which they acquired for the company more than one-fourth of the whole shares of its undertaking, and returned to the shareholders from whom they purchased more than one-fourth of its paid-up capital. It does not appear to have formed any part of the scheme to re-sell or re-issue the shares, and matters stood in the position I have described at the date of the liquidation. I do not doubt that, as suggested by the learned judges of the Court of Appeal, the object of the directors was to keep James Schofield & Sons, Ltd., as a sort of family concern, which was a perfectly lawful object if pursued by legitimate means. But the directors and shareholders of a company limited by shares, who desire to have the concern in the hands of themselves and their friends and to keep its shares out of the market, ought to use their own money for that purpose, and not the trading capital of the company. In my opinion, the application of the company's funds, in furtherance of any such object, is altogether illegitimate, because it is foreign to the proper business of the company, and in violation of statute law. If it were held to be incidental to the business of the company, and not a diminution of its capital, there seems to be no reason why James Schofield & Sons, Ltd., should not have purchased at par a half or two-thirds instead of a fourth of its own shares. I concur, therefore, in the judgment which has been moved.

LORD FITZGERALD.—LORD HERSCHELL has stated accurately that there are three questions awaiting our decision. The first is, whether the shares in question were purchased by Mr. G. W. Schofield on his own account, or as agent for the company. If I had to determine what the true character of that transaction was, and if that was necessary for our decision, I should hesitate very much to say that the agreement of May 1, 1880, was entered into by G. W. Schofield on behalf of the company and not upon his own account. The second question is, whether, assuming that these shares were purchased for the company and that the company had power to buy its own shares, the purchase was completed in accordance with the articles of association. Upon that question I make the same observation, that it is not necessary for our present decision to express any decided opinion upon it, but the impression upon my mind is that, if I had to decide that question, I should say that the transaction was not completed in accordance with the articles of association, and was, therefore, inoperative. The third question is the important one in the case. It is a question of very great public importance, and one cannot but feel satisfied that at last it has come to the point where it is necessary to pronounce an authoritative decision upon it.

The question is put thus in the reasons for the appeal—"Because the company had no power to make or authorise any such purchase of its own shares." That is answered in the reasons given for the respondents thus: "Because the purchase by the company of the said shares was not ultra vires, but under the circumstances was and is a transaction in every way binding on the company." The question now is: Which of these reasons are we to adopt? I have read the two very elaborate opinions which have been already delivered upon this subject, and I have also read the very weighty opinion which has yet to be delivered by LORD MACNAGHTEN. Upon carefully reading them and deliberately considering them, I have laid aside what I intended to be my own opinion in the case, and I intend to do little more than, upon this question, to state my entire concurrence in the views which have been expressed by your Lordships who have spoken, and in those which are about to be expressed by my noble and learned friend. I would add that I consider that the decision which the House has been able to arrive at is a most wholesome one in the public interests and for public purposes.

I would not say another word, but that I wish to advert to a case to which I called attention in the course of the argument—it was a case which came up for decision before the Court of Appeal in Ireland, and in which a very elaborate judgment was delivered by FITZGIBBON, L.J. I refer to *Re Balgooley Distillery Co.* (7). I only wish to observe that I think that affords the ablest criticism which has taken place up to this morning upon the authorities and upon the question which we have now to determine. I will only repeat that I express my entire concurrence upon the third question, in the decision of the House, and in the reasons given for it.

LORD MACNAGHTEN.—The learned counsel for the appellants raised three points for your Lordships' consideration. In the first place, they contended that the shares belonging to Whitworth's executors, which were the subject of the agreement of May, 1880, were not really purchased on behalf of the company. From facts either proved or admitted and from documents in evidence, they asked your Lordships to infer that in making that agreement George William Schofield was acting on his own account, though he meant all the while to treat the company as the purchaser if the bargain turned out to be a bad one. That is a charge of dishonesty for which, as far as I can see, there is not a shadow of foundation. In the next place, assuming the purchase clauses in the articles to be valid, it was contended that the requirements of those clauses were not duly complied with. This is a more difficult question. In the unsatisfactory state of the evidence I do not propose to give any final opinion upon it. I will only make one or two observations. Article 179 provides that "any share," that is any share in James Schofield & Sons, Ltd.

"may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then market value thereof, as the board think reasonable."

It does not appear that the board ever exercised any judgment or thought in the matter. From the year 1875 the company's shares were not saleable or sold in the market, or dealt with by the public. After that date any shares that any member wished to sell were bought by the company as a matter of course. Excepting a few instances where shares were sold below their par nominal value, the price given was invariably a sum equal to the amount paid up, and that although the company was steadily going from bad to worse, trading at a loss, and at the same time borrowing money to buy up the shares of members who wanted to withdraw. Why the price was kept up under these circumstances it is not necessary to inquire. Whatever the reason may have been, the sum which the board agreed to pay for the shares belonging to Whitworth's executors cannot, I think, by any figure of speech, be described as the market

value or as bearing any relation to the market value of the shares. If that be so, there seems to be a difficulty in the way of enforcing against the company the completion of a contract founded on something like a breach of trust on the part of the directors. A

The third point is one of general importance. It raises the question whether it is competent for a company formed under the Companies Act, 1862, on the principle of limited liability, to purchase its own shares when it is authorised by its articles to do so. The consideration of that question, as it appears to me, necessarily involves the broader question whether it is competent for a limited company under any circumstances to invest any portion of its capital in the purchase of a share of its own capital stock, or to return any portion of its capital to any shareholder without following the course which Parliament has prescribed. B
If the case were not in some degree embarrassed by the decision in *Re Dronfield* (2), and by dicta in earlier cases, I should answer both questions in the negative without the slightest doubt or hesitation. C
It appears to me that the notion of a limited company taking power to buy up its own shares is contrary to the plain intention of the Act of 1862, and inconsistent with the conditions upon which, and upon which alone, Parliament has granted to individuals who are desirous of trading in partnership the privilege of limiting their liability. D
The Act of 1862 requires that the objects for which a limited company is established shall be stated in its memorandum. Those objects cannot be enlarged by anything to be found in the articles, or by anything outside the memorandum. E
Whatever may fairly be regarded as incidental to the objects stated in the memorandum, the company is authorised to do. Everything beyond that is prohibited. Further, every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount. That is equivalent to a declaration that the capital is to be devoted to the objects of the company.

The effect of that statement, taken in connection with s. 38, is explained very clearly by CORRON, L.J., in *Guinness v. Land Corp. of Ireland* (5). After commenting on s. 38, the lord justice proceeds thus (22 Ch.D. at p. 375): F

"From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid." G

If that be a correct exposition of the law, as I think it is, it seems to me to be decisive on the present question. If the purchase of shares in James Schofield & Sons, Ltd., was not one of the objects of that company, how could its capital be properly employed in that purchase? H
BOWEN, L.J., indeed, founding himself on *Re Dronfield Silkstone Coal Co.* (2), assumes that cases may occur where the purchase of its own shares is incidental to the legitimate objects of a limited company, and such a case he considers the present to be. On that two observations arise. If the exercise of such a power can be regarded as incidental to the objects of a limited company, there seems to be no need for giving the power in express terms either in the memorandum or in the articles. I
Every company must have it. Every company may exercise it in a proper case. In the next place, whatever may be thought of the special circumstances to be found in *Re Dronfield Silkstone Coal Co.* (2), there are no special circumstances here. It was said that the company was a family company. But a family company, whatever the expression means, does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company. It can have no special privilege or immunity. It was

A said that the board did not want Whitworth's shares to be sold to outsiders, or put on the market. Unfortunately, there was nothing special in that. That was part of the regular practice of the company, a practice which became more and more confirmed as the company's affairs became more and more embarrassed.

B The company's balance-sheets for the last few years of its existence are in evidence. On the one side, among the debit items, they show the amount due to the company's bankers; on the other side, under the head of "shares purchased," they show the amount spent by the company in the purchase of its own shares. The figures are instructive. In December, 1880, the company owed its bankers, who were secured creditors, £20,202. Up to that date, from its commencement in 1865, it had spent £16,202 in the purchase of its own shares. By December, 1883, the debt at the bankers had increased to £30,490, and the sum spent in the purchase of its shares amounted to £32,935. By means of these purchases that large sum, more than one-fifth of the nominal capital of the company, had been withdrawn from the fund to which, as CORRON, L.J., says, the creditors have a right to look. In 1884 the company went into liquidation, and the creditors are unpaid.

C In the face of the figures to which I have referred, counsel for the respondents hesitated to maintain that the particular purchase was incidental to the objects of the company. But he urged that the vendors had nothing to do with that; they were not concerned with the management of the company. It was enough for his argument if it were conceded that the purchase of its own shares might be incidental to the objects for which the company was formed. Your Lordships then asked in what case, and under what circumstances, such a purchase could be said to be incidental to the objects of a limited company? In answer to that question the learned counsel not unnaturally turned to *Re Dronfield Silkstone Coal Co.* (2), and suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out shareholders whose continuance in the company was undesirable. That was the way in which the proposition was put in the *Dronfield Case* (2), where matters had come to a deadlock; but I would ask: Is it possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine? Who are the shareholders whose continuance in a company the company or its executive consider undesirable? Why, shareholders who quarrel with the policy of the board, and wish to turn the directors out; shareholders who ask questions which it may not be convenient to answer; shareholders who want information which the directors think it prudent to withhold. Can it be contended that, when the policy of directors is assailed, they may spend the capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics?

G I took the liberty during the argument of referring to a case which is reported under the name of *Harben v. Phillips* (8). It was the case of a large shipping company, in which the shareholders were divided into two hostile camps. One party, with the old directors at their head, wished to make London the port of departure for their fleet. The other party were determined that the business should remain at Southampton. Both sides were perfectly honest, each was fully convinced that the company would be ruined if the view of their opponents prevailed. Could it be suggested that in such a case directors might lawfully employ the company's funds in buying up a sufficient number of shares to silence opposition? Or is the purchase allowable only when the undesirable shareholder stands alone, and the other members are all of one mind?

I In the latter case the action of the directors may not be open to misconstruction; but still the purchase would not be "a mere domestic matter" as it was termed by JAMES, L.J., in *Re Dronfield Silkstone Coal Co.* (2). It must involve the employment of funds which have been dedicated to other purposes, and the use or misuse of which concerns other persons besides the shareholders. Nor can it be considered incidental to the objects of the company merely because it

may be very convenient. After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from the common misfortune of having to pay for what one wants out of one's own purse when there is no other way of getting it. If the capital proposed to be expended in the purchase of its shares is "in excess of the wants of the company," the transaction may be carried out under the provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company's wants, it certainly ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be attained by means to which no exception can be taken. If shareholders think it worth while to spend money for the purpose of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on a fund in which others as well as themselves are interested.

That, I think, is the law, and that is the good sense of the matter. There remains, however, a more serious objection still. It seems to me that, if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void. There are two conditions of the memorandum, the condition defining the objects of the company and the condition defining its capital, one or both of which would be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a "lawful purpose" within the meaning of s. 6 of the Act of 1862 [Act of 1948, s. 1 (1)]? If it were the only object of the company no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day, or allow a quotation to any company which purports to have the power of buying in its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of *Corron, L.J.*, who thought the power in the present case valid because it was only "a power to authorise the board, whenever they thought it desirable for the purposes of the company, to buy the shares." The condition would then run thus: "The capital of the company is £150,000 in 15,000 shares of £10 each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so." It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate the qualification would have the effect of reducing one of the statutory conditions of the memorandum [Act of 1948, s. 2 (4)] to an empty form.

So far I have not relied upon the Acts of 1867 and 1877, which are to be construed as one with the Act of 1862, because I think the question is clear on the earlier Act; but I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. The Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power "to pay off any capital which may be in excess of the

A wants of the company" [Act of 1948, s. 66 (1) (c)], and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or "the payment to any shareholder of any paid-up capital." It follows that, if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

B **C** One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in s. 26 [Act of 1948, Sched. 6, Pt. I, para. 3 (i)]; every company is to return to the Registrar of Joint Stock Companies once a year "the total amount of shares forfeited." There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts [see 6 HALSBURY'S LAWS (3rd Edn.) 264, 265], but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

D **E** If you agree in the result at which I have arrived you will prevent a distinction being set up between the powers of statutory corporations governed by the Companies Acts and the powers of those governed by the Companies Clauses Acts, for which, as it appears to me, it would be difficult to find any foundation in reason. In the Companies Clauses Consolidation Act, 1845, provision is made for forfeiture and for forfeiture only. By the Companies Clauses Act, 1863, companies are authorised to accept surrenders of shares not fully paid up, but it is expressly enacted that

"the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share."

F It has never been suggested, so far as I am aware, that a company governed by the Companies Clauses Acts can purchase its own shares. Your Lordships have held that the principles which were laid down in *Ashbury Rail. Carriage & Iron Co. v. Riche* (1), as to the limit of the powers of incorporated companies, apply with equal force to companies governed by the Companies Acts and to companies incorporated by special Act of Parliament. It would be a singular thing if your Lordships were compelled to hold that one class of companies can purchase its own shares while the other is prohibited from so doing.

G **H** It is necessary to say a few words with regard to the decision of the Court of Appeal in *Re Dronfield Silkstone Coal Co.* (2). Much reliance, of course, was placed on that decision and your Lordships were warned against the danger of disturbing its authority, having regard to the time which has elapsed since it was pronounced and to the probability of its having been acted upon to a considerable extent. So far as my experience goes, that decision has never been recognised in the profession as an authority for the general proposition that a limited company may purchase its own shares; and I am confirmed in this view by the criticisms on the case to be found in MR. BUCKLEY'S well-known work on COMPANIES, and in the notes in MR. PALMER'S excellent collection of precedents. I do not think that your Lordships' judgment in the present case will touch the decision in *Re Dronfield Silkstone Coal Co.* (2), though it will, of course, displace much of the reasoning on which the case was decided. If I may respectfully say so, though I agree with the reasoning of SIR GEORGE JESSEL, M.R., on the main point, still I

think the decision of the Court of Appeal was right. It seems to me that it may be supported on very simple grounds. Mr. Ward's name was not on the register when the company was ordered to be wound-up. To make him a contributory it was, therefore, necessary to rectify the register. After winding-up the court has that power under ss. 35 and 98 [Act of 1948, s. 116, s. 257 (1)]. But it is a judicial power, as it has been called, and it is to be exercised by the court, to use the language of s. 35, "if satisfied of the justice of the case." These are not mere idle words; they mean, I think, what they say, although they have been sometimes overlooked. LORD CAIRNS, I may observe, relied upon them in *Sichell's Case* (9), as showing that the court is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition. The arrangement under which Ward retired was an honest arrangement. It was in accordance with a provision of the articles which had never been determined to be invalid. It was expressly sanctioned at an extraordinary general meeting, at which all the shareholders were present with the exception of the holder or holders of 11 shares out of 1,600. Ward's name was off the register for seven years. During part of that time the company had been extremely prosperous, and all the shareholders who remained in the company had received dividends largely increased by reason of Ward's retirement. Moreover there was no creditor whose debt was incurred while Ward was a shareholder, or who had been induced to trust the company by having Ward's name held out as a member. The power to make a person who is not on the register contribute to debts when the company is wound-up is a power given by statute. The same statute requires the court, before exercising the power, to be satisfied of the justice of the case [see now Act of 1948, s. 212]. In *Re Dronfield Silkstone Coal Co.* (2), the liquidator, as representing shareholders, had no equity; he had none as representing creditors. It would be a strange travesty of justice to compel a person to pay debts with which he has nothing to do at the instance of an applicant who has no equity to set the court in motion.

The present case is wholly different from *Re Dronfield Silkstone Coal Co.* (2). There it was sought to undo a transaction which could not be undone altogether so as to restore the parties to their original position, and which could not be undone at all without committing injustice. Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company. Under these circumstances the application ought, I think, to have been refused by the Court of Appeal as it was by the Vice-Chancellor. For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the appeal allowed, as usual with costs.

Appeal allowed.

Solicitors: *Gregory, Rowcliffes & Co.*, for *Addleshaw & Warburton*, Manchester; *Marsland, Hewitt & Everett*, for *Grundy & Lamb*, Manchester.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

A BOSTON DEEP SEA FISHING AND ICE CO. v. ANSELL

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), June 25, 26, 27, 1888]

[Reported 39 Ch.D. 339; 59 L.T. 345]

B *Agent—Duty to account—Profit from transaction within scope of agency—Right of principal to take profit—Receipt by agent from third party of secret commission—Right of principal to determine contract.*

Master and Servant—Misconduct of servant—Receipt from third party of secret commission—Liability to summary dismissal—Right of employer to recover from servant amount received by him.

C An agent acting for a principal or a servant employed by a master who, unknown to the principal or master, takes from a third person, with whom he has been employed by the principal or master to do business, a profit, whether by way of percentage or otherwise and whether the profit is given to him in return for services actually performed for the third party, for his supposed influence, or on any other ground, is guilty of a gross breach of duty towards the principal or master, and the principal or master is entitled summarily to dismiss him and to recover from him the amount of the profit which he received. This is so even where the transaction from which the illegal profit was made took place a substantial time previously or was an isolated transaction, unless in the latter case (per BOWEN, L.J.) the circumstances were such that the conduct of the agent or servant on the whole did not amount to a breach of confidence and good faith.

E *Master and Servant—Wages—Yearly contract—Salary paid quarterly under company's articles—Servant dismissed before end of year—Right to last quarterly payment—Right to payment on quantum meruit—Commission—Commission on sales—Summary dismissal—Right to commission on sales effected.*

F The plaintiff company employed the defendant as managing director at a salary of £800 a year which, in accordance with the articles of the company, was paid to him quarterly on Jan. 1, April 1, July 1, and Oct. 1. On Oct. 19 the defendant was summarily dismissed for misconduct. On a claim by him for a quarter's salary due on Oct. 1 and for the amount of commission due to him in respect of sales by the company.

G **Held:** (i) on construction the contract was a yearly contract for a yearly payment to which the defendant would not be entitled until the end of the year; the fact that under the articles payments were made quarterly did not affect the matter; and, therefore, no salary had accrued due to the defendant before his dismissal and he was not entitled to the quarterly payment which would otherwise have been made on Oct. 1, nor could he recover on a quantum meruit; but (ii) he was entitled to the commission on sales directly the sales had taken place, and his right to this commission was not effected by his dismissal.

H **Notes.** Applied: *Costa Rica Rail. Co. v. Forwood*, [1901] 1 Ch. 746; *Erskine v. Sachs*, [1901] 2 K.B. 504; *Swale v. Ipswich Tannery* (1906), 11 Com. Cas. 88; *General Billposting Co., Ltd. v. Atkinson*, [1908-10] All E.R. Rep. 619; Distinguished: *Federal Supply and Cold Storage Co. of South Africa v. Angehrn and Piel* (1910), 80 L.J.P.C. 1. Considered: *Rhodes v. Macalister* (1923), 29 Com. Cas. 19; *A.-G. v. Goddard* (1929), 98 L.J.K.B. 743; *Ramsden v. David Sharratt & Sons, Ltd.* (1930), 35 Com. Cas. 314. *Reading v. A.-G.*, [1951] 1 All E.R. 617. Referred to: *Re Famatina Development Corpn.*, [1914] 2 Ch. 271; *Healey v. Société Anonyme Française Rubastic*, [1917] 1 K.B. 946; *Taylor v. Oakes, Roncoroni & Co.* (1922), 127 L.T. 267; *Adams v. Morgan*, [1923] 2 K.B. 234; *Harrods, Ltd. v. Lemon*, [1931] All E.R. Rep. 285; *Southern Foundries (1926), Ltd.*, and

Federated Foundries, Ltd. v. Shirlaw, [1940] 2 All E.R. 445; *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378; *Re Reading's Petition of Right*, [1949] 2 All E.R. 68.

As to the rights of a principal against an agent and the duty of a servant, see 1 HALSBURY'S LAWS (3rd Edn.) 188-195 and *ibid.*, vol. 25, pp. 462-465, 485-488. For cases see 1 DIGEST (Repl.) 539-554, and 34 DIGEST (Repl.) 77 et seq., 144-151.

Cases referred to in argument:

Pearce v. Foster (1886), 17 Q.B.D. 536; 55 L.J.Q.B. 306; 54 L.T. 664; 51 J.P. 213; 34 W.R. 602; 2 T.L.R. 534, C.A.; 34 Digest (Repl.) 84, 557.

Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co. (1875), 10 Ch.App. 515; 45 L.J.Ch. 121; 32 L.T. 517; 23 W.R. 583, L.J.J.; 1 Digest (Repl.) 552, 1730.

Ridgway v. Hungerford Market Co. (1835), 3 Ad. & El. 171; 1 Har. & W. 244; 4 Nev. & M.K.B. 797; 4 L.J.K.B. 157; 111 E.R. 378; 34 Digest (Repl.) 84, 560.

Lilley v. Elwin (1848), 11 Q.B. 742; 17 L.J.Q.B. 132; 11 L.T.O.S. 151; 12 J.P. 343; 12 Jur. 623; 116 E.R. 652; 34 Digest (Repl.) 134, 915.

Bentley v. Craven (1853), 18 Beav. 75; 52 E.R. 29; 1 Digest (Repl.) 531, 1608.

Taylor v. Laird (1856), 1 H. & N. 266; 25 L.J.Ex. 329; 27 L.T.O.S. 221; 156 E.R. 1203; 34 Digest (Repl.) 111, 751.

Cutter v. Powell (1795), 6 Term Rep. 320; 101 E.R. 573; 34 Digest (Repl.) 108, 736.

Goodman v. Pocock (1850), 15 Q.B. 576; 19 L.J.Q.B. 410; 14 Jur. 1042; 117 E.R. 577; 34 Digest (Repl.) 124, 842.

Imperial Mercantile Credit Association (Liquidators) v. Coleman (1873), L.R. 6 H.L. 189; 42 L.J.Ch. 644; 29 L.T. 1; 21 W.R. 696, H.L.; 9 Digest (Repl.) 516, 3399.

Appeal by the plaintiff company against a decision of KEKEWICH, J., in an action in which they claimed from the defendant Ansell an account of moneys received by him from third parties while he was managing director of the company as commission or bonus in connexion with transactions relating to the company's business, and on a counterclaim by the defendant for damages for wrongful dismissal.

Laurance, Q.C., and *Warrington* for the company.

Crump, Q.C., and *Vernon Smith* for the defendant.

COTTON, L.J.—This is an appeal by the plaintiffs in the action in respect not only that KEKEWICH, J., did not give them the full relief to which they are entitled on their statement of claim, but also that he granted on the counterclaim to the defendant Ansell relief to which he was not entitled.

The plaintiff company was formed in the year 1885, and before it was registered, and, therefore, incorporated, they were considering what they should do to establish their business. The defendant, Mr. Ansell, had been engaged for a considerable time at Hull, in the business in which the company proposed to enter at Boston, and possessed some fishing smacks. Mr. Garfit, the chairman of the company, shortly before the incorporation of the company, made an arrangement with Mr. Ansell that Mr. Ansell should hand over to the plaintiff company all his fleet of smacks, and that he should enter into certain arrangements which were to be carried out by him, as the managing director, when the company was formed. Therefore, he was an agent acting with considerable authority on behalf of the plaintiffs. Very shortly after the incorporation of the company the board of directors authorised Mr. Ansell to enter into negotiation with, and to contract with, the Earle's Shipbuilding Co., to build smacks or other vessels which the company required for the purpose of carrying on its business. He had certain directions from the board, negotiated with Earle's Shipbuilding Co., and entered into two contracts with that company on behalf of the plaintiff company. The company went on with him as their managing director for some time, but in May, 1886,

A there was some dissatisfaction with his conduct. An inquiry was directed, a Mr. Hodgson, to whom the matter was referred, made a report, and in September the board suspended Mr. Ansell from acting as manager. They could not, of course, discharge him from being managing director, but a meeting was called in October, and a resolution was passed discharging Mr. Ansell from his position as managing director. At that time the company did not know what had been done by Mr. Ansell as regards the contract with Earle's Shipbuilding Co. It was not disputed by the counsel who appeared here for Mr. Ansell that, if there was any circumstance which, though unknown to the company at the time they dismissed Mr. Ansell from his position, would justify them in so doing, it was immaterial whether it was known at that time, and, if it was known after the time the action was brought, then the company could justify the dismissal by proof of that fact.

Mr. Ansell was dismissed, and I think his dismissal must be taken to date from that meeting on Oct. 19, and not from the day in September when he was suspended by the board, because suspension is very different from dismissal. When a man is suspended from the office he holds, it merely amounts to saying, "So long as you hold the office, and until you are legally dismissed, you must not do anything in the discharge of the duties which under your office you ought to do towards your employer," and I cannot consider that the resolution by the general meeting to discharge him from the position he held can be taken to relate back. Then the plaintiff company and Mr. Garfit brought an action against Mr. Ansell and also against a Mr. Hadfield. That action was dismissed, because the matters alleged to have been done by Mr. Hadfield in collusion with Mr. Ansell were, in the opinion of the judge, not proved. We have not had any appeal from that dismissal. But Mr. Ansell, by a counterclaim, alleged that he had been wrongfully dismissed, and claimed damages for that wrongful dismissal, and also £200 for a quarter's salary down to Oct. 1. These claims the learned judge granted him. Besides that he sought an account of commission which was said by him to be due to him, for sales effected by the company through him, and he is entitled to that under his agreement with the company, because he is entitled to commission on all sales previous to the time when he was dismissed.

I think, in the first instance, it is desirable, although it is not the principal contention here, to refer to the relief which is sought by the plaintiffs in their appeal. There is no appeal by the defendant as regards the sum of £219 which was received by him from the Earle's Shipbuilding Co. KEKEWICH, J., considered that the plaintiffs were entitled to recover that sum from the defendant, he having received that sum from Earle's Shipbuilding Co., part of it as a commission of 1 per cent. on the contract price for the first sale of vessels, and £50 as a lump sum in respect of the subsequent contract which was entered into through Mr. Ansell. There is no appeal from that at all, and, therefore, one need not consider it except so far as that transaction has to be referred to for the purpose of considering whether there was a wrongful dismissal. That sum was received on May 31, 1886, and in respect of that sum we shall have to alter very considerably the order which was made by the learned judge. There must be a direction that that shall be paid, and, in my opinion, the company are also entitled to have what the judgment did not give to them, viz., interest at 5 per cent. on that sum as against Mr. Ansell since the time that the money was received by him.

But there are two other matters in respect of which the plaintiffs say they ought to have got relief from the judge, and that they did not. Mr. Ansell had been engaged at Hull in this business of fishing and selling ice and various other things, and he had various smacks and was a member of two incorporated companies, one called, for the sake of distinction, the Ice company, and the other called either the Carrying company, or the Red Cross company. I suppose the red cross was the flag under which they sailed. As regards what Mr. Ansell received from both those companies the plaintiffs seek relief. The way in which those

companies provided for the division of their profits was very much the same in one respect, that is to say, they provided that their members should have a sum not exceeding a certain percentage by way of dividend, and that a bonus was to be given them as consuming members, that is to say, as regards the Ice company, the shareholders in that company who bought the ice supplied by the company were entitled to a bonus in respect of the profits gained by the company on the transactions in which they were engaged with the company by buying ice from them.

Before the existence of the plaintiff company Mr. Ansell had a fleet of smacks, and he had purchased from the Ice company the ice which those smacks required to keep the fish which they caught until they could get it to the market, and he received from the Ice company in respect of those transactions a bonus. After the plaintiff company had been formed, and after he transferred his fleet of smacks to the plaintiff company, he still continued to take from the Ice company the ice required for the purposes of those smacks. It was contended at one time by his counsel that he really bought from the Ice company, and then sold again to the plaintiff company; but, in my opinion, the invoices which were handed up contradicted that. There was the invoice of ice as supplied, not to him to be sold again to somebody else, but to be supplied to and on account of the very smacks which he had formerly owned, and which he had sold to the plaintiff company. In the statement of defence he refers to that to show that there had been a question as between him and the Ice company as to whether it was right that these purchases of ice after the sale of the smacks to the company should be charged to him or should be charged to the company, because, if they were to be charged to the company, the company not being a member could not claim these bonus profits, but if the smacks were to be considered as still his and worked in his name, then there would be a claim for bonuses arising from the transactions. What he says in his statement of defence is that he

"has been for some years past and is a shareholder in the Hull Ice Co., Ltd., which after payment of a certain dividend divides its surplus profits as a bonus among the shareholders whom it has supplied with ice, rateably to the amount of ice supplied to them; and before the sale of the said smacks to the plaintiff company he procured his ice for such smacks from the said Ice company. Since such sale he has on the plaintiff company's behalf procured such ice from the said Ice company, and supplied it to the plaintiffs at the price charged to all customers."

There he says and admits he procured it on behalf of the plaintiff company. He continues:

"To save payment of the bonus the Ice company proposed to debit the plaintiff company and not this defendant with the ice supplied, but this defendant refused to allow this to be done. The surplus profits payable to this defendant as such shareholder in respect of ice supplied to the plaintiff company amount to £60 or thereabouts."

KEKEWICH, J., considered that the plaintiff company were not entitled to that £60 which the defendant has received by way of bonus in respect of the ice supplied since the vessels were no longer his but were the vessels of the plaintiff company, and he so held on the ground, as I understand it, that the plaintiff company could never themselves have been entitled to receive the bonus profit, and, therefore, they cannot claim it from the defendant, who was their agent, whom, however, he held accountable for the sum which he received when he was their agent from Earle's Shipbuilding Co. In my opinion, that is wrong. The question is not whether the company could directly have claimed this sum, but whether, when their agent received this profit in respect of a contract which he had entered into on behalf of the company as their agent for goods supplied to the company, the company are not entitled as against their agent to claim that money. In my opinion, they are. It

A is a profit arising from a contract which he on the part of the company entered into, and in consequence of the supply to the company by his order of a particular quantity of ice. It was said that he was entitled under the articles (No. 68) to enter into contracts and do business with the company. He was; but that, in my opinion, did not justify him, when contracting on behalf of the company, in putting into his own pocket a profit obtained entirely in consequence of the goods being
B supplied under that order to the plaintiff company. On that point, therefore, I differ from the view taken by KEKEWICH, J., and, in my opinion, the plaintiffs are entitled to an account as to the sums so received by him as bonuses from the ice company.

Then we come to another company, the Carrying company. That company had steam-vessels which went out from time to time to the fleet of fishing smacks, and
C brought home to the markets the fish which had been caught by the vessels of the fleet. The contention raised by counsel for the defendant was that there was no contract entered into by Mr. Ansell in respect of the carrying of fish home by the Carrying company, in respect of which this bonus profit was given to him. But, in my opinion, it cannot be considered that that can make this case an exception, because, even if there was no direct contract, or no direct order given by Mr. Ansell
D to the captains of the smacks who caught the fish, yet, having regard to the articles of association of the Carrying company, and to what had gone on before and was apparently continued, we must hold judicially that the transfer of the fish caught by the smacks which were once Mr. Ansell's, but which at the time when the fish were caught were the smacks of the company, was done, if not by his directions after the company was formed, in continuance of the directions given by him
E before, and under the contract which he had entered into with the Carrying company, because in the Carrying company's articles there is an article which throws on every one of the smack owners who is a member of the company the obligation and duty as between him and the Carrying company of sending all his fish home by the boats of the company. That article is this :

F "Every member being a smack owner shall by all possible ways and means support and maintain the company; and all the members shall and will form their respective fishing vessels so entered in the company into a fleet, and each member undertakes that all fish caught by his respective entered vessels shall be carried to shore in the company's vessels, and in no other manner."

G So that there was a direct contract still existing between him and the company as regards his vessels, that his vessels should be dealt with in this way, "and for the due and faithful observance of this and the last preceding article each member undertakes to enter into a bond with the company in the penal sum of £100." Then there was an article which gave these bonus profits only to those members who performed their obligations to the company. At this time, it is true, Mr.
H Ansell was not a smack owner in reality, because the owners of the smacks were the company and not he, but he was acting as owner, and it was only as being owner, and representing himself to the company as being the owner, that he was entitled to that which he got at the end of March, 1886, these bonuses in respect of the carriage of the fish. In my opinion, we should allow ourselves to be deceived by words and would not be guided by facts, if we acceded to the argument addressed
I to us on behalf of Mr. Ansell, that the captains joined what fleet they pleased and then shipped on board whatever carrying vessels they thought fit. In my opinion, therefore, so far as any of the bonus profits which he has received from the Carrying company is attributable to the fish caught in the smacks of the company, formerly his and still worked in his name, he must account to the plaintiff company on the same grounds as those which I have mentioned with regard to the Ice company, and the plaintiff company is entitled to an account in that respect.

We come to the counterclaim, and there is an appeal against the decision of KEKEWICH, J., on the counterclaim. What one has to consider first is this :

Had the company, although they knew it not, at the time they dismissed the defendant in October, a good ground of dismissal? In my opinion, they had. I have stated that he was engaged not only by the plaintiff, Mr. Garfit, but that he agreed with the company to be their general manager, and had authority given to him with reference to the contract to be entered into with the Earle's Shipbuilding Co. When he was engaged on that contract, in respect of the matter of that very contract he in one instance got a percentage of 1 per cent. from the shipbuilding company, and in the other case he insisted on getting, and did get, a lump sum of £50. It is suggested that we shall be laying down new rules of morality and equity if we hold this was a good ground for dismissing Mr. Ansell. If people have an idea that such transactions can be properly performed by an agent, the sooner they are disabused of that idea the better.

In my opinion, if a servant or a managing director, or any person who is authorised to act, and is acting for another in the matter of any contract, receives as regards the contract any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is an act sufficient to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased so that his percentage may be larger. In my opinion, where an agent entering into a contract on behalf of his principal and without the knowledge or assent of that principal receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to an employer, whether a company or an individual, whether he be servant or whether he be managing director, power and authority to dismiss him from his employment as a person who by that act is shown to be incompetent of faithfully discharging his duty to his principal.

It was said by KEKEWICH, J., that this was an isolated transaction, and, therefore, in his opinion, it did not give legal authority or power to the company to dismiss him. But I cannot accede to that view. As far as we know it is an isolated transaction; but if one finds at the very beginning of the employment that this agent, whose duty it was not to receive anything from the persons with whom he was dealing, did in fact do so, and in fact kept the receipt of the money secret for months after it had been received from the shipbuilding company, I am not satisfied that that man has not done other things equally inconsistent with his duty to his principals. In my opinion, the discovery of that fact, even if it was an isolated transaction, shows that he would put himself in a position not faithfully to discharge his duty, that he would put himself in a position to regard the interest of someone else rather than that of his employer, and that that did justify his employers in discharging him from the position which he held.

It was urged before us that it was a long time ago. Supposing the act had been done eight years ago, would that in law have justified the employer in discharging him? In law, I say Yes. It is very true that if an employer was a reasonable man and found that a servant who had served him faithfully for several years had in the early time of his employment done an act which was wrongful and which justified his dismissal, he would probably say: "This is a man who has been in my employ a few years. I think that he has always behaved himself honestly in the discharge of his duties, except in regard to this one transaction which took place a long time ago, and, therefore, I do not insist on my legal right." But although a man would ordinarily act in that way yet, in my opinion, that has no effect on the question whether the act is not of such a character as to justify the employer in dismissing him when he found it out. If he knows of the act, and still continues to employ him, it may be held by

A judges of fact or by a jury, that he has condoned it and prevented himself from insisting on the legal right, but, assuming the act of misconduct is unknown, it cannot be said that the mere fact that it happened eighteen months before prevents the company from insisting upon their legal right to discharge a person who has so misconducted himself. In my opinion, therefore, so much of the order as gives to Mr. Ansell on the counterclaim damages for wrongful dismissal must be discharged.

B Then we come to another question, which is of a somewhat different character. He claimed £200 for a quarter's salary down to Oct. 1. That question gives considerable difficulty, and upon it we had considerable discussion as to the law bearing upon the matter. It appears that, on Jan. 8, 1886, long after the company was formed, there was another agreement in writing entered into between C Mr. Ansell and the company, which provided that the former agreement should be adopted by the company and be binding on the company in the same manner and be read and construed in all respects as if the company had been in existence at the date thereof. Therefore, we must read that agreement of August, 1885, as if it was an agreement by the company and not merely an agreement of the company to be performed after it was adopted by the company. D It was said that Mr. Ansell had a right of action for the quarter's salary due on Oct. 1, and, therefore, a right of action before his dismissal, and that he has not lost that right of action by reason of the dismissal. That was founded upon this, that his salary was paid quarterly in accordance with the articles which provided that the salary should be paid quarterly. That article was not E the contract between Mr. Ansell and the company under which he agreed to serve the company, but it was a mere contract between the shareholders and the company, and regulated the way in which the payment should be made and the way in which the accounts should be kept. What we have to consider is, not whether as a shareholder he could have insisted on their performing that agreement, but whether, under the contract by which he agreed to be managing F director of the company, he had that right. We must look to the terms of the agreement of Aug. 4, 1885, which is confirmed in the manner I have mentioned. We find that he is to have a salary after Jan. 1, 1886, "after the rate of £800 per annum." That, to my mind, is a contract for a yearly service and a yearly payment, and, although he was in fact paid quarterly, it was not a payment under the contract, but simply a payment in accordance with the directions given G by the company's articles. Therefore, in my opinion, it cannot be said that on Oct. 1 there was a right in Mr. Ansell to sue the company under this contract for £200, and, therefore, the question does not arise as to what would have been the effect if that had been the case. Nothing which I can say must be considered as expressing any opinion in favour of the view that, if there had been a quarter's salary then actually due for which he could have sued, his dismissal would have deprived him of that right. But the question is this: Can H he sue for a proportionate part of the salary for the current year? What he would have been entitled to if he had continued in the plaintiff's service until the end of the year would have been £800, but, in my opinion, that would give him no right of action until the year was completed. If that is the true construction of his contract with the company by which he agreed to come into the employ I of the company as managing director, the authorities which were referred to would show that, as regards the current quarter of the current year he cannot, having been properly dismissed, get any payment in respect of that. In my opinion, therefore, on that point also the judgment must be varied.

Another point is this. Under the contract which was to bind the company and the managing director he was to be allowed 5 per cent. on all fish and ice supplied or sold by the company to its customers, exclusive of fish sent in to the markets. In my opinion, that stands in a very different position from the £800 a year. He had a right, in my opinion, to that percentage directly the

sales had taken place. Probably, as a matter of account, and as a matter of convenience, it would be brought into account at the end of the year, and then paid to him; but notwithstanding that he would be entitled, in my opinion, to have the payment of that percentage if he chose to sue for it whenever the sales had taken place, and the amount of the sales ascertained in order that the percentage might be arrived at. What is the result? In my opinion, the counterclaim fails altogether, except so far as it asks an account of those commissions on the sale of ice and fish. The learned judge directed an account of that, and reserved the costs of it. As regards the counterclaim, the proper judgment will be to dismiss it with costs, except so far as it seeks an account and relief in respect of the commission on the sales of ice and fish. The costs of that portion of the counterclaim must be reserved as well as the costs of the inquiry, to be dealt with when the inquiry has been completed.

BOWEN, L.J.—The lord justice has discussed at length the facts of this case, and in the judgment which I am about to pronounce I shall not go all through them again, but shall confine myself to stating shortly what seems to me to be the true view of the law of this case.

I will first of all deal with what is the cardinal matter of the whole case—whether the plaintiffs were justified or not in dismissing their managing director as they did. This is an age, I may say, when a large portion of the commercial world makes its livelihood by earning, and by earning honestly, agency commission on sales or other transactions; but it is also a time when a very large portion of those who move within the ambit of the commercial world earn, I am afraid, commission dishonestly by taking commission not merely from their masters, but from the parties with whom their masters are negotiating and with whom they are dealing on behalf of the masters, and taking such commission without the knowledge of their masters, employers, or principals. There never was a time in the history of our law when it was more essential that courts of justice should draw with precision and firmness the line of demarcation which prevails as between commission which may be honestly received and kept, and commission taken behind the master's back and in fraud of the master. In the present instance we have first of all to consider what was done by the managing director, and in the next place if we find that the managing director has taken and received a commission behind the back of his company, and without the knowledge of his company, and kept it, we have to pronounce our opinion upon the question whether or not in law that is an ample reason for his dismissal.

With regard to the facts relating to the Earle's Shipbuilding Co., they stand beyond all dispute. The managing director has received a profit which was unknown to his own principal—his own employer. How does that bear upon the condition which is implied in every contract of service or agency such as this, the condition that he will faithfully and truly discharge his duty towards his employer, and that, if he does not so discharge it, the employer is to be at liberty to elect whether he will determine the service or in spite of the fault still continue the erring servant in his employ? **KEKEWICH, J.**, recognising, as it seems to me, the law generally as I have stated it, appears to have considered that the receipt of commission from the shipbuilding company was an isolated case, and on that ground on the whole he thought that there was no sufficient reason for dismissing him. I think the view that if it is an isolated case it does not amount to such misconduct as would entitle the master to determine the service is a mistake. It seems to me to be a confusion between the duty of the judge to draw inferences of the fact and the duty of the judge to pronounce a decision of law. There may be cases where the breach of confidence and good faith towards the master would not arise if there was a simple isolated act; but those cases are not cases of fraud at all; they are cases of isolated acts which, if they occurred singly, would not in themselves amount to a determination of the

A confidential relation or breach of the faithful service which the servant is bound to render. In that class of cases it is perfectly proper to consider whether on the whole the conduct of the servant has been such as to amount to a breach of confidence, and if it is not then the dismissal will not be justified. In such cases you might leave it to the jury to consider whether there had been such an accumulation, or such a repetition, of the acts as to give a ground for the determination of service; but in cases where the character of the isolated act is such as of itself to be beyond all dispute a breach of the confidential relation and a want of faith towards the master, the rights of the master do not depend on the caprice of the jury, or of the tribunal which tries it. Once the tribunal has found as a fact that there is a fraud and breach of faith, then the right of the master to determine the contract follows as matter of law. There can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master and the continuation of confidence between them. He does the wrongful act, whether such profit be given to him in return for services which he actually performs towards the third party, or in return for services which he is supposed to perform, or for his supposed influence, or on any other ground at all. If it is a profit which arises out of the transaction, it belongs to his master, and he has no right to take it, or keep it, or bargain for it, unless his master knows it.

It is said that, if the transaction was one of very old date, that in some way it deprives the master of his right to treat it as a breach of faith. As the lord justice has pointed out, the age of the fraud may be a reason in the master's mind for not acting on his rights, but it is impossible to say that, because a fraud has been concealed for six years, therefore, the master's right when he discovers it is not to act upon his discovery, and to put an end to the relation of employer and employed with which such fraud was inconsistent. I, therefore, find it impossible to adopt KEKEWICH, J.'s, view or to come to any other conclusion except that, the managing director having been guilty of a fraud on his employers, was rightly dismissed by them, even though they did not discover the fraud until after the time they had actually pronounced the sentence of dismissal.

What follows from that with regard to the salary? As regards his current salary, it is clear and established beyond all doubt by authorities which we should not be justified in overruling, even if we desired to do so, that the servant who is dismissed for wrongful behaviour cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date and on the condition that he has fulfilled his duty as a faithful servant down to that later date. The authorities put the question beyond dispute, and the principle also leads us to the same conclusion. He cannot sue the master in such a case on his contract with the master, because the obligation of his master under the contract is that he shall pay the salary only at the end of the current period. He cannot recover, therefore, on the contract, nor can he recover on quantum meruit, because he cannot take advantage of his own wrongful act to insist that the contract is rescinded. As regards himself the contract is still open, although he has chosen to break it. Some confusion always arises from treating these cases between master and servant as a rescission of the original contract. It is not a rescission of the contract in the ordinary sense in which that term is used—that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It is only a rescission in the sense that it determines the relation for the future, and you may regard that determination in two ways. It is either a determination in conformity with the rights of the master which arise under the contract, there being, as I have said, in every contract of service an implied condition that if faithful service is not

rendered the master may elect to determine the contract, and the determination takes place on that implied condition. Or you may test it under the more general law, which is not applicable to contracts of service alone. You may treat it if you like as the wrongful repudiation of the contract by one party being accepted by the other, as a determination of the contract from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract which emancipates himself from continuing it further. It is not a rescission of the contract in the ordinary sense in which the term is used in common law. It is for that reason that it becomes plain beyond all doubt, that the servant cannot sue on quantum meruit any more than he can sue under a special contract.

The only question therefore is whether the salary in question was current salary within the meaning of the propositions which we have been discussing. Was it money any portion of which had accrued due at the time of the dismissal, even though it was not payable till afterwards, or was it a salary which had not accrued due at all? If it had accrued due, but was not payable till afterwards, a question might have arisen whether Ansell was entitled to it, but, as it does not necessarily arise in this case, I desire to express no opinion on that point. It seems to me that, on the true view of the facts, the salary here had no portion of it accrued due before Ansell's dismissal. According to the original contract, which was to be adopted by the company, he was to be paid at an annual rate. The company was formed, and among its articles of association it provides that the managing director is to be paid quarterly. Inasmuch as the contract is one which was not necessarily within the Statute of Frauds and might be made by parol only, if the matter had stood there, I think the existence of the articles of association at the time when the managing director entered on his employment, and the fact that all parties must have known that in the articles of association there was a provision that the managing director was to be paid quarterly, might be some evidence for the jury, or for the court, from which they might reasonably conclude that in reality, though the original written contract contained no such express provision as to quarterly payments, nevertheless the true terms on which he was serving were that he should be paid quarterly. But the case, unfortunately for the managing director, does not stand there, because after the articles of association had been framed, and after he had entered nominally on his duties, it was agreed between him and the company that he and they should again reduce into writing the exact terms on which he was to serve, and in reducing the terms into writing again any provision for quarterly payment is omitted. It seems to me, therefore, that one must look, and look only, to the agreement which by arrangement between the parties themselves was to be taken as the final and express agreement between them, and the inference in favour of the salary being payable quarterly, which otherwise would have arisen, is displaced by the subsequent agreement. The matter is not, perhaps, beyond all doubt, but that, I think, is the true view.

As to the sales, it seems to me, for the reasons which have been given by the lord justice, his dismissal does not prevent him from being entitled to any commission on sales which had become due at the time of his dismissal, because, although in the ordinary course of the business of the company the commission on such sales would not be ascertained until the end of the current year, I think that on his dismissal they would become payable at once. I think he is entitled at his own risk, and subject to the reservation which the lord justice has suggested as to costs, to an account of the commission due on such sales, if any such sales there be, as to which I know nothing.

That disposes of the most important part of the dispute between the parties. But I wish to add one word on the subject of the bonuses which he claims to be entitled to retain as received from the Hull Ice Co., and the Hull Steam Fishing and Ice Co., otherwise called the Red Cross Company. If that was a profit received

A by him, as it seems to me to have been, while he was agent, and arising out of the duty which he was employed to perform for the company, it falls under the same branch of law as the profits received in respect of the shipbuilding company. I have some little difficulty in following the judgment of KEKEWICH, J., with regard to that. It may be, perhaps, reported by the shorthand writer inaccurately, but if B KEKEWICH, J., is of opinion that it is of the essence of a title to relief in such a case that the principal should be able to claim as his money as against the other party to the business transaction the money received by his agent, I do not think that is the law. It is true, as KEKEWICH J., says, that the money which is sought to be recovered must be money had and received by the agent for the principal's use. But the use which arises in such a case and the reception to the use of C the principal which arises in such a case does not depend on any privity between the principal and the opposite party with whom the agent is employed to conduct business. It is not that the money ought to have gone into the principal's hands in the first instance. It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract D if you put it as a legal proposition, or an equitable right if you treat it as a matter of equity, as between the principal and agent, that the agent should pay such money over. That renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, to take it out of the hands of the agent, which gives the principal a right to relief in equity. For these reasons I fail to agree with the judgment of the learned judge in the E court below, and I think the judgment suggested by the lord justice is the only possible one.

FRY, L.J.—I also feel myself quite unable to agree with the decision of the learned judge in the court below, and as I differ from him I propose to add a few words to explain the grounds of my decision.

F The main question of law to be determined in this case is: What was the real character of the dealings between the defendant Ansell and Earle's Shipbuilding Co.? With regard to the law and facts there is really no dispute. Mr. Ansell was appointed managing director of this company by an agreement entered into before the company was registered and adopted by the company after its registration, and not merely was he so appointed from its commencement, but at G the first meeting of the directors, on Aug. 27, he received express instructions to arrange the terms of the building of four or five trawlers with Earle's Shipbuilding Co. Thus authorised, both as managing director and by the special resolution of the board, he goes to the shipbuilding company and he accepts an agreement from them to pay him a commission of 1 per cent. on the price to be paid by the company of which he was managing director to the shipbuilding company. A further contract was subsequently entered into in which H it is said that Mr. Ansell exerted himself to beat down the prices of the shipbuilding company, but he insisted on a payment being then made to him, and after debate he succeeded in obtaining £50 from them. Those are the broad, undisputed features, of Mr. Ansell's dealing with the shipbuilding company. In I my judgment, the conduct of Ansell in so dealing is a fraud—a fraud on his principals, a fraud not according to any artificial or technical rules, but according to the simple dictates of conscience and according to the broad principles of morality and law, and I think it is the duty of the courts to uphold those broad principles in all cases of this description. We are invited to consider the state of mind of Mr. Ansell—whether he thought it wrong; in other words, we are invited to take as the standard of our decision the alleged conscience of a fraudulent servant. I decline to accept any such ground as the rule on which the court is to decide such questions.

Having come without hesitation to the conclusion that Mr. Ansell's conduct was fraud of a gross character, the result appears to me to be very plain. In the first place, it gives the company a plain right to recover the money which Mr. Ansell received, and received, according to my view, in consequence of his position for the use of the company, the fact of which receipt he never disclosed to the company, with interest at 5 per cent. I take that to be the undoubted right of a principal who has been defrauded by his agent. In the second place, it appears to me to deprive Ansell of any right to recover the £200 which, according to the ordinary course of business between them, would have been payable to him as salary. That question depends not only on the one which I have already dealt with, but on the further inquiry whether the engagement to pay is to pay annually or quarterly. Like my learned brother who preceded me, if the matter rested on the contract of Aug. 4, 1885, and the articles of association which authorised the directors to confirm and carry into effect that agreement, with modifications, I should have been inclined to hold that there was evidence on which we might reasonably conclude that the directors had modified the original contract between Ansell and the company, and that it had been adopted with the modification that the salary should be paid quarterly. But then we find, months after those articles have been executed and the company registered, a formal instrument is entered into between Ansell and the company by which it is agreed that the original terms of the agreement of Aug. 4, 1885, shall be the terms binding between the company and him. The terms of that contract were yearly employment and a yearly payment. Therefore, notwithstanding the practice of the company, which seems to me to be referable to the articles which, as between the directors and the shareholders, justify the payments quarterly, yet the relations between Ansell and the company are determined by the agreement of Jan. 8, 1886, and that was for a yearly payment. I think, therefore, the £200 which, in the ordinary course, would have been paid on Oct. 1, was really a portion of the current salary, and as such cannot be recovered by a servant who has been dismissed for fraud.

The other conclusion at which I arrive is that the fraudulent conduct of Ansell was in law ample justification for his dismissal, in other words, that when the master discovered the fraudulent conduct on the part of the servant that gave him a plain right to dismiss that servant. I do not think that that proposition can for a moment be disputed. A number of arguments were addressed to us to induce us to come to the conclusion that this conduct of Ansell's was not truly of the character that I have described. The first is one that is set up by Mr. Ansell himself, to which I will briefly refer. He alleged that the contract between himself and the shipbuilding company was not a fraud upon the plaintiffs, because the formal parties to the contract were not the plaintiff company, but the directors as individuals. I regret to say that in pursuance of that view he has ventured in the course of these proceedings to pledge his oath to the statement that, with the exception of three commissions, not including the one in question, he had "not received any sum of money by way of commission, bonus, allowance, or otherwise from companies or persons from whom the plaintiff company made purchases or with whom they had dealings and transactions, and which accrued or became payable between the month of August, 1885, and October, 1886, inclusive." That statement was entirely false. When he swore that affidavit he had received the commission from Earle's, and he justifies that affidavit by the suggestion that this was not a dealing between the plaintiff company and Messrs. Earle. That fact is a very striking illustration of the straits to which men are driven who allow themselves to enter into transactions of this description, and do not disclose them to their principles. I am very glad to say that counsel who have given us the explanation of that affidavit did not address to us any argument to support the validity of such a contention. It is one to which I think attention should be called as showing the character of the transaction.

It is said in the next place it was no part of Ansell's duty to superintend the

A building of these trawlers and smacks, and that he gave attention to the fittings and so forth. I take an entirely different view of Mr. Ansell's duties. He became managing director, not from the date of his removal from Hull to Boston, but from the date of the registration of the company, and he received salary for that according to the express terms of the agreement. He was, therefore, engaged as managing director because of his special knowledge and skill, and so far as his special knowledge and skill were required to be employed in the building of these smacks it was unquestionably his duty to give it. First of all it is plain that there was no bargain between himself and the shipbuilding company that he should render this service. He did it as part of his general duty, but he received the commission because he stipulated for the commission. Then again he has relied on the stipulation contained in the contract between himself and Mr. Garfit, that he might be allowed to carry on any business of a nature not prejudicial to the interests of the company. But it is prejudicial to the interests of the company where a man whose duty it is to buy at the lowest price enters into a bargain which makes it his interest to buy at the highest. In fact all these cases put forward are mere dust thrown in the eyes of the court to endeavour to shut out the true nature of this transaction, which I repeat to my mind, is a grave and undoubted fraud.

D Then it is said, and that is the view which weighed with the learned judge, that this is an isolated case. We have no other ground upon which we can conclude this to be an isolated case except the absence of success on the part of the plaintiffs in proving any other case except that to which I shall shortly refer, and the oath of Mr. Ansell that it is, and after the passage in the affidavit to which I have referred I can place very little reliance upon his statement. I do not feel judicially satisfied that it is an isolated case. Suppose it be, is that an excuse? Is a man to commit a gross fraud on his master, to conceal that fraud, and then when it is discovered to say that it is an isolated case, and, therefore, you cannot dismiss me? That is not according to my view of the law with regard to the relation of master and servant. I repeat, it seems to me the company were justified in law as well as in morality in discharging Mr. Ansell as a man who was not worthy of being trusted by them.

E

The only other points to which I need refer are shortly with regard to two contracts between the Hull Ice Co. and the Red Cross Co. and Mr. Ansell. With regard to these, the only point I think it at all necessary to refer to is the ingenious argument of junior counsel for the defendant, that with regard to the Red Cross Co. there was no evidence of the contract made by Mr. Ansell. According to my view it is not necessary that there should be evidence of a contract by Mr. Ansell. He undertook with the Red Cross Co. to use all his influence to promote their interests by entering as many smacks as might be upon the books of the company, and trading with them to as large an extent as he could. He was entitled to the bonus only on the terms of observing that obligation, and he received the bonus. By his act, therefore, and he has told us no doubt the truth, he did influence business to that company. Whether he influenced it by giving directions to the smack masters, or in however indirect a way, is immaterial. He has taken money upon the footing of bringing business to them, and after that it is impossible for us to say that he did not. With regard to the other points which have been dealt with by the lords justices, I content myself by saying that I concur entirely in everything that they have said.

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[Reported by W. C. Biss, Esq., Barrister-at-Law.]

LEESON v. GENERAL MEDICAL COUNCIL

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), December 18, 19, 21, 1889]

[Reported 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303]

Domestic Tribunal—Finality of decision—Jurisdiction of court—Consideration whether tribunal acted honestly within jurisdiction—Need to observe principles of natural justice—Bias—Disqualification for acting in judicial capacity—General Medical Council—Infamous conduct of medical practitioner—Removal from register.

When the proceedings of a domestic tribunal on an inquiry are brought before the court the only question the court can investigate is whether the tribunal acted honestly within its jurisdiction. The substantial elements of natural justice must be found to have been present at the proceedings of the tribunal. An accused person must have notice of that of which he is accused, and opportunity of being heard and of putting forward his case and dealing with the case which is made against him. The tribunal must hear and consider all relevant matters and arrive at an honest decision on the facts before them. If that is done, the court has no power to review the evidence given before the tribunal or to determine whether the tribunal came to a right conclusion.

A person who has a judicial duty to perform disqualifies himself from performing it if he has a pecuniary interest in the matter on which he has to adjudicate or a bias which renders him otherwise than an impartial judge. If he is an accuser, he must not be a judge. Where facts are established from which the inference is drawn that such a person has an interest in the decision of a case the law does not allow an inquiry whether or not his mind was actually biased by the interest. If he was interested in the decision, he could not properly act as judge.

Per FRY, L.J.: It is a matter of public policy, so far as is possible, that judicial proceedings should not only be free from the actual bias and prejudice of the judges, but that they should be free from the suspicion of bias or prejudice.

The plaintiff, a physician, was summoned before the General Medical Council, acting under the powers given to them by s. 29 of the Medical Act, 1858, to answer a complaint that he had been guilty of "infamous conduct in a professional respect." The inquiry had been set on foot by the Medical Defence Union, an association having for its objects the protection of members, the prevention of unprofessional conduct, and the punishment of offenders against medical law. The council proceeded with the inquiry, found the plaintiff guilty, and directed his name to be removed from the register. Two members of the council present at the meeting were members of the Defence Union. On a motion by the plaintiff to restrain the publication of the council's resolutions and the removal of his name from the register on the ground that the charge showed no offence over which the council had jurisdiction, and that the proceedings were invalid because two members of the Defence Union had taken part in the decision.

Held: the complaint was such that the council had jurisdiction to inquire into it, and, if the complaint were proved, to order the removal of the plaintiff's name from the register; the tribunal, which had to act judicially, had done so, having given full and fair consideration to the plaintiff's case, and so the court could not consider whether the decision of the council was right or wrong; (FRY, L.J., dissenting) the two members of the Defence Union were not interested in the decision of the council so as to be disqualified for adjudicating on the matter: and, therefore, the motion must be dismissed.

A **Notes.** The Medical Act, 1858, was repealed by the Medical Act, 1956, ss. 32 to 38 of which deal with the constitution and powers of the Disciplinary Committee of the General Medical Council and the erasure from and restoration to the register of the names of medical practitioners: see 36 HALSBURY'S STATUTES (2nd Edn.) 597-603.

B Applied: *Partridge v. General Medical Council* (1892), 57 J.P. 4; *Allinson v. General Medical Council*, [1891-4] All E.R. Rep. 768. Considered: *Everett v. Griffiths*, [1921] 1 A.C. 631. Applied: *Maclean v. Workers Union*, [1929] All E.R. Rep. 468. Referred to: *R. v. Gaisford*, [1892] 1 Q.B. 381; *R. v. L.C.C., Ex parte Akkersdyk, Ex parte Fermentia*, [1891-4] All E.R. Rep. 509; *R. v. L.C.C., Re Empire Theatre* (1894), 71 L.T. 638; *R. v. Burton, etc., Tunbridge Wells Justices and Incorporated Law Society, Ex parte Young* (1897), 61 J.P. 727; *R. v. London Justices, Ex parte South Metropolitan Gas Co.* (1908), 98 L.T. 519; *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276; *Pratt v. British Medical Association*, [1918-19] All E.R. Rep. 104; *Thompson v. British Medical Association, New South Wales Branch*, [1924] A.C. 764; *Frome United Breweries Co. v. Bath Justices*, [1926] All E.R. Rep. 576; *R. v. General Medical Council*, [1930] 1 K.B. 562; *Re Lawson* (1941), 57 T.L.R. 315; *General Medical Council v. Spackman*, [1943] 2 All E.R. 337; *Healey v. Ministry of Health*, [1954] 2 All E.R. 580.

Case referred to:

(1) *R. v. Allan* (1864), 4 B. & S. 915; 32 L.J.M.C. 98; 10 Jur.N.S. 796; 10 Cox, C.C. 405; 122 E.R. 702; sub nom. *R. v. Hodgson*, 3 New Rep. 503; 9 L.T. 761; 28 J.P. 484; 12 W.R. 423; 25 Digest (Repl.) 64, 534.

E Also referred to in argument:

Dimes v. Grand Junction Canal (Proprietors) (1852), 3 H.L.Cas. 759; 8 State Tr.N.S. 85; 19 L.T.O.S. 317; 17 Jur. 73; 10 E.R. 301, H.L.; 16 Digest (Repl.) 426, 2273.

Mercers and Ironmongers Co. of Chester v. Bowker (1725), 1 Stra. 639.

F *R. v. Gibbon* (1880), 6 Q.B.D. 168; 29 W.R. 442, D.C.; 33 Digest (Repl.) 161, 134.

R. v. Farrant (1887), 20 Q.B.D. 58; 57 L.J.M.C. 17; 57 L.T. 880; 52 J.P. 116; 36 W.R. 184; sub nom. *R. v. Taunton (Mayor)*, 4 T.L.R. 87, D.C.; 33 Digest (Repl.) 151, 56.

G *R. v. Milledge* (1879), 4 Q.B.D. 332; 40 L.T. 748; 27 W.R. 659; sub nom. *R. v. Weymouth Justices*, 48 L.J.M.C. 139; 43 J.P. 606, D.C.; 33 Digest (Repl.) 161, 128.

Ex parte La Mert (1863), 4 B. & S. 582; 3 New Rep. 120; 33 L.J.Q.B. 69; 9 L.T. 410; 12 W.R. 201; 122 E.R. 578; 33 Digest (Repl.) 520, 28.

Allbutt v. General Medical Council (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 33 Digest (Repl.) 520, 31.

H *R. v. Handsley* (1881), 8 Q.B.D. 383; 30 W.R. 368; sub nom. *R. v. Handsley, etc., Burley Justices, Ex parte King*, 51 L.J.M.C. 137; 46 J.P. 119, D.C.; 33 Digest (Repl.) 162, 135.

R. v. Meyer (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R. v. Harrison*, 24 W.R. 392; 33 Digest (Repl.) 158, 109.

I *R. v. Pettitmangin* (1864), 9 L.T. 683; 10 Jur.N.S. 797, n.; sub nom. *Ex parte Pettitmangin*, 28 J.P. 87; 33 Digest (Repl.) 158, 108.

Appeal by the plaintiff, Joseph Frederick Leeson, a medical practitioner, from a decision of NORTH, J., on a motion by the plaintiff for an injunction to restrain the General Medical Council and John Marshall, on behalf of himself and all other members of the said council, from removing the plaintiff's name from the register of general practitioners until the trial of the action, and from publishing certain resolutions passed by them on Nov. 28, 1889, to the effect

that the plaintiff had been guilty of "infamous conduct in a professional respect," A
and directing their registrar to erase his name.

On Nov. 27, 1889, the council held an inquiry into a charge that had been preferred against Mr. Leeson of alleged "infamous conduct in a professional respect," the council purporting to proceed under s. 29 of the Act of 1858, which provided :

"If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

After the members who conducted the inquiry had deliberated, the presiding member informed Mr. Leeson that the council had come to the conclusion :

"(i) That you have committed the offence charged against you; (ii) that the offence is, in the opinion of the council, 'infamous conduct in a professional respect;' and (iii) that the registrar has been directed to erase your name from the Medical Register."

Notice of the charge which had been made against the plaintiff was given to him by a letter, dated Nov. 15, 1889, from the council's solicitor to the plaintiff in the following terms :

"On behalf of the General Medical Council, I give you notice that information and evidence has been laid before the council by which you are charged with having been guilty of infamous conduct in a professional respect, the particulars of which alleged conduct are as follows: For that you, being a registered medical practitioner, do act as cover of, or by your presence, advice, and assistance do enable, one Cornelius Bennett Harness (an unqualified person) to carry on the business or profession of a medical electrician and to practise as if he were duly qualified, under the style of the 'Medical Battery Co., Ltd.,' and 'The Electropathic and Zander Institute,' at 52 Oxford Street, London, W., the said Cornelius Bennett Harness publicly advertising himself as the Medical Battery Co.'s consulting medical electrician. I am directed further to give you notice that on Nov. 27, 1889, a meeting of the General Medical Council will be held at 299 Oxford Street, London, W., at four o'clock in the afternoon, to consider the above-mentioned charge against you and decide whether or not they should direct your name to be removed from the 'Medical Register,' pursuant to s. 29 of the Medical Act, 1858. You are invited and required to answer in writing the above charges and to attend before the General Medical Council at the above-mentioned place and time to establish any denial or defence that you may have to make to the above-mentioned charges, and you are hereby informed that if you do not attend as required the General Medical Council may proceed to hear and decide upon the said charges in your absence. Any answer or other communication or application which you may desire to make respecting the said charges or your defence thereto must be addressed to the general registrar of the Medical Council and transmitted so as to reach him not less than three days before the day appointed for the hearing of the case. A copy of s. 29 of the Medical Act, 1858, and of a certain standing order of the General Medical Council, is enclosed herewith for your information. A copy of the evidence sent to the General Medical Council in support of the complaint is also enclosed."

The inquiry had been set on foot at the instance of the Medical Defence Union—an incorporated association having for its objects the protection of its members, the prevention of unprofessional conduct, and the punishment of offenders against

medical law. Two of the members of the General Medical Council who sat to adjudicate on the matter, namely, Dr. James Grey Glover and Mr. Thomas Pridgin Teale, were subscribers of 10s. per annum to the Medical Defence Union, and in that sense members of it, but they had nothing to do with its management. The proceedings before the council on Nov. 27, 1889, were opened by their solicitor, who stated the nature of the charges, and were afterwards conducted by the solicitor of the Medical Defence Union.

In giving judgment dismissing the motion, which was, as stated above, brought by the plaintiff, NORTH, J., said that the suggestion that there was not a proper charge giving jurisdiction to the General Medical Council failed and it was not open to him to reconsider the decision arrived at by the council. There was nothing to make it improper for Dr. Glover and Mr. Teale to adjudicate on the matter. The plaintiff appealed against the learned judge's decision.

Rigby, Q.C., Cozens-Hardy, Q.C., and George Henderson for the plaintiff.

Everitt, Q.C., and Muir Mackenzie for the General Medical Council.

L. B. Sebastian watched the case on behalf of the Medical Battery Co., Ltd., and Mr. C. B. Harness, the president.

Cur. adv. vult.

Dec. 21, 1889. **COTTON, L.J.**—This is an appeal from a decision of NORTH, J., refusing to restrain the defendants, the General Medical Council, from acting on the resolution at which they arrived, which was that the name of the plaintiff be struck off the register of medical practitioners, and to prevent them from publishing that resolution. The General Medical Council is a body which is formed under the Medical Act, 1858. That Act was passed for the purpose of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners. The General Medical Council is partly composed of medical men who are named by certain bodies, and partly of persons who are elected by the general body of medical men in the country, and some who are named by the Queen. They have certain powers given to them by the Act. The Act for the first time required that there should be a register, and that those only who are entered on the register can sue for and obtain payment of any money payable to them for medical attendance or medical fees. Section 29 contains a most important provision :

"If any registered medical practitioner shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

That is what was done in this case by the council. Another section to which I ought to refer is s. 40, because it was a good deal referred to in argument. It enables criminal prosecutions to be taken against persons who falsely pretend to be registered practitioners [s. 31 of Medical Act, 1956], but the proceeding taken in this case was not with reference to that section. It was in exercise of the powers to which I have referred given by s. 29. There have been a good many points argued, and the first was that the matter in respect of which the General Medical Council have adjudicated or decided was not a matter within the powers given to them by s. 29. The charge made against Dr. Leeson, and which was brought to his notice by writing according to the practice of the General Medical Council was this:

"For that you being a registered medical practitioner do act as cover of, or by your presence, advice, and assistance do enable one Cornelius Bennett Harness, an unqualified person, to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of the Medical Battery Co., Ltd."

It was said that there was nothing contained in this complaint which would justify the General Medical Council in exercising the powers given to them by s. 29. There was a good deal of verbal criticism ably pressed upon us as to the effect of what was done here. It was said that there was no allegation that Mr. Harness was practising as if he were duly qualified under the style of the Medical Battery Co., and that all that was suggested against him was that he represented himself to be a medical electrician. I cannot read the charge in that way. We know what a duly qualified man is in the Act. A person is duly qualified if he is on the register, and so duly qualified to obtain the benefit of the Act as regards the privileges which are conceded to medical men who are on the register. The register states what the different qualifications are in respect of which medical men can be put on the register. I have no doubt myself that this complaint does state that which would justify the General Medical Council (if on the facts they were satisfied of it) in coming to the conclusion that an offence had been committed of infamous conduct from a medical point of view, or, in the words of the Act, "infamous conduct in any professional respect." That, in my opinion, is the true construction of the words of the charges made against Dr. Leeson. It was found that he had been guilty of the acts which were charged against him, and then there was a direction to erase his name from the register.

There has been a good deal of question as to what took place, and we have had the evidence which was before the General Medical Council and the evidence in this action brought before us. In my opinion, it is wrong to consider whether the General Medical Council arrived at a right conclusion on the evidence which was brought before them. In my opinion, that is not for us. The General Medical Council cannot have, strictly, evidence. They cannot take evidence on oath. They cannot take evidence which we as lawyers have to consider as evidence. They have statements made before them in support of any complaint which is made, and also they have statements made on the other side by the medical men against whom the complaint is made. If it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given them by s. 29, I think we ought not to look at the evidence or in any way consider whether they have arrived at the right conclusion.

If it was proved that the council acted corruptly, and that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then, no doubt, the matter would be different. In the present case, although there were some statements in the affidavits of the plaintiff that there was prejudice against him and so forth, that was not pressed upon us by his counsel, nor was it in any way supported by anything which was brought before us. Dr. Leeson seems to have had a most perfect consideration of his case. The complaint was brought forward in the ordinary mode required by the rules and regulations of the General Medical Council. He was present at the inquiry. He was represented by his solicitor and he brought his own witnesses, that is to say, those who were to make statements in support of his contention that in his conduct he had done nothing which was "infamous in a professional respect." Everything was fully heard and considered, and then the council arrived at the conclusion at which they did arrive. In my opinion, that being so, we cannot consider whether they are right or wrong. If they acted honestly, gave every opportunity for the person complained of to bring his statements before them, and fairly conducted the matter in question, in my opinion, we ought not to enter into the question. If we once do that we are assuming to judge whether they came to a right conclusion on the statements which were before them. In my opinion, therefore, the first ground which was taken in support of this application fails, because I think there was a charge which justified the council in coming to a conclusion under s. 29, and there was no reason for suggesting that the proceedings were improperly conducted by the council.

There was another point raised which gave us rather more doubt on the matter.

A It was suggested that this order made by the council must be considered as made by a non-competent tribunal. It was said that, taking the General Medical Council as acting judicially, they were so constituted on this occasion that any order made by them ought, having regard to the decisions which there have been, to be considered as a nullity. A complaint was made against Dr. Leeson. That complaint was brought in the name of the Medical Defence Union, and two
B of the members of the council who were present when the case of Dr. Leeson was considered, were members of the Medical Defence Union. It was said that, that being so, those persons are to be considered in the light of prosecutors, that they could not also sit as judges of the matter, and that, therefore any decision at which the council arrived when there were present these two members who were incompetent to act as judges in the matter must be considered as a nullity.

C The rule is very plain, that no man can be plaintiff or prosecutor in any proceeding and at the same time sit to adjudicate on the matters raised in the proceeding. In other words, no man can sit in judgment when he has put himself in the position of a prosecutor or complainant. To my mind it is clear that the General Medical Council, in respect of the complaint against Dr. Leeson, were acting judicially. They were not in the ordinary sense judges, but they had to decide judicially whether or not the complaint against Dr. Leeson was well founded. They could, if they considered it was well founded, make an order which would deprive him from being on the register, with very important consequences.

But one has to consider this: Were either of these two gentlemen—Mr. Teale and Dr. Glover—to be considered as complainants in this case? I must look a little at the facts connected with the Medical Defence Union. The Medical Defence Union was a company limited by guarantee under the Companies Acts. One of its objects was "to support and protect the character and interests of medical practitioners practising in the United Kingdom." Another was "to promote honourable practice, and to suppress or prosecute unauthorised practitioners." Then "to advise and defend, or assist in defending, members of the union in cases where proceedings involving questions of professional principle, or otherwise, are brought against them." So that the object of the Medical Defence Union was not only to prosecute those who offended against the Act, but also to defend those against whom charges were brought unreasonably. Under the articles there was set up a council of the union, and what they had to do was defined by the articles thus:

G "The objects for which the union is established, as set forth in the memorandum of association, shall be carried out in the manner provided by these articles, provided that the second of the objects of the union, as there set forth, so far as relates to the suppression or prosecution of unauthorised practitioners shall not in any case be acted upon without the sanction of a unanimous resolution of the council, confirmed by a majority of members present and voting at a general meeting."

H I mention that because, although we are not now considering a prosecution under the Act, that is a limit on the power of the council. Except in that respect there is no limit on the power of the council, who can do everything which is not expressly, or by Act of Parliament, required to be done by the whole body.

I Neither Mr. Teale nor Dr. Glover were members of the council; they were members of the union by subscribing 10s. a year, and by giving a guarantee, the amount of which we do not know, which was to provide any expense which would be necessary in order to carry out the objects of the association. The powers of the council are referred to in art. 36:

"The management of the business and the control of the union shall be vested in the council, who, in addition to the powers and authorities of these articles expressly conferred on them, may exercise all such powers and do

all such acts and things as may be exercised or done by the union, and are not hereby or by statute expressly directed or required to be exercised or done by the union in general meeting."

This complaint made against Dr. Leeson was brought forward by the council, to which neither of these two members of the General Medical Council belonged. They were not upon it, and they could not, having regard to the articles, exercise any control or give any direction as to what should be done by the council in bringing forward this complaint. Are they as members in any way interested? The expenses of this complaint could not be thrown by the General Medical Council on Dr. Leeson, the person complained of. They had no power to give any costs, and, therefore, whatever might be the result of this complaint made against him would not in any way affect the liability of Mr. Teale and Dr. Glover to contribute anything to the expenses of this proceeding. In my opinion, as regards the question whether they are to be considered as complainants here, we ought to look to substance. We ought not, because this complaint is brought by the council of the union in the name of the union, to say that a person, a member of the union, who has nothing to do and can have nothing to do with bringing forward the complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward the complaint. "Prosecutor" was the term sometimes used in the argument, but sometimes objected to. I use it for the sake of simplicity. Therefore, it cannot be said that these two members were incompetent to act because they were adjudicating upon a complaint brought forward by themselves. As I have already shown, there can be no pecuniary interest, and no bias in that respect either from any pecuniary liability which was thrown upon them, or anything of that kind. Whichever way it was determined, their liability to contribute to the expenses would be just the same. As regards the objects of the union I give no opinion whether it is desirable to form such unions. The objects are just as much to defend those who are improperly attacked, as to bring before the General Medical Council any questions which may throw reflection on the conduct of any member of the profession. So that Mr. Teale and Dr. Glover are not, in my opinion, to be considered as complainants here—as persons who are bringing forward a charge. There was hardly any contention that their position as members of the union did involve a bias which would prevent them from adjudicating on this matter of Dr. Leeson.

Numerous cases were quoted, but, in the view which I take of the matter, it is only necessary to advert to one, which probably is the strongest in favour of Dr. Leeson, namely, *R. v. Allan* (1). There certain gentlemen, riparian owners and owners of salmon fishing, and some who were outsiders, formed themselves into a body, but were not in any way incorporated. All of them apparently were to have equal power. There was a committee formed which was to direct prosecutions. Three magistrates were sitting on the Bench when a question was brought before them. They were members of this association which had been formed. One of them was a member of the committee, and had directed the prosecution. There was no doubt, therefore, that he was a prosecutor in the matter which was brought before the magistrates for decision, nor could there be any doubt that, having regard to the principles laid down, the conviction which resulted was bad. The other two magistrates had nothing to do with that committee, and were only members of the association. That was the principal point relied on in the present case. But *COCKBURN, C.J.*, uses language which, no doubt, would seem to show that, even if only those magistrates who were members of the association, and not on the committee, had been on the Bench, the conviction would have been bad. What he said was this (4 B. & S. at p. 922):

"Certain members of that association were present as justices, and took part in this conviction. They were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors."

A I do not think that the language of judges ought to be taken without reference to the facts of the case, and, although COCKBURN, C.J., does use that large expression, yet BLACKBURN and MELLOR, JJ., do not use language which can be even tortured into showing that, if any member of the association had been on the Bench at the time, that would have vitiated the proceedings. BLACKBURN, J., said (*ibid.* at p. 924):

B "One of the justices who joined in the conviction, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institutes the prosecution must not act as judges upon it."

C There, I think, he puts it that the conviction was bad because one member of the committee, who were the prosecutors, was sitting on the Bench. MELLOR, J.'s, language, fairly interpreted, leads, I think, to the same conclusion. I should not follow COCKBURN, C.J., in a case like the present even if he did intend to say by the language he used that the conviction would have been bad if any one of the members of the association (who had nothing to do with the prosecution, and could not have) had been on the committee. Here neither Mr. Teale nor Dr. Glover had, or could have had, any voice at all in this prosecution, and they, according to the evidence, knew nothing about it till the matter was brought before them as members of the General Medical Council. In my opinion, this objection, which is a most serious one, cannot prevail, and we ought to hold that NORTH, J., was right in refusing the injunction.

F BOWEN, L.J.—As to the first point raised by the appeal I shall say very little in addition to what the lord justice has already stated. These proceedings were in the nature of judicial proceedings, although the forum is a domestic one, and although the evidence taken before such forum differs in many respects from evidence which is adduced in a court of law, and in particular in the all-important respect that it is not given upon oath. What the court alone can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction. G The jurisdiction is defined by the statute. There must be an allegation before the General Medical Council of "infamous conduct in a professional respect," and adjudication must be arrived at after due inquiry. The statute says nothing more. But, in saying so much, the statute certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard.

H With respect to the charge made in the present case, the charge of which Dr. Leeson had notice, it is a charge of "infamous conduct in a professional respect," and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen that in the present case those conditions have been fulfilled by the tribunal which held the inquiry. The functions of the court of law are, therefore, at an end. We have no power to review the evidence any more than we have a power to say whether the tribunal came to the right conclusion. If indeed it could be shown that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to show that the inquiry had not been a due inquiry. But, if there is no blot of that kind upon the proceedings, the

jurisdiction of the domestic tribunal—which has been clothed by the legislature with the duty of discipline in respect of a great profession—must be left untouched by courts of law. It appears to me for these reasons that the view which **COTTON, L.J.**, has expressed is a sound one, and I entirely concur with it. A

Next comes a very serious question, viz., whether or not the tribunal which adjudicated in respect of the plaintiff's conduct was rendered incompetent by the fact that two of its members had taken part as accusers before the council of the very person upon whose conduct they were adjudicating. As the lord justice has said, nothing can be clearer than the principle of law that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser, he must not be a judge. If he has a pecuniary interest in the success of the accusation, he must not be a judge. Where such a pecuniary interest exists the law does not allow any further inquiry whether or not the mind was actually biased by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser. B
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The question which has to be answered by the court in such a case as the present must be: Has the judge whose impartiality is impugned taken any part in the prosecution either by himself or by his agents? I think it is to be regretted that these two gentlemen as soon as they found that the person who was accused was a person against whom a complaint was being alleged by the council of a society to which they subscribed, and to which they in law belonged as members, did not at once retire from the General Medical Council. I think it is to be regretted, because judges, like *Cæsar's* wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the General Medical Council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical Council will think it reasonable advice that those who sit on these cases should cease to occupy a position of subscribers to a society which brings them before the council. But, having said that, I come back to the point which we have to decide, viz., whether those two gentlemen took any part whatever in the prosecution, either by themselves or their agents. It appears to me, in spite of the cloud which the ingenuity of the plaintiff's counsel raised upon the point, that the true answer upon the facts here must be in the negative. I think, although they were members of the body whose council did bring this complaint before the General Medical Council, they did not themselves take any part, and could not have taken any part, in the prosecution which was not conducted by the council of the union as their agents. The council was supreme in the matter, and I think that they stand clear, upon the facts being investigated, of all suspicion whatsoever. Treating the latter part of the case as one which depends upon an inference of fact, and regretting as I do that there should be colour for the suggestion that has been made and that a controversy should accordingly have arisen which required to be investigated with the care which we have brought to bear upon it, I think that, as a matter of substance and of fact, these gentlemen were not accusers on this occasion. The appeal, therefore, in my judgment, must be dismissed with costs. E
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FRY, L.J.—Two questions have been argued before us. The first was a question whether the charge which was laid before the General Medical Council was one which was within the jurisdiction of that council. With all that has been said by my learned brothers on that part of the case I entirely concur. I shall add nothing to what they have so fully and clearly expressed.

Then comes the second question, whether, having regard to the fact that two members of the council were subscribers to what is known as the Medical Defence

A Union, the council as constituted was competent to determine the charge. There are two subordinate points there. In the first place, I cannot for one moment yield to the argument which was addressed to us by the leading counsel for the General Medical Council, that they were not acting judicially in the performance of their duties on the occasion in question. The nature of the proceedings and the effect of the proceedings seems to me to be very strong to show that it must be a
B judicial proceeding, because the result was to deprive Dr. Leeson of rights which before that were vested in him as a duly qualified medical man on the register of the General Medical Council. Further than that, the language of the statute, if it be necessary to refer to it, is, in my judgment, equally clear. It requires a due inquiry. It requires a judgment. It requires that that judgment shall find the accused guilty. Inquiry and judgment and guilt are all words which
C express a proper form of judicial proceeding. Therefore, although this body proceeds by different rules of evidence from those on which the courts of law proceed, I cannot for a moment doubt that the General Medical Council were proceeding judicially. Nor can I help adding that the manner in which the General Medical Council has proceeded in this inquiry, as on all other inquiries, shows that the General Medical Council are fully conscious that they are performing judicial duties,
D and endeavour evidently to perform them in a very admirable manner.

It was urged before us that the Medical Defence Union were not in fact complainants. It was said that the General Medical Council could proceed without any prosecutor or person acting before it—that is to say, they might proceed *mero motu*. That is quite true. It is, however, equally true that in this case they did not
E proceed *mero motu*, but proceeded in this manner. They allowed the solicitor and the honorary secretary of the Medical Defence Union to appear before them in the character of complainants—a course which seems to me to have been a very convenient one to pursue. It is not unworthy of remark that at the very same meeting of the General Medical Council at which these proceedings were taken against Dr. Leeson, rules in respect of the procedure at such inquiries were passed
F by the General Medical Council, which divided themselves into two classes of cases. Where the inquiry is brought before the General Medical Council by a complainant, and the complainant appears personally or by counsel, or solicitor, then a certain order of procedure was required, and that order of procedure followed very nearly the procedure before a court. It gave the complainant an opportunity to state his case and produce his proofs. Then the accused was to be invited
G to state his case and to produce his proofs, and there was an opportunity given for a reply in certain cases. The second class of cases was where no complainant appeared. There the General Medical Council proceeded simply by reading the complaint, and calling on the accused practitioner to state his case and produce his evidence.

It is evident, therefore, that the Medical Defence Union, either as a whole or
H by their executive, were proceeding as complainants and as quasi-prosecutors in this inquiry. No doubt the Medical Defence Union acts through its council, its executive body, and this proceeding was taken by the executive body, who were represented, as I have already stated, by their solicitor and the honorary secretary. They acted, in fact, as prosecutors, producing the evidence and stating the case, and urging what was to be said for the prosecution or quasi-prosecution. To that union
I two of the members of the General Medical Council who sat upon this case, and, therefore, took part in this decision, were subscribers. It may be taken that this prosecution—I call it a “prosecution” for the sake of brevity—was within the objects of the union. It appears to me that subscribing to a union of this description implies two things. It implies, first, a general sympathy with the objects of the union, and, secondly, a confidence in the discretion of the executive body who have to carry on the business of that union. No doubt the amount of confidence and the amount of sympathy may vary in different cases and from time to time with the same subscribers. But that is the natural conclusion, I think,

one arrives at, when one finds that a person subscribes to an association for carrying on prosecutions. A

That, in my opinion, makes the subscriber to an association of this kind what has been called a virtual prosecutor. Of course he is not an actual prosecutor; he is not before the tribunal in propria persona: he has not even given instructions to the solicitor who appears. But he has shown his sympathy and his confidence in the body who are acting. I cannot think that a body of subscribers to a union of this description could form a satisfactory body of judges to determine the proceedings taken by the union itself. Taking that view of the case, I cannot shut my eyes to the fact, which judges know as well as everybody else, that there are in this country numerous associations formed for the purpose of carrying on prosecutions in respect of alleged violations of the law of various kinds. They may be in respect of violations or alleged violations of rights of fishery in a river, as in the river Tees case (*R. v. Allan* (1)), or they may be violations or alleged violations of the laws which restrain cruelty towards animals, or they may be violations or alleged violations of the ecclesiastical laws. It appears to me that subscribers to those associations indicate their sympathy with the general proceedings of the body carrying on those prosecutions, and I think they come within the description which has been laid down of virtual prosecutors. B C D

To my mind, this point is determined by authority—I do not say authority binding on us, but authority which I think deserves the utmost respect and consideration. I mean the case to which COTTON, L.J., has referred of *R. v. Allan* (1). There there was a voluntary association of persons which consisted of two classes—ordinary members who were the owners of riverside property or occupiers of the rights of fishing in the river Tees and its tributaries; secondly, honorary members who might be desirous of promoting the objects of the association by contributing to its funds and were, as I understand, not riparian proprietors or owners of rights of fishing in the Tees. That body acted as most of these bodies do, through a committee. That committee was not only to make byelaws and rules and regulations, but they were the persons to engage and dismiss watchers, and, in the event of proceedings under the Act being considered necessary, the committee were to instruct the secretary to enforce its provisions. The secretary and treasurer were, subject to the approval of the committee, to determine what proceedings should be taken against any person acting in contravention of the law. The ordinary members, therefore, and the honorary members had nothing whatever to do with instituting the prosecution or appointing watchers. The person who laid the information in that case was a watcher of the association. Therefore, he was engaged and liable to dismissal, not by the general body, but by the committee. The magistrates who sat on the bench to hear that complaint were three—Mr. Allan was an ordinary member, and the owner of property having a frontage to the river, Mr. Smith, who was not only an ordinary member, but also an active member of the committee and had been concerned in a resolution which authorised the committee to take proceedings for the recovery of such penalties as in their opinion had been incurred at the defendant's locks, and, lastly, Mr. Pease, who was not an ordinary member, but only a subscribing member of the association. Those were the three justices. E F G H

In what way did the court deal with the application to quash the conviction on the ground that the magistrates were the virtual prosecutors? COCKBURN, C.J., said (4 B. & S. at p. 922): I

“It is impossible to hold consistently with the principles which have been established by decided cases, and are founded in the very essence of justice, that these magistrates were competent judges upon the occasion in question.”

Observe that he does not hold that one magistrate is disqualified, but he holds that all three were disqualified according to the essential principles of justice. The learned judge proceeds thus:

"An information was laid against the defendant for the violation of the provisions of an Act of Parliament passed for the protection of salmon fisheries. . . . Certain members of that association were present as justices [again dealing with them all individually] and took part in this conviction; they were essentially prosecutors being members of an association the aggregate of which were undoubtedly the prosecutors."

BLACKBURN, J., in my opinion, notwithstanding what has been said by COTTON, L.J., took the same view. He deals, no doubt, in the first place, with the case of Mr. Smith, who was a member of the committee, but he goes on to add this (*ibid.* at p. 924):

"There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information; but members of the association which institutes the prosecution must not act as judges upon it."

In other words, he says neither an ordinary nor an honorary member of this association can act as a judge upon the matter. Every subscriber to that association appears to me, in the view of these two learned judges, disqualified from sitting as judge or acting as judge on that complaint.

I think, therefore, that is a decision which, in point of substance and principle, applies to the present case. It is not binding upon us, but, in my view, that decision is right, and I think it ought to be upheld and applied to the present case. I think it is a matter of public policy, so far as is possible, that judicial proceedings should not only be free from the actual bias and prejudice of the judges, but that they should be free from the suspicion of bias or prejudice; and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the cases of prosecutions instituted by the association to which they subscribe. It is needless for me to disclaim any intention, in arriving at that conclusion, of holding that the two gentlemen in question were liable to any bias. That appears to me a point which is not really open to us, because I rest my decision on the ground of public policy, and I disclaim any right to inquire whether in fact they were or they were not biased. I need hardly say that I do not believe they were. It was urged that *R. v. Allan* is not conclusive, and is not in point, because it was said that there the association was not an incorporated one, and in the present case it is incorporated. That, in my judgment, has nothing to do with the case. Corporation or incorporation is quite immaterial in considering the operation upon the mind of being a member of a union for the purpose of carrying on prosecutions. I think, therefore, that we should be misled by a trivial and immaterial difference if we gave any effect to that.

If the matter, therefore, rested with me, I should have held that the decision of the General Medical Council in this case was invalid, and that the council as constituted on the occasion in question was not competent to decide on it, and in so doing I think that I should best maintain the dignity, and, therefore, the usefulness of the General Medical Council. My learned brethren are of the opposite opinion, and, therefore, this appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *R. Furber; Farrer & Co.; A. Fleet.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

ALLCARD v. SKINNER

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), May 13, 16, 17, July 9, 1887]

[Reported 36 Ch.D. 145; 56 L.J.Ch. 1052; 57 L.T. 61; 36 W.R. 251; 3 T.L.R. 751]

Undue Influence—Gift to religious body—Need of independent advice—“Religious influence most dangerous and powerful”—No proof of actual exercise of influence.

The court will set aside a voluntary gift (i) where the court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, or (ii) where the relations between the donor and the donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor; in such a case the court sets aside the gift unless it is proved that it was the spontaneous act of the donor acting in circumstances which enabled him to exercise an independent will and justifies the court in holding that the gift was the result of a free exercise of the donor's will and was not brought about by any undue influence on the part of the donee. The first class of these cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of case the court interferes, not on the ground that any wrongful act has been committed by the donee, but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused. Equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit, directly or indirectly, by the gifts which the donor makes under or in consequence of such influence unless it be shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside, and the means of considering his or her worldly position, and of exercising an independent will about it. The influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful. To counteract it courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors although there has been no proof of the actual exercise of such influence. The courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence in circumstances which render proof of it impossible.

In 1867 the plaintiff, an unmarried woman aged 27, sought as a confessor N., a clergyman who was the spiritual director of a Church of England sisterhood. In 1868, on his introduction, she became an associate of the sisterhood, and as such, without becoming a member of the body or residing with the sisters, she joined in their charitable work. In January, 1870, she became a postulant, that is, a member of the lowest order of the sisterhood. In April, 1870, she became a novice. In 1871 she was admitted a full member of the sisterhood, embracing for life vows which enjoined (i) poverty, that is, denuding herself of all her present and future property, either in favour of the sisterhood or otherwise; (ii) obedience; and (iii) chastity. She also agreed to the rules of the sisterhood, one of which forbade a member of the sisterhood to communicate with any person outside the sisterhood except by leave of the mother superior. While a sister, and without independent advice, she made gifts of money and stock to the mother superior on behalf of the sisterhood. In 1879 she left the sisterhood and joined the Roman Catholic Church.

In 1884, hearing that another woman, on leaving the sisterhood, had obtained the return of the money which she had given to the sisterhood, the plaintiff claimed the return of the stock which she had given. In 1885 the present proceedings were begun against the mother superior for declarations that the plaintiff had been induced by undue influence to make over the property to the mother superior who held it as trustee for her.

Held: (i) the equitable title of the mother superior to the property given by the plaintiff was imperfect by reason of her influence over the plaintiff which inevitably resulted from her position, and so the gifts made by the plaintiff were voidable; but (ii) (COTTON, L.J., dissenting) the delay and conduct of the plaintiff after leaving the sisterhood were such as to disentitle her to recover.

Notes. Considered: *Wilton v. Osborn*, [1901] 2 K.B. 110. Applied: *Inche Noriah v. Shaik Allie Bin Omar*, [1928] All E.R. Rep. 189. Considered: *Tufton v. Sporni*, [1952] 2 T.L.R. 516; *Bullock v. Lloyds Bank, Ltd.*, [1954] 3 All E.R. 726. Referred to: *Tyars v. Alsop, Mann & Co.* (1888), 59 L.T. 367; *Hale v. Sheldrake* (1889), 60 L.T. 292; *Morley v. Loughnan*, [1893] 1 Ch. 736; *Powell v. Powell*, [1900] 1 Ch. 243; *Howes v. Bishop*, [1909] 2 K.B. 390; *Lancashire Loans, Ltd. v. Black*, [1933] All E.R. Rep. 201; *Lough v. Ward*, [1945] 2 All E.R. 338; *Antony v. Weeraseeka* (1953), 97 Sol. Jo. 522.

As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq., and cases there cited.

Cases referred to:

- (1) *Whyte v. Meade* (1840), 2 I.Eq.R. 420; 12 Digest (Repl.) 119, *473.
- (2) *Wright v. Vanderplank* (1856), 8 De G.M. & G. 133; 25 L.J.Ch. 753; 27 L.T.O.S. 91; 2 Jur.N.S. 599; 4 W.R. 410; 44 E.R. 340, L.J.J.; 12 Digest (Repl.) 113, 668.
- (3) *Clough v. London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex Ch.; 21 Digest (Repl.) 440, 1479.
- (4) *De Bussche v. Alt* (1878), 8 Ch.D. 286; 47 L.J.Ch. 381; 38 L.T. 370; 3 Asp.M.L.C. 584, L.J.J.; 21 Digest (Repl.) 476, 1666.
- (5) *Huguenin v. Baseley* (1807), 14 Ves. 273; 33 E.R. 526, L.C.; 12 Digest (Repl.) 111, 657.
- (6) *Norton v. Relly* (1764), 2 Eden, 286; 28 E.R. 908; 12 Digest (Repl.) 118, 695.
- (7) *Nottidge v. Prince* (1860), 2 Giff. 246; 29 L.J.Ch. 857; 2 L.T. 720; 24 J.P. 726; 6 Jur.N.S. 1066; 8 W.R. 742; 66 E.R. 103; 12 Digest (Repl.) 118, 696.
- (8) *Lyon v. Home* (1868), L.R. 6 Eq. 655; 37 L.J.Ch. 674; 18 L.T. 451; 16 W.R. 824; 12 Digest (Repl.) 119, 702.
- (9) *Rhodes v. Bate* (1866), 1 Ch. App. 252; 35 L.J.Ch. 267; 13 L.T. 778; 12 Jur.N.S. 178; 14 W.R. 292, L.J.J.; 12 Digest (Repl.) 125, 765.
- (10) *Smith v. Clay* (1767), Amb. 645; 3 Bro. C.C. 639, n.; 27 E.R. 419, L.C.; 20 Digest (Repl.) 553, 2592.
- (11) *Hovenden v. Lord Annesley* (1806), 2 Sch. & Lef. 607; 32 Digest 509, 1687.
- (12) *Mitchell v. Homfray* (1881), 8 Q.B.D. 587; 50 L.J.Q.B. 460; 45 L.T. 694; 29 W.R. 558, C.A.; 12 Digest (Repl.) 121, 720.

Also referred to in argument:

- Dent v. Bennett* (1839), 4 My. & Cr. 269; 8 L.J.Ch. 125; 3 Jur. 99; 41 E.R. 105, L.C.; 12 Digest (Repl.) 121, 714.
- Hoghton v. Hoghton* (1852), 15 Beav. 278; 21 L.J.Ch. 482; 17 Jur. 99; 51 E.R. 545; 12 Digest (Repl.) 112, 662.
- Fulham v. McCarthy* (1848), 1 H.L.Cas. 703; 11 L.T.O.S. 389; 12 Jur. 757; 9 E.R. 937, H.L.; 12 Digest (Repl.) 118, 699.
- Re Metcalfe's Trusts* (1864), 2 De G.J. & Sm. 122; 3 New Rep. 657; 33 L.J.Ch. 308; 10 L.T. 78; 28 J.P. 260; 10 Jur.N.S. 287; 12 W.R. 538; 46 E.R. 321, L.J.J.; 12 Digest (Repl.) 119, 700.

Gresley v. Mousley (1859), 4 De G. & J. 78; 28 L.J.Ch. 620; 33 L.T.O.S. 154; A
 5 Jur.N.S. 583; 7 W.R. 427; 45 E.R. 31, L.J.J.; 40 Digest (Repl.) 394, 3150.
Clegg v. Edmondson (1857), 8 De G.M. & G. 787; 26 L.J.Ch. 673; 29 L.T.O.S.
 131; 3 Jur.N.S. 299; 44 E.R. 593, L.J.J.; 20 Digest (Repl.) 553, 2597.
Turner v. Collins (1871), 7 Ch. App. 329; 41 L.J.Ch. 558; 25 L.T. 779; 20 W.R.
 305, L.C.; 12 Digest (Repl.) 114, 674.
Lindsay v. Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221; 22 W.R. 492, P.C.; B
 21 Digest (Repl.) 431, 1424.

Appeal by the plaintiff from a decision of KEKEWICH, J.

Sir Horace Davey, Q.C., Finlay, Q.C., and F. B. Palmer for the plaintiff.

Sir Edward Clarke, Q.C., Warmington, Q.C., and E. Ford for the defendant.

Haldane for the Caledonian Rail. Co. and *C. H. Sargant* for the Midland Rail. C

Co.

Cur. adv. vult.

July 9, 1887. The following judgments were read.

COTTON, L.J.—This was an action brought to set aside certain gifts made by the plaintiff to the defendant, Miss Skinner, while the plaintiff was a member of a sisterhood of which the defendant was the lady superior. KEKEWICH, J., dismissed the action with costs. D

The plaintiff, by her action, sought to recover two sums of stock transferred by her to the defendant in the year 1874, which still remained in the name of the defendant, and also all moneys other than annual income which had been from time to time given by the plaintiff to the defendant, and which had been expended by the defendant for the charitable purposes in which the plaintiff and the other members of the sisterhood had been engaged. On the appeal the claim of the plaintiff was confined to the sums of stock still remaining in the name of the defendant. E

The history of the case begins in 1868. At that time the defendant, Miss Skinner, was the lady superior of an institution or sisterhood, which was an association of ladies who devoted themselves to works of charity, with the assistance of and under the spiritual direction of the Rev. Mr. Nihill, who was the vicar of St. Michael's, Mark Street, Finsbury. In 1868 the plaintiff, who was then residing with her mother, became an associate of the sisterhood, and joined in the charitable work in which they were engaged, but did not reside with them. However, in January, 1870, she became a postulant, in May of that year a novice, and in August, 1871, she became a professed sister, and as such took the vows. I understand that at this time the rules which are in evidence had not been reduced into writing, but it is conceded that the principles on which the sisterhood was conducted were the same as those afterwards expressed in the rules, and that the rules may be considered as expressing in detail the vows of poverty, chastity, and obedience which the plaintiff took when she became a professed sister. F
 Though the vow of poverty required that a sister should not hold any property, yet neither the vow nor the rules required that the property owned by any sister before she became professed should be made over to the superior or to the sisterhood. The obedience was to be rendered to the superior; but, although it is necessary that a sister should be obedient to the orders of the superior in any work like that in which the sisterhood was engaged, yet I cannot but express my doubt as to the propriety of the absolute submission required by the rules to the will of the superior, and I regret the terms in which the rules expressed the obedience which was required. Certainly the rules imposed the most absolute submission by the sisters to the superior, and prevented a sister from obtaining without leave the advice or counsel of any person not connected with the sisterhood. G
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After the plaintiff became a professed sister she from time to time handed over to the defendant the income to which she was entitled under her father's will, and also the capital moneys, as she was entitled to receive them, under that will. The

capital moneys amounted to about £8,000, and of this she handed over to the defendant sums exceeding £7,000, of which the sums of stock amounting to £500 ordinary stock of the Midland Railway Co. and £1,171 four per cent. Caledonian Railway stock, still remaining in the hands of the defendant, are part. The remainder had been expended for the purposes of the sisterhood before the action was brought. The stock was transferred by the plaintiff in 1874. It is probable that this is a portion of the father's estate which was then divisible. There is no evidence as to what took place at the time when the transfer was in fact made. It is urged by the defendant's counsel that there is no difference between the claim of the plaintiff to the stock remaining and her claim to the moneys given by her to the defendant and applied by her to the purposes of the sisterhood. If the money so expended had been applied by the transferee for her own selfish purposes, or had been obtained by fraud or deception on the part of the donee, probably this would have been the case. But if the plaintiff has an equity to set aside gifts made to the defendant, in my opinion, the defendant would have a stronger equity against the plaintiff, to prevent her from making the defendant personally liable for money spent by her for the charitable purposes to promote which the plaintiff and defendant were at the time of the expenditure associated, and which the plaintiff was at the time willing and anxious to promote.

Is the plaintiff entitled to recall the stock now in question and still in hand? There is no decision in point with reference to a case like the present. For, although in *Whyte v. Meade* (1) a deed of gift by a nun was set aside, there were in that case special circumstances which prevent it being treated as an authority in favour of the plaintiff. The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the court, enable the donor afterwards to set the gift aside? These decisions may be divided into two classes—(i) Where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; (ii) where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will, and justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. Both the defendant and Mr. Nihill have stated that they used no influence to induce the plaintiff to make the gift in question, and there is no suggestion that the defendant acted from any selfish motive, and it cannot be contended that the case comes under the first class of decisions to which I have referred.

The question is whether the case comes within the principle of the second class, and I am of opinion that it does. At the time of the gift the plaintiff was a professed sister, and, as such, bound to make absolute submission to the defendant as superior of the sisterhood. She had no power to obtain independent advice, she was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being (to use the words of KNIGHT BRUCE, L.J., in *Wright v. Vanderplank* (2)) "not in the largest and amplest sense of the term, not in mind as well as person, an entirely free agent." We have nothing to do with the plaintiff's reason for leaving the sisterhood; but, in my opinion, when she exercised her legal right to do this she was entitled to

recover so much of the fund transferred by her as remained in the hands of the defendant, on the ground that it was property the beneficial interest in which she had never effectually parted with. It was urged that it would be contrary to public policy to grant the plaintiff relief, on the ground that it would be a hindrance to the charitable work in which the plaintiff and the sisterhood were engaged, and that it would be better to show those who were desirous of leaving the work that they could not take with them any part of their property. But, in my opinion, it would be wrong to put such pressure on those who may wish to leave. Such work to be effectual must be done with a willing mind, and, in my opinion, it would be productive of evil to attempt to retain in such a society as the sisterhood, by the pressure of loss of property, those whose heart and will are no longer in the work, and who desire to exercise their legal right of withdrawing.

But it is contended, and KEKEWICH, J., decided against the plaintiff on this ground, that she had competent advice, that of her brother, before she joined the sisterhood, that she then formed the resolution (as Mr. Nihill stated in his evidence) to give everything to the sisterhood, and that this prevents the subsequent transfer being set aside. In my opinion, even if there were evidence that she had, before she joined the sisterhood, advice on the question of how she should deal with her property, that would not be sufficient. The question is, I think, whether at the time when she executed the transfer she was under such influence as to prevent the gift being considered as that of one free to determine what should be done with her property. No reliance can be placed on the promise made to Mr. Nihill [that the plaintiff would devote her property to the service of the poor]. This could not be enforced, and did not in any way bind her in law, or pass the property; and the title of the defendant depends solely on the transfer made in 1874. In my opinion, when the plaintiff left the sisterhood in 1879, she was entitled to set aside the transfer, and to have re-transferred to her the fund still held by the defendant.

Has she lost this right by delay? The case is not like that of a contract voidable for fraud. There the party defrauded must elect, and within a reasonable time, for, until he does so, he retains the right or the benefits, however inadequate, secured to him by the contract. It is to such a case that the judgment in *Clough v. London and North Western Rail. Co.* (3) applies, and not to a case of voluntary gift like the present, where the person seeking to set aside the transfer never received any benefit whatever from the transaction. There was an attempt to show that in consequence of the plaintiff's delay in bringing the action the defendant, and the sisterhood which she represents, had incurred liabilities on the faith of retaining the money given by the plaintiff. But I can find no evidence to support this contention. Counsel for the defendant contended that in 1883 a lease was taken for the sisterhood at a rent exceeding that for which it had been previously liable. But the lease, if it was of the suggested date, is not in evidence, and the evidence attributes the taking of a larger piece of land at the increased rent to the reliance of Mr. Nihill on the expectations formed in 1870 or 1879, based on the plaintiff's promises that she would give her property to the sisterhood. This defence, in my opinion, fails.

Is the delay (and in this case it was very great) of itself sufficient to deprive the plaintiff of her right to the fund now in the defendant's hands? The defendant has not pleaded the Statute of Limitations, and I do not suggest that she could have successfully done so. In cases where the fact of influence depends on the result of conflicting evidence, delay must be important, but it cannot be disputed that the plaintiff was in a state which necessarily subjected her to a powerful influence. The proof of this does not depend on parol evidence, but on the rules and admitted principles of the sisterhood. Mere delay in enforcing a right is not in itself a defence. It is very different from raising no objection to an act while it is being done, which may be treated as assent to the act, and, therefore, as being acquiescence so as to be an equitable defence. The judgment of THESIGER, L.J., in *De Bussche v. Alt* (4) is in point. In *Wright v. Vanderplank* (2), which was

much relied upon as regards delay, the action was not brought until ten years after the execution of the deed sought to be set aside, yet TURNER, L.J., says (8 De G.M. & G. at p. 149) :

"As to the time which has elapsed, if the case had rested on time only, much might have been said in favour of the plaintiff's claim,"

and in dismissing the action he relied on the way in which the donor had during the period subsequent to the execution of the deed dealt with the property as recognising the deed as effectual. Moreover, delay in asserting rights cannot be in equity a defence unless the plaintiff was aware of her rights. In her evidence she stated that until long after 1879 she did not know that she could set aside the gift. A letter of June, 1879, was relied on to displace this statement. But the terms of that letter, though apparently inconsistent with her evidence, are ambiguous, and the letter was not put to her in cross-examination. Also it was in evidence that shortly after she left the sisterhood she had some conversation with her brother about her money and with a Roman Catholic priest, who advised her not to trouble herself about it; and also that shortly after she left the sisterhood she consulted with a solicitor as to making a fresh will, and that he told her "it was too much money to leave behind her." But I understand that KEKEWICH, J., did not discredit her evidence as to the time when she first was informed of her right to set aside the gifts to the defendant, and I think that we ought to hold that she did not, until long after 1879, know her rights.

The delay which has occurred since 1879 is, I think, a defence against any claim on behalf of the plaintiff to the dividends on the stock now in the name of the defendant before the commencement of the action. But, in my opinion, it is no defence as regards the stock remaining in the hands of the defendant and the dividends accrued since the commencement of the action. At the time when the plaintiff left the sisterhood in 1879 that stock was property which the plaintiff was entitled to claim, as being held by the defendant in trust for her. The delay in this case does not, in my opinion, amount to evidence that the plaintiff recognised the gift as her own spontaneous act, and, in my opinion, it cannot be relied upon as having deprived the defendant of any evidence in her favour which could have been adduced if the plaintiff had brought her action shortly after she had left the sisterhood. In my opinion, the plaintiff is entitled to a decree for re-transfer to her of the stock in question and for payment of the dividends accrued since the commencement of the action.

LINDLEY, L.J.—In 1867 the plaintiff was living with her mother in London, and, on the recommendation of some clergyman, the plaintiff went to the Rev. Mr. Nihill, vicar of St. Michael's, Finsbury, for confession, and asked him for work in his parish of Shoreditch. By him she was introduced to the defendant Miss Skinner, who was then, and is still, the lady superior of the sisterhood of St. Mary at the Cross. Shortly afterwards—i.e., in 1868—the plaintiff joined the sisterhood as an associate, and at about this time she promised Mr. Nihill to devote her property to the service of the poor. She explained to him that she had not much property then, but that she would have more, and she said she would bring all into the sisterhood. This promise, Mr. Nihill tells us, he considered binding upon her conscience; and it is plain that the plaintiff herself so considered it. But this promise was purely gratuitous, and it does not appear that the plaintiff ever knew that the promise in question was not binding upon her in point of law; her evidence shows that she did not realise its full meaning, or the position she would find herself in if she should ever desire to leave the sisterhood. Such an event never occurred to her as one which could ever happen.

In 1870 the plaintiff became a postulant, and later in the same year a novice, and finally in August, 1871, a sister. Each of these steps was accompanied by religious services, and bound the plaintiff more and more closely to the sisterhood,

and alienated her more and more from the world at large. When the plaintiff became a postulant she ceased to reside with her mother, and resided with the sisterhood, and while a postulant she made a will, by which she left the whole of her property to the sisterhood. This was done at the request of the lady superior. The will, when made, was laid upon the altar, and was regarded as a consecrated document. Why, is not explained, and is left to inference. The only reason I can suggest for such a step is to impress the plaintiff that she was doing a very solemn thing, and one which was never to be undone. The will laid upon the altar and consecrated would, I imagine, cease to be regarded by the plaintiff and the lady superior as a revocable instrument.

The plaintiff was twenty-seven years of age, or thereabouts, when she first joined the sisterhood. She sought Mr. Nihill; he did not seek her. She wished to join the sisterhood, and she was resolved to devote herself and her property to it and to charitable work. This wish and determination were naturally strengthened by the religious services of the sisterhood, and by the influence of those around her. There is evidence that, when a novice, and before she had become a sister, she wished to leave the sisterhood, but that she did not feel that she could do so, and that she felt even then bound to the sisterhood. After she became a sister she again wished to leave, but she was told by the lady superior that she could not do so, and that she was bound to the sisterhood for life. On another and later occasion she was not allowed to leave, although she wished to do so. On becoming a sister the plaintiff took vows of obedience to the lady superior, and of poverty and chastity; and there can be no doubt that the plaintiff regarded these vows as binding on her, not only when she took them, but ever afterwards until she finally left the sisterhood and became a Roman Catholic.

On becoming a sister the plaintiff also became subject to the rules of the sisterhood. These rules, although not reduced into their final shape until 1872 or 1873, were practically in force before, and were well known to the plaintiff when she became a sister. The important rules are those which require (i) implicit obedience to the lady superior; (ii) poverty. A third rule (No. 31) is thus worded: "Let no sister seek advice of any extern without the superior's leave." The vow of poverty and the rule as to poverty obliged each sister to give away all her property. But the rule did not require her to give it or any of it to the sisterhood. She could give it to her relations, or to the poor if she wished. But it would be idle to suppose that a sister would not feel that she ought to give some of her property at least to the sisterhood, and it would be equally idle to suppose that she would not be expected to do so. The forms of deeds in the schedules A. and B. to the rules are very significant. The donee is inserted as "— her heirs, executors, administrators, and assigns." The introduction of "her" is very unusual in a legal form, and shows plainly enough who the donee was expected to be. Further, the deeds, when filled up, are by the rules to be placed on the altar, in order, I suppose, to add to their solemnity, and impress the donor with a sense of their irrevocability. The plaintiff never executed any such deed as was contemplated by the rules; but they and the schedules show what was expected to be done. In this particular case, moreover, the plaintiff had expressly promised to give all she had to the sisterhood, and Mr. Nihill tells us that non-performance of this promise would have been regarded as dishonourable.

The vow and rule obliging to implicit obedience to the lady superior, and the exhortation or command to regard her voice as the voice of God, produce very different effects on different minds. There can, however, be no question that the plaintiff felt bound by the vow and by the rule until she emancipated herself from both of them, which she did when she left the sisterhood. It is important, however, to bear in mind that the fetter thus placed on the plaintiff was the result of her own free choice. There is no evidence that pressure was put upon her to enter upon the mode of life which she adopted. She chose it as the best for herself; she devoted herself to it heart and soul; she was, to use her own expression, "infatuated"

with the life and with the work. But, though infatuated, there is no evidence to show that she was in that state of mental imbecility which would justify the inference that she was unable to take care of herself or to manage her own affairs. The rule against obtaining advice from externs without the consent of the lady superior invites great suspicion. It is evidently a rule capable of being used in a very tyrannical way, and so as to result in intolerable oppression. I have carefully examined the evidence to see how this rule practically worked; but I can find nothing on the subject. I can find nothing to show, one way or the other, what would have been the effect, for example, of a request for leave to consult a friend or obtain legal or other advice respecting any disposition of property or respecting leaving the sisterhood. There, however, is the rule, and a very important one it is. I shall have occasion to refer to it again hereafter.

Such being the nature of the vows and rules which the plaintiff had taken, and to which she had submitted herself, and by which she felt herself bound by the highest religious sanctions, it is necessary to examine what she did with her property, and the circumstances under which she gave it to the sisterhood. The evidence shows that her brother, who was one of her trustees, kept her fully informed of what her property consisted of, and he remitted to her from time to time cheques and transfers of railway stock and other securities to which she was entitled. The brother's letters, and the cheques and transfers, all passed through the hands of the lady superior, it being the rule that she should see all letters to sisters. The plaintiff gave all the cheques to the lady superior after endorsing them, and also transferred to her all the railway stock and securities as they were received. The cheques were handed over to Mr. Nihill, who was the treasurer of the sisterhood, and were paid by him into a bank to an account kept in his own name, and on which he alone could draw. The sisterhood was building a hospital, in which the plaintiff took great interest, and most of the plaintiff's money was spent in defraying the expense of the building.

I have examined the evidence with care, in order to see whether any pressure was put upon the plaintiff in order to induce her to give her property to the sisterhood, or whether any deception was practised upon her, or whether any unfair advantage was taken of her, or whether any of her money was applied otherwise than bona fide for the objects of the sisterhood, or for any purpose which the plaintiff could disapprove. The result of the evidence convinces me that no pressure (except the inevitable pressure of the vows and rules) was brought to bear on the plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for any purpose other than the legitimate objects of the sisterhood. Not a farthing of it was either obtained or applied for the private advantage of the lady superior or of Mr. Nihill; nor indeed did the plaintiff ever suggest that such had been the case. The real truth is that the plaintiff gave away her property as a matter of course, and without seriously thinking of the consequences to herself. She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood, or desire to have her money back. In giving away her property as she did she was merely acting up to her promise and vow, and the rule of the sisterhood, and to the standard of duty which she had erected for herself under the influences and circumstances already stated.

In May, 1879, the plaintiff left the sisterhood. On May 16 she was received into the Roman Catholic Church, and she then regarded herself as freed from the vows she had taken on joining the sisterhood. Soon after she had left the sisterhood the plaintiff had some conversation with her brother about getting her money back; and he said he did not want the trouble and she had better leave it alone. She was also advised by a Roman Catholic priest not to trouble about it. In February, 1880, she consulted her present solicitor about making a new will, and she then had some conversation with him about the money she had given to the sisterhood, and he told her it was too large a sum to leave

behind without asking for it back, and she said she would not trouble about it. Some time in 1884 the plaintiff heard that another sister, a Miss Merriman, had left the sisterhood, and had asked for the money back, and had had it returned to her, and then plaintiff made up her mind to try and get her money back. Upon her re-examination the plaintiff said that she had no idea that she could get it back until after she had heard that Miss Merriman had recovered hers. But the evidence already alluded to shows clearly that she had considered the matter, and had come to the conclusion that it was not worth troubling about. As a matter of fact, although she asked the lady superior in 1880 to give her back her will, she never asked for any of her money back until 1884, more than five years after she had left the sisterhood, and the present action was not brought until August 28, 1885.

By her action the plaintiff sought to recover the whole of the capital money which she had given to the sisterhood, amounting to nearly £8,500. KEKEWICH, J., tried the action, and gave judgment for the defendant. From this judgment the plaintiff has appealed, but she has limited her appeal to two sums of £500 and £1,171 railway stock transferred by her to the lady superior, and still standing in her name. Two questions are raised by the appeal, viz., first, whether the gifts made by the plaintiff to the sisterhood were revocable or irrevocable when made; secondly, whether, assuming them to have been irrevocable when made, it was competent for the plaintiff to revoke them when she did.

The first question is one of great importance and difficulty. Its solution requires a careful consideration of the legal effect of gifts by persons of mature age who feel bound by vows and rules to give away their property, but who have taken the vows and submitted to the rules voluntarily and without pressure, and who are subject to no other coercion or influence than necessarily results from the vows and rules themselves, and from the state of their own minds. There is no statutory law in this country prohibiting such gifts unless what is given is land, or money to be laid out in land. These are provided for by the Mortmain and Charitable Uses Acts; but they have no application to this case [the Charities Act, 1960, repealed the law of mortmain: see s. 38 (40 HALSBURY'S STATUTES (2nd Edn.) 168)]. The common law, as distinguished from equity, does not invalidate such gifts as these. There being no duress or fraud, the only ground for impeaching such gifts at law would be want of capacity on the part of the donor, and, although the plaintiff was a religious enthusiast, no one could treat her as in point of law non compos mentis. There is no authority whatever for saying that her gifts were invalid at law. It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated.

The doctrine relied upon by the plaintiff is the doctrine of undue influence expounded and enforced in *Huguenin v. Baseley* (5), and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap. First, there are the cases in which there has been some unfair and improper conduct—some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. *Norton v. Relly* (6); *Nottidge v. Prince* (7); *Lyon v. Home* (8); *Whyte v. Meade* (1), all belong to this group. In *Whyte v. Meade* (1) a gift to a convent was set aside, but the gift was the result of coercion clearly proved. The evidence does not bring the present case within this group. The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the courts throw upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and

was removed from the influence of the donee when the gift to him was made. *Huguenin v. Baseley* (5) was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was entrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that LORD ELDON used the language so often quoted, and so much relied on in this case. He said (14 Ves. at p. 299):

"Take it that she [the plaintiff] intended to give it to him [the defendant]; it is by no means out of the reach of the principle. The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf."

This principle has been constantly recognised and acted upon in subsequent cases, but in all of them, as in *Huguenin v. Baseley* (5) itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty, the language of LORD ELDON ceases to be applicable. *Rhodes v. Bate* (9) was determined on the same principle as *Huguenin v. Baseley* (5), the court having come to the conclusion that the relation of the defendant to the plaintiff was really that of a solicitor to his client.

I have not been able to find any case in which a gift has been set aside on the ground of undue influence, which does not fall within one or other or both of the groups above mentioned. Nor can I find any authority which actually covers the present case. But it does not follow that it is not reached by the principle on which the court has proceeded in dealing with the cases which have already called for decision. They illustrate, but do not limit, the principle applied to them. The principle must be examined. What, then, is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people?

In my opinion, the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. *Huguenin v. Baseley* (5) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance, and vice if persons could get back property which they had foolishly made away with, whether by giving it to charitable institutions, or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked, or misled, in anyway, by others into parting with their property, is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud. As no court has ever attempted to define fraud, so no court has ever attempted to define undue influence, which includes one of the many varieties. The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful. To counteract it courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which

render proof of it impossible. The courts have required proof of its non-exercise, A
and, failing that proof, have set aside gifts otherwise unimpeachable.

In this particular case I cannot find any proof that any gift made by the
plaintiff was the result of any actual exercise of power or influence on the part
of the lady superior or of Mr. Nihill, apart from the influence necessarily incidental
to their position in the sisterhood. Everything that the plaintiff did is, in my
opinion, referable to her own willing submission to the vows she took, and to the B
rules which she approved, and to her own enthusiastic devotion to the life and
work of the sisterhood. This enthusiasm and devotion were nourished,
strengthened and intensified, by the religious services of the sisterhood, and by
the example and influence of those about her. But she chose the life and work;
such fetters as bound her were voluntarily put upon her by herself; she could
have shaken them off at any time had she thought fit, and had she had the C
courage so to do; and no unfair advantage whatever was taken of her. Under
these circumstances it is going a long way to hold that she can invoke the doc-
trine of undue influence to save her from the consequences of her own acts, and
to entitle her to avoid the gifts she made when in a state of mind different from
that in which she now is.

I am by no means insensible of the difficulty of going so far. Nevertheless, D
consider the position in which the plaintiff had placed herself. She had vowed
poverty and obedience, and she was not at liberty to consult externs without the
leave of her superior. She was not a person who treated her vows lightly; she
was deeply religious and felt bound by her promise, by her vows, and by the
rules of the sisterhood. She was absolutely in the power of the lady superior
and Mr. Nihill. A gift made by her, under these circumstances, to the lady
superior, cannot, in my opinion, be retained by the donee. The equitable title
of the donee is imperfect by reason of the influence inevitably resulting from
her position, which influence experience has taught the courts to regard as
undue. Whatever doubt I might have had on this point if there had been no
rule against consulting externs, that rule, in my judgment, turns the scale
against the defendant. In the face of that rule the gifts made to the sister-
hood cannot be supported in the absence of proof that the plaintiff could have
obtained independent advice, if she had wished for it, and that she knew that
she would have been allowed to obtain such advice if she had desired so to do.
I doubt whether the gifts could have been supported if such proof had been
given, unless there was also proof that she was free to act on the advice which
might be given to her. But the rule itself is so oppressive and so easily abused
that any person subject to it is, in my opinion, brought within the class of those
whom it is the duty of the court to protect from possible imposition. The gifts
cannot be supported without proof of more freedom in fact than the plaintiff
can be supposed to have actually enjoyed. The case is brought within the
principle so forcibly expressed by KNIGHT BRUCE, L.J., in *Wright v. Vander-*
plank (2), in which a gift by a daughter to her father was sought to be set aside. H
If any independent person had explained to the plaintiff that her promise to
give all her property to the sisterhood was not legally binding upon her, and that
her vows of poverty and obedience had no legal validity, and that if she gave her
property away and afterwards left the sisterhood she would be unable to get her
property back, it is impossible to say what she might or might not have done.
In fact she never had the opportunity of considering this question. I

Where a gift is made to a person standing in a confidential relation to the
donor the court will not set aside the gift, if of a small amount, simply on the
ground that the donor had no independent advice; in such a case some proof
of the exercise of the influence of the donee must be given. The mere existence
of such influence is not enough in such a case: see the observations of TURNER,
L.J., in *Rhodes v. Bate* (9), 1 Ch. App. at p. 258. But if the gift is so large as not to
be reasonably accounted for on the ground of friendship, relationship, charity, or

A other ordinary motive on which ordinary men act, the burden is upon the donee to support the gift. So in a case like this a distinction might well be made between gifts of capital and gifts of income, and between gifts of moderate amount and gifts of large sums which a person unfettered by vows and oppressive rules would not be likely to wish to make. In this case the plaintiff practically gave away all she could, although, having a life interest in other property, she did not
B reduce herself to a state of poverty.

As I have already stated, I believe that in this case there was in fact no unfair or undue influence brought to bear upon the plaintiff other than such as inevitably resulted from the training she had received, the promise she had made, the vows she had taken, and the rules to which she had submitted herself. But her gifts were in fact made under a pressure which, while it lasted, the
C plaintiff could not resist, and were not, in my opinion, past recall when the pressure was removed. When the plaintiff emancipated herself from the spell by which she was bound she was entitled to invoke the aid of the court in order to obtain the restitution from the defendant of so much of the plaintiff's property as had not been spent in accordance with the wishes of the plaintiff, but remained in the hands of the defendant. The plaintiff now demands no
D more.

I proceed to consider the second point which arises in this case, viz., whether it is too late for the plaintiff to invoke the assistance of the court. More than six years had elapsed between the time when the plaintiff left the sisterhood and the commencement of the present action. The action is not one of those to which the Statute of Limitations in terms applies, nor is that statute pleaded.
E But this action very closely resembles an action for money had and received, laches and acquiescence are relied upon as a defence, and the question is whether this defence ought to prevail. In my opinion, it ought. Taking the statute as a guide, and proceeding on the principles laid down by LORD CAMDEN in *Smith v. Clay* (10), and by LORD REDESDALE in *Hovenden v. Annesley* (11), the lapse of
F six years becomes a very material element for consideration.

It is not, however, necessary to decide whether this delay alone would be a sufficient defence to the action. The case by no means rests on mere lapse of time. There is far more than inactivity and delay on the part of the plaintiff. There is conduct amounting to confirmation of her gift. Gifts liable to be set aside by the court on the ground of undue influence have always been treated as
G voidable, and not void. If authority for this proposition be wanted, such authority will be found in *Wright v. Vanderplank* (2) and *Mitchell v. Homfray* (12). Moreover, such gifts are voidable on equitable grounds only. A gift intended when made to be absolute and irrevocable, but liable to be set aside by a court of justice, not on the ground of change of mind on the part of the donor, but on grounds of public policy based upon the fact that the donor was
H not sufficiently free relatively to the donee—such a gift is very different from a loan which the borrower knows he is under an obligation to repay, and is also different from a gift expressly made revocable, and never intended to be absolute and unconditional. A gift made in terms absolute and unconditional naturally leads the donee to regard it as his own; and the longer he is left under this impression the more difficult it is justly to deprive him of what he
I has naturally so regarded.

So long as the relation between the donor and the donee which invalidates the gifts lasts, so long is it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessity ceases when the relation itself comes to an end; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not, the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive—that the donor is content not to call the gift

in question or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it. This view is not only conformable to the well-settled rules relating to other voidable transactions: see the judgment in *Clough v. London and North Western Rail Co.* (3); but is also warranted by *Wright v. Vanderplank* (2) and *Mitchell v. Homfray* (12). It is true that in those cases the donors had died; but it is clear, I think, that the decisions proceeded upon the ground that the donors, if alive, could not have obtained relief. A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor, but passes to his representatives; and if in *Mitchell v. Homfray* (12) the donor had been entitled when he died to have the gift set aside, his executors would have succeeded to his rights, and would have obtained the relief they sought. In this particular case the plaintiff considered, when she left the sisterhood, what course she should take, and she determined to do nothing, but to leave matters as they were. She insisted on having back her will, but she never asked for her money until the end of five years or so after she left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned. Moreover, by demanding her will and not her money, she made her resolution known to the defendant.

It was urged that the plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the plaintiff did not know that it was at least questionable whether the defendant could retain the plaintiff's money if she insisted on having it back. In the next place, if the plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts; she was in communication with her present solicitor in 1880; his remark that "it was too large a sum to leave behind without asking for it back" was a clear intimation that she ought to ask for her money back, and was a distinct invitation to her to consider her rights. She declined to do so; she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong, and contrary to sound principle, to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no ground for equitable relief; nor is it an answer to an equitable defence based on laches and acquiescence.

Again, it was urged that the defendant has not been prejudiced by the delay, and that nothing has been done on the faith that the plaintiff would not require her money to be returned to her. But I do not think this material. I treat the money as absolutely given to the sisterhood when the plaintiff determined not to ask for it back, which she did in 1880. But, further, I cannot come to the conclusion that nothing has been done on the faith of the money being the property of the sisterhood. It is contrary to human nature to suppose the plaintiff's money was not for years regarded as the money of the sisterhood, and that the sisterhood did not act on that assumption and make their arrangements accordingly. Mr. Nihill's evidence satisfies me that they did so, although I do not think he shows that they took any particular step on the faith of having the particular sum now sought to be taken from them. It is not, however, in my opinion, necessary to prove so much as this. Whether the plaintiff's conduct amounts in point of law to acquiescence or laches, or whether it amounts to an election not to avoid a voidable transaction, or whether it amounts to a ratification or a confirmation of her gifts, are questions of mere words which it is needless to discuss. In my judgment, it would not be fair or right to the defendant to compel her now to restore the money sought to be recovered by this appeal. Nor, in my opinion, would such a result be in conformity with sound

a legal or equitable principles. Upon this ground, therefore, I am of opinion that this appeal ought to be dismissed.

BOWEN, L.J.—This is a case of great importance. There are no authorities which govern it. My brethren, on whose experience in matters of equity I naturally should rely, differ, and on that ground I have thought it right to express my own views upon the point. It is a question which must be decided upon broad principles, and we have to consider what is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the defendant, but where there is an all-powerful religious influence which disturbs the independent judgment of one of the parties, and subordinates for all worldly purposes the will of that person to the will of the other.

It seems to me that it is of essential importance to keep quite distinct two things, which in their nature seem to me to be different—the rights of the donor, and the duties of the donee, and the obligations which are imposed upon the conscience of the donee by the principles of this court. As to the rights of the donor in a case like the present, I entertain no doubt. It seems to me that persons who are under the most complete influence of religious feeling are perfectly free to act upon it in the disposition of their property, and not the less free because they are enthusiasts. Persons of this kind are not dead in law. They are dead indeed to the world so far as their own wishes and feelings about the things of the world are concerned; but such indifference to things external does not prevent them in law from being free agents. In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. It seems to me that, so far as regards her rights, she had the absolute right to deal with her property as she chose. Passing next to the duties of the donee, it seems to me that, although this power of perfect disposition remains in the donor under circumstances like the present, it is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit, directly or indirectly, by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside, the means of considering his or her worldly position and for exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play. If this had been the gift of a chattel, therefore, the property then would have passed in law, and the distinction between the gift of a chattel and the gift of money may be treated as a pecuniary one only for this purpose.

That being the rule, in the first place, was the plaintiff entitled to the benefit of it? She had vowed, in the most sacred and solemn way, absolute and implicit obedience to the will of the defendant, her superior, and she was bound altogether to neglect the advice of externs—not to consult those outside the convent. I offer no sort of criticism on institutions of this sort—no kind of criticism upon the action of those who enter them, or of those who administer them. In the abstract I respect their motives, but it is obvious that it is exactly to this class of case that the rule of equity which I have mentioned ought to be applied if it exists. It seems to me that the plaintiff, so long as she was fettered by this vow—so long as she was under the dominant influence of this religious feeling—was a person entitled to the protection of the rule. Was the defendant bound by this rule? I acquit her most entirely of all selfish feeling in the matter. I can see no sort of wrongful desire to appropriate to herself any worldly benefit from the gift; but, nevertheless, she was a person who benefited by it so far as the disposition of the property was concerned, although, no doubt, she meant to use it in conformity with the rules of the institution, and did so use it.

I pause for one moment to say a word as to the views of KEREWICH, J., which are not altogether consistent with the above. He seems to have thought that the question turned on the original intention of the donor at the time she entered the convent, and that what passed subsequently could be treated as if it were a mere mechanical performance of a complete mental intention originally formed. I entirely agree with the view presented to us by the plaintiff as to that part of the judgment appealed from. It seems to me that it is not the point upon which the case turns; that the standard of duty was originally created by the plaintiff herself, although her original intention is one of the facts, no doubt, which bear upon the case, and is not to be neglected. But it is not the crucial fact. We ought to look, it seems to me, at the time at which the gift was made, and to examine what was then the condition of the donor who made it. For these reasons I think that, without any interference with the freedom of persons to deal with their property as they please, we ought, and can hold but one opinion, that in 1879 the plaintiff could have set this gift aside.

Then comes the question of the time which has elapsed since. What effect has time upon a right to the protection of this rule. The rule is an equity arising out of public policy. I do not think that the delay in itself is an absolute bar, though it is a fact to be considered in determining the inference of fact which appears to me to be the one that we must draw on one side or the other. I have described, to the best of my imperfect powers, what to my mind the principle of the rule is. It is a principle arising out of public policy, and one which imposes a fetter upon the conscience of the recipient of the gift. When is that barrier removed from the conscience of the recipient of the gift? It seems to me that the common sense answer ought to be—and I think the right answer is—as soon as the donor escapes from the religious influence which hampered her at the time, as soon as she becomes free and determined to leave the gift where it is. If she has so acted—if her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief that the gift is to lie where it has been laid—then, by estoppel, it appears to me that the donor of the gift would be prevented from revoking it.

But I do not base my decision here on that ground. I do not base my decision at all upon the view that she is estopped by the delay. But a long time has elapsed. Five years is a long time in the life of anybody, and it is a long time in the life of a person who has passed her life in seclusion like the plaintiff. Every day and every hour during those five years she has had the opportunity of reflecting upon her past life and upon what she has done. She has had that opportunity since she passed away from the influence of the defendant; and that she did pass away from it most completely is proved to demonstration by the fact that she entered a different religious community. Having belonged to the Church of England, she has entered the Church of Rome. The influence, therefore, ceased completely. She was surrounded by persons perfectly competent to give her proper advice. She had her solicitor. She had her brother, a barrister himself, and she had the directors of the consciences of the community which she had entered.

I draw unhesitatingly the inference, under the circumstances, that she did, in or shortly after 1879, consider this matter and determine not to interfere with her previous disposition. Was she aware of her rights at the time she formed this resolution? In my view, I incline to think that she must have been, having regard to the character of the advisers who surrounded her, but I do not consider it to be essential to draw that inference. It is enough if she was aware that she might have rights, and deliberately determined not to inquire what they were or to act upon them. Then, again, I unhesitatingly draw the inference that she was aware that she had rights, or might have them, and that she deliberately made up her mind not to enforce them. In drawing this inference of fact I do no discredit to the character of the plaintiff, which is above

all reproach, but on carefully considering her evidence I do not feel that I can place reliance upon her memory; and, in my view, it would be wrong to draw the inference upon her evidence that she did in her own mind never form any definite view about the property she left behind in the convent.

I need hardly say that I feel great embarrassment in having to give the casting voice in a matter of such great importance, when two whose opinions and authority are far greater than my own differ in the matter. In my view, this appeal ought to be dismissed, and dismissed on the ground that the time which has elapsed—though not a bar in itself, though not amounting to laches which disentitles the plaintiff to relief—is, nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world—viz., that the lady considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt, if she had the will she had the power to disturb.

Appeal dismissed.

Solicitors : *Blount, Lynch & Petre; Freemans & Dicker.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD AND OTHERS

[CHANCERY DIVISION (Stirling, J.), July 16, 17, 18, 23, 24, 25, 30, 31, August 1, 6, November 6, 1889]

[*Reported 44 Ch.D. 412; 59 L.J.Ch. 34; 62 L.T. 678; 6 T.L.R. 25*]

Building Society—Director—Powers—Advances—Security—No restriction to trustee securities—Hazardous investments—Wasting security—Observation of ordinary business prudence—Advance on second mortgage of leasehold colliery—Further advance to redeem first mortgage—Money borrowed for that purpose—Entry into possession of property—Payment of rent and expense of maintaining and working colliery.

The directors of a building society ought not to be held liable for losses on loans authorised by them on the rules laid down by the Court of Chancery with respect to the duties of trustees of wills and settlements where the preservation of the trust funds is the primary object. In the exercise of their discretion they may properly make advances on classes of securities forbidden to ordinary trustees. They are not under an obligation to avoid investments attended with hazard, dependent for their value on the course of trade, or of a wasting nature, but may, in the absence of anything to the contrary in the rules or articles of association of the society, act in the same manner as men of business of ordinary prudence.

The directors of a building society advanced £25,000 on a second mortgage of a leasehold colliery. Later they made a further advance to redeem the first mortgage on the property, borrowing money for that purpose. Later still the society entered into possession of the mortgaged property and paid out of the

funds of the society the rents reserved by the lease and the expenses of maintaining and working the colliery.

Held: under the rules of the society the first advance was within the powers of the directors, and by implication they had power to make the further advance to redeem the first mortgage and to borrow money for that purpose, and also, making use of the ordinary powers of mortgagees, to enter into possession of the colliery and to apply money of the society in maintaining and working it; the directors, therefore, were not guilty of any neglect or default which would disentitle them to the protection in such circumstances afforded them by the rules of the society.

Notes. Section 13 of the Building Societies Act, 1874, was repealed by the Building Societies Act, 1962, of which see s. 1 (1): 42 HALSBURY'S STATUTES (2nd Edn.) 62. As to the permitted classes of additional security see s. 26 of, and Sched. 3 to, the Act; *ibid.* 84, 168.

Considered: *Bradford Third Equitable Benefit Building Society v. Borders*, [1939] 1 All E.R. 481; *Halifax Building Society v. Salisbury*, [1939] 4 All E.R. 427. Referred to: *Want v. Campain* (1893), 9 T.L.R. 254; *Sun Permanent Benefit Building Society v. Western Suburban and Harrow Road Permanent Building Society*, [1921] All E.R. Rep. 690.

As to the powers and liabilities of directors of building societies and additional security, see 3 HALSBURY'S LAWS (3rd Edn.) 568-570, 594-602; and for cases see 7 DIGEST (Repl.) 484, 485, 497, 498.

Cases referred to :

- (1) *Re Faure Electric Accumulator Co.*, post; (1888), 40 Ch.D. 141; 58 L.J.Ch. 48; 59 L.T. 918; 37 W.R. 116; 5 T.L.R. 63; 1 Meg. 99; 9 Digest (Repl.) 536, 3522.
- (2) *Fleming v. Self* (1854), 3 De G.M. & G. 997; 3 Eq. Rep. 14; 24 L.J.Ch. 29; 24 L.T.O.S. 101; 18 J.P. 772; 1 Jur.N.S. 25; 3 W.R. 89; 43 E.R. 390, L.C.; 7 Digest (Repl.) 479, 6.
- (3) *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch.D. 440; 52 L.J.Ch. 857; 48 L.T. 134; 32 W.R. 73, C.A.; on appeal sub nom. *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; 33 W.R. 173, H.L.; 7 Digest (Repl.) 479, 4.
- (4) *Re Railway and General Light Improvement Co.*, *Marzetti's Case* (1880), 42 L.T. 206; 28 W.R. 541, C.A.; 9 Digest (Repl.) 489, 3215.
- (5) *Learoyd v. Whiteley* (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 36 W.R. 721; 3 T.L.R. 813, H.L.; 43 Digest 856, 3038.
- (6) *Small v. Smith* (1883), 10 R. (Ct. of Sess.) 1198; affirmed (1884), 10 App. Cas. 119, H.L.; 7 Digest (Repl.) 484, 36.
- (7) *Re Asiatic Banking Corpn.*, *Royal Bank of India's Case* (1869), 4 Ch. App. 252; 19 L.T. 805; 17 W.R. 359, L.J.J.; 3 Digest (Repl.) 304, 949.

Also referred to in argument :

- Charitable Corpn. v. Sutton* (1742), 2 Atk. 400; 9 Mod. Rep. 349; 26 E.R. 642, L.C.; 10 Digest (Repl.) 1290, 9129.
- Evans v. Coventry* (1857), 8 De G.M. & G. 835; 26 L.J.Ch. 400; 29 L.T.O.S. 118; 22 J.P. 19; 3 Jur.N.S. 1225; 5 W.R. 436; 44 E.R. 612, L.J.J.; 9 Digest (Repl.) 536, 3519.
- Overend and Gurney Co. v. Gibb* (1872), L.R. 5 H.L. 480; 42 L.J.Ch. 67, H.L.; 9 Digest (Repl.) 489, 3213.
- Blackburn Benefit Building Society v. Ward* (1882), unreported.
- Ireland v. Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp. M.L.C. 389, H.L.; 1 Digest (Repl.) 485, 1275.
- London Financial Association v. Kelk* (1884), 26 Ch.D. 107; 53 L.J.Ch. 1025; 50 L.T. 492; 9 Digest (Repl.) 665, 4402.

Leeds Estate Building and Investment Co. v. Shepherd (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 3 T.L.R. 841; 36 W.R. 322; 9 Digest (Repl.) 632, 4216.

Re Pearson, Oxley v. Scarth (1884), 51 L.T. 692; 35 Digest 289, 414.

Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319; 43 L.T. 676; 29 W.R. 370, C.A.; 32 Digest 522, 1791.

Knox v. Gye (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234; 32 Digest 511, 1702.

Brown v. Howard (1820), 2 Brod. & Bing. 73; 4 Moore, C.P. 508; 129 E.R. 885; 32 Digest 524, 1803.

Whitehead v. Howard (1820), 2 Brod. & Bing. 372; 5 Moore, C.P. 105; 129 E.R. 1010; 1 Digest (Repl.) 528, 1589.

Smith v. Fox (1848), 6 Hare, 386; 17 L.J.Ch. 170; 10 L.T.O.S. 363; 12 Jur. 130; 67 E.R. 1216; 32 Digest 343, 251.

Short v. McCarthy (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest 342, 249.

Howell v. Young (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry.K.B. 14; 4 L.J.O.S. K.B. 160; 108 E.R. 97; 32 Digest 342, 250.

Re Hindmarsh (1860), 1 Drew. & Sm. 129; 1 L.T. 475; 8 W.R. 203; 62 E.R. 327; 32 Digest 355, 386.

Land Credit Co. of Ireland v. Lord Fermoy (1870), 5 Ch. App. 763; 23 L.T. 439; 18 W.R. 1089, L.C. & L.J.; 9 Digest (Repl.) 528, 3480.

Pickering v. Stephenson (1872), L.R. 14 Eq. 322; 41 L.J.Ch. 493; 26 L.T. 608; 20 W.R. 654; 9 Digest (Repl.) 504, 3316.

Re Denham & Co. (1883), 25 Ch.D. 752; 50 L.T. 523; 32 W.R. 487; 9 Digest (Repl.) 526, 3462.

Studdert v. Grosvenor (1886), 33 Ch.D. 528; 55 L.J.Ch. 689; 55 L.T. 171; 50 J.P. 710; 34 W.R. 754; 2 T.L.R. 811; 9 Digest (Repl.) 538, 3537.

Re County Marine Insurance Co., Rance's Case (1870), 6 Ch. App. 104; 40 L.J.Ch. 277; 23 L.T. 828; 19 W.R. 291, L.J.J.; 9 Digest (Repl.) 527, 3474.

Re National Funds Assurance Co. (1878), 10 Ch.D. 118; 48 L.J.Ch. 163; 39 L.T. 420; 27 W.R. 302; 9 Digest (Repl.) 526, 3464.

Re Oxford Benefit Building and Investment Society (1886), 35 Ch.D. 502; 55 L.T. 598; 35 W.R. 116; 3 T.L.R. 46; sub nom. *Re Oxford Building Society, Ex parte Smith*, 56 L.J.Ch. 98; 9 Digest (Repl.) 479, 3135.

Stone v. Cartwright (1795), 6 Term Rep. 411; 101 E.R. 622; 1 Digest (Repl.) 452, 1034.

Bromley v. Coxwell (1801), 2 Bos. & P. 438; 126 E.R. 1372; 1 Digest (Repl.) 452, 1041.

Rossiter v. Trafalgar Life Assurance Association (1859), 27 Beav. 377; 54 E.R. 148; 1 Digest (Repl.) 446, 983.

Cassaboglou v. Gibb (1883), 11 Q.B.D. 797; 52 L.J.Q.B. 538; 48 L.T. 850; 32 W.R. 138, C.A.; 1 Digest (Repl.) 554, 1747.

Action brought by the Sheffield and South Yorkshire Permanent Building Society, in liquidation, against former directors of the society and the legal personal representatives of two directors who had died for a declaration that the defendant directors and the estates of the two deceased directors were liable to make good to the society sums advanced out of the assets of the society to one Thomas Joseph upon the security of leasehold collieries in Wales, and also sums expended out of the assets of the society in preserving those securities and maintaining and working the collieries.

By s. 13 of the Building Societies Act, 1874:

"Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage; and any society under this Act shall, so far as is necessary

for the said purpose, have power to hold land with the right of foreclosure . . . Provided always, that any land to which any society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall as soon afterwards as may be conveniently practicable be sold or converted into money."

By r. 14 of the rules of the society :

"The directors and all other officers of the society shall be, and are, hereby indemnified and saved harmless out of its funds and property from and against all losses, costs, charges, damages, and expenses which they may incur or be put unto in or about the execution of their respective offices, trusts, and services; and none of them shall be answerable for any act or default of any other of them, or for the insufficiency or deficiency in the title or otherwise of any security whatsoever which shall be taken for the repayment of any advance, unless the loss arising by such means shall happen through their own neglect or default."

At the material times there were twelve directors of the society, namely, John Aizlewood, Alfred Bennett, Henry Bloor, Thomas Charlesworth, Robert Thomas Eadon, John Taylor, John Wilson, Simeon Hayes, Joseph Brailsford, Alfred Allott, Robert Leader, and Henry Loxley. All of them except Robert Leader and Henry Loxley, who had since died, were defendants to this action. Robert Leader and Henry Loxley being dead, their legal personal representatives were made defendants. The defendant Allott and the legal personal representatives of Loxley did not put in any defence, and judgment was given against them in default of appearance. This report deals with the position of the other directors.

Rigby, Q.C., Buckley, Q.C., and Theobald for the plaintiffs.

Sir Horace Davey, Q.C., Hastings, Q.C., and Chadwyck Healey for the first eight defendants.

Bigham, Q.C., and Upjohn for the defendant Brailsford.

Pearson, Q.C., and Levett for the personal representatives of the defendant Leader.

Cur. adv. vult.

Nov. 6, 1889. **STIRLING, J.**, read a judgment in which he said: The transactions impeached in the action divide themselves into three heads: First, an original advance of £25,000 in 1878; secondly, an advance of £41,000 in November, 1881; and thirdly, an expenditure for the preservation, maintenance, and working of the colliery. Each of these matters involves somewhat different considerations, and I propose to deal with them separately.

The original advance of £25,000 is attacked on the ground that it was beyond the powers of the society, or at all events of the directors; and, further, that it was made so recklessly and improvidently as to render the directors liable in respect of it, even if it was within their powers. Was the advance beyond the powers of the society? The object of the society is to make advances "upon security of freehold, copyhold, and leasehold estate." It is said that the advance of £25,000 was not made on such security, but on the security of the colliery and mines carried on by Mr. Joseph. In fact, however, the Dunraven, Hendrewen, and Blaengwini properties were held under leases, and constituted leasehold estate, the leases including minerals, which were to be worked and got by the lessees. The property offered as security was, therefore, to some extent of a wasting nature, and its value was affected by its being used for the purposes of the colliery business carried on by Joseph. Those were matters fit and proper to be considered in determining what amount should be advanced on the security of the leasehold property; but, in my judgment, it cannot be said that the society was precluded by reason of the existence of those circumstances from making any

advance, however small, on mortgage of it; and I am, therefore, of opinion that this part of the transaction was not beyond the powers of the society. Whether the sum advanced was properly advanced is a matter which requires subsequent consideration.

It was next said that the advance was not made exclusively on the security of leasehold estate, but was made partially on the security of the interests of Mrs. Joseph and her children in the funds held on the trusts of the two settlements of Sept. 28, 1876, and Jan. 15, 1877; it was said that those interests constituted an essential and integral part of the securities taken by the plaintiff society, and that reliance was placed upon them by the directors; and it was contended that the inclusion of those interests in the securities vitiated the whole transaction—that, in fact, the inclusion of any personal element in the security would vitiate such a transaction. [As to additional securities see now Building Societies Act, 1962, s. 26, Sched. 2.] If this contention were pushed to the utmost extent, it would seem to follow that the inclusion in the building society's mortgage of a personal covenant by the mortgagor for repayment of the advance, and reliance placed by the officers of the society on the solvency of the mortgagor, might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and, in my judgment, properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society, and I think that the officers of the society might to a certain extent, and for certain purposes, rely on the solvency of the mortgagor.

For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject-matter of the security. If the circumstances of the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like advantage by means of the personal guarantee of a third party, or a charge on some readily available pure personal estate. The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Building Societies Act, 1874, and the question for the officers of the society to determine is what amount may properly be advanced, and that they must decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower, or the worth of any personal estate he may be willing to throw in.

Next, it is to be considered whether the transaction, though within the powers of the society, was within the powers of the directors; and here it will be convenient to commence with some general observations as to the position and duties of directors of such societies. It has been laid down—and I take it to be established law—that directors of trading companies are not trustees in the sense in which that term is used with reference to settlements or wills. The question is discussed, and the authorities considered, in *Re Faure Electric Accumulator Co.* (1), and it is sufficient for me to refer to the judgment of KAY, J., in that case. It is said, however, that the rules there laid down refer to trading companies incorporated under the Companies Acts, and that the directors of building societies incorporated under the Building Societies Act, 1874, are in a different

position. Such societies, according to s. 13 of that Act [see now s. 1 (1) of A Building Societies Act, 1962], are established

“for the purpose of raising, by the subscriptions of the members, a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate.”

It has been repeatedly pointed out that the objects of such societies are twofold: on the one hand, to assist some of the members to obtain advances on the security of their property; on the other hand, to assist others to obtain a high rate of interest on their money.

Thus, in the judgment in *Fleming v. Self* (2), in which LORD CRANWORTH elaborately explained the nature and objects of such societies as were established under the Benefit Building Societies Act, 1836, he says:

“In truth, the whole scheme is but an elaborate contrivance for enabling persons, having sums for which they have no immediate want, to lend them to others at a very high rate of interest;”

and in *Re Guardian Permanent Benefit Building Society* (3) SIR GEORGE JESSEL, M.R., says of the same Act (23 Ch.D. at p. 458):

“It was the object to assist, therefore, some of the members to obtain freehold or leasehold property, and some a high rate of interest.”

Similar observations apply to societies incorporated under the Act of 1874. The societies, therefore, in one aspect of them have for their object the acquisition of gain in the shape of a high rate of interest by the investing members, and the directors ought not, in my opinion, any more than the directors of companies formed under the Act of 1862, to be held liable upon the rules (which JAMES, L.J., in *Marzetti's Case* (4), said were, in his opinion, too strict rules) laid down by the Court of Chancery with respect to the duties of trustees of wills and settlements, where the preservation of the trust funds is the primary object. Some of the observations of the other learned judges who took part in the decision in *Marzetti's Case* (4) also deserve consideration. The present Master of the Rolls [LORD ESHER, then BRETT, L.J.] says (42 L.T. at p. 209):

“The question is whether Mr. Marzetti has been guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law. Mr. Marzetti has been guilty of not making those inquiries which a person of ordinary care in his position would have made.”

COTTON, L.J., says (*ibid.*):

“Trustees are liable whatever trouble they take, if the fund in their case goes not according to the trust. Opinions of counsel, bona fides, or care, do not protect them. Now, directors are confidential agents with the liabilities of trustees, but they have a large discretion, and, if they act bona fide, they are relieved, and are not liable for want of judgment or error if they make a payment which is in fact not for the purposes of the company.”

In the exercise of this large discretion, the directors may, as I conceive, properly make advances on classes of securities forbidden to ordinary trustees.

One rule which is binding on ordinary trustees is thus stated by LORD WATSON in *Learoyd v. Whiteley* (5) (12 App. Cas. at p. 733):

“Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to that class of investments which are permitted

by the trust, and likewise to avoid all investments of that class which are attended with hazard."

In my judgment, directors are not under an obligation to avoid investments attended with hazard, but might, in the absence of anything to the contrary in the rules or articles of association, act in the same manner as men of business of ordinary prudence, and, if any particular society or company should deem such powers too wide, it would be competent to the members to properly frame rules or articles to impose such restrictions as they might deem advisable.

Is there then to be found in the rules any limitation on the powers of the directors as regards the nature of the property on the security of which they may make advances? It is observed that the rules of the society, though they deal with various special kinds of property, contain no reference to collieries. It is pointed out that one of the permanent officers of the society is the surveyor, whose duty it is to survey and value property offered as security, and whom the directors were bound to consult; and it is said that, inasmuch as the property offered by Mr. Joseph was of such a nature that Mr. Innocent, the duly appointed surveyor, was (as is admitted on both sides) not qualified to give an opinion as to its value, the directors ought at once to have seen that it was not one which they were authorised to accept. Rule 54 (as to the alteration of mortgaged property) was also referred to as showing that the directors had no power to take the security of a wasting property, such as a colliery in active operation. The rules of the society appear to be framed on the supposition that the property likely to be most frequently or ordinarily offered as security, or, at all events, one class of such property, would be land on which buildings were, or were proposed to be, erected, and there are to be found rules dealing with that kind of property. Mr. Innocent was an architect, and qualified to survey and value such property, and was doubtless chosen to fill the office of surveyor in the like expectation; but I do not find anything in the rules which limits the operations of the society to that or any other species of property. The terms of r. 47 are of the widest possible description:

"The funds of the society shall be applied in making advances to members in respect of the shares held by them on legal or equitable mortgage of freehold, copyhold, or leasehold property."

It was, therefore, within the powers of the directors to accept any such property as security. It might be difficult, or even impossible, to find a person duly qualified to advise them as to the value of every species of such property; and the rules do not appear either explicitly or by implication to prohibit them from obtaining the advice of a duly qualified expert in a particular case, where the permanent surveyor might not happen to be such. As to r. 54, it appears to be directed to a similar matter, and to have for its object to secure that changes in the nature of the mortgaged property shall receive the sanction of the directors. I am, therefore, of opinion that the proposed transaction was within the powers of directors.

I have now to consider whether the defendants who appear have so acted with reference to the transaction, which is within their powers, as to be held liable for the advance of £25,000. [His LORDSHIP referred to the evidence, said that with regard to the original advance of £25,000 he had come to the conclusion that the defendants had not been guilty of any neglect or default, and continued:] The advance of £41,000 in November, 1881, is next to be considered. It is of a totally different nature from that of the £25,000. It does not fall within the category of ordinary advances to members. It was not an investment of any portion of the funds of the society, for there were no funds to invest, and the money actually used was borrowed. There is no rule which in express terms sanctions such an advance, but it was sought to be justified in argument on the ground that the directors, having power to make advances on a second mortgage, had by implication power to redeem a prior charge, and this was the best, and

indeed the only course open to them under the circumstances. To this it was answered on behalf of the plaintiffs that the directors had no such implied power, and in support of this proposition *Small v. Smith* (6) was relied upon. That case was before the House of Lords on appeal from the Court of Session. It appeared that a building society in Scotland incorporated under the Act of 1874 had made an advance to a Mr. McDonald, a member of the society, on the security of certain property subject to a prior charge in favour of Small and others, the appellants to the House of Lords, for £3,000. This security contained a proviso enabling the society to pay off this prior charge, and binding Mr. McDonald, the mortgagor, to repay to the society the expenses of discharging the prior security and the prior incumbrances. The appellants gave, as by the law of Scotland they were entitled to do, notice that they proposed to exercise the power of sale incidental to their security, and thereupon negotiations took place between them and the directors of the building society, which resulted in the grant by the directors of a bond whereby the society, in consideration of the appellants forbearing for six months to exercise the power of sale, became bound at the expiration of that period to pay to the appellants what was due on their prior encumbrance. The consideration for this bond did not appear on the face of it, but was, in fact, the appellants' forbearance to exercise the power of sale. The question was whether that was binding on the society. The rules expressly empowered the directors, on the failure of an advanced member to pay what was due from him, to enter into possession and receive the rents and profits, and to sell, and it was provided that when such default was made the society should have full power to act in every respect as absolute proprietor and owner of the property. There was also a rule that the directors should have power to act for the society in accordance with the rules in any matter which might arise. It was held that neither under the special powers which were conferred on the board of directors by the rules of the society, nor under the general powers vested in them by implication, could the giving of the bond in question be justified, and it was held not to be valid.

The case, therefore, is different from the one which I have to consider, and it is important to see the grounds upon which the conclusion was based. It appears that LORD SELBORNE lays down that the directors of a building society have powers by implication to do those things which are proper consequences of the relation constituted between mortgagor and mortgagee, or the relation constituted between the first mortgagee and a second mortgagee, or which, by working out the legal rights or remedies already existing on the one side or the other, would or might result. Each of the noble Lords agrees that the question in a case like this is one of the authority of the directors, to be ascertained from the rules of the society; and they distinguish the position of the directors who, in the words of LORD WATSON, are unfettered, or who have unlimited powers to conduct the business according to the rules which guide individuals. Those last expressions appear to have reference to a case which was cited and relied on in the argument before the House of Lords and also before me—namely, *Re Asiatic Banking Corpn., Royal Bank of India's Case* (7). I do not think that what is there said is intended as an expression of opinion to the contrary of what is laid down by LORD SELBORNE, for his Lordship is there dealing with the case of a Scottish heritable bond, the holder of which has no right of foreclosure, such as by the law of England is vested in a first mortgagee. In my judgment, therefore, the directors had power to pay off the first encumbrance. If it was within their power to redeem, it was also within their power to borrow the necessary funds for the purpose, and the discretion which they exercised has not really been impeached. I think, therefore, that this portion of the case fails as against the defendants other than Allott and the representative of Loxley.

I have next to consider the case so far as it relates to the sums expended by the directors out of the assets of the company for the preservation, maintenance, and working of the colliery. It was contended, again on the authority of *Small v.*

Smith (6), that it was altogether beyond the power of the directors. On the other hand, it was contended, on the authority of the *Royal Bank of India's Case* (7), that the whole of this expenditure took place as a consequence of acts proper and prudent to be done with a view to obtaining the benefit of the security. The test, according to *Small v. Smith* (6), is not to consider whether the directors had power to do everything which might have been done by individuals or unfettered directors, but it is to be considered whether the rules confer expressly or by fair implication any such power on the directors. There is here no rule which expressly sanctions such expenditure. Neither is there any rule conferring on the directors of the society any such unlimited authority as was vested in the directors in the *Royal Bank of India's Case* (7). The rules again do not, as was the case in *Small v. Smith* (6), prescribe the duties of the directors as to the enforcing and realising of securities; but, by r. 19, they are empowered to do such acts as are authorised by the Building Societies Act, 1874. Section 13 of that Act confers on building societies power to hold land (with the right of foreclosure, subject to the obligation to convert into money as soon as conveniently may be practicable) to which an absolute title has been acquired. Under the powers so conferred the plaintiff society might enter into possession of any land, whether freehold, copyhold, or leasehold, comprised in a mortgage made by a member to secure an advance, and might retain possession till a sale was conveniently practicable. By the rules the directors are, as it appears to me, authorised to do the same thing.

Apart from this, I conceive that, under the general powers of management vested in the directors, they have by implication power to make use of any of the ordinary remedies of mortgagees, among which is to be reckoned the power of entering into possession of the land comprised in these securities. Such entry is, in the language of LORD SELBORNE, one of those things which would or might result from the working out of the legal rights and remedies already existing. This being so, it appears to me to follow that, if the land be leasehold, the directors must, upon entering into possession, have power to make all ordinary payments necessary to prevent the forfeiture of that property, and particularly to expend out of the assets of the society all sums necessary for the payment of rent, when such payment is secured by a power of re-entry contained in the lease. I do not think that any inference to the contrary can fairly be drawn from the special provisions contained in rr. 51 and 53, both of which appear to me to confer powers of expenditure of an ampler nature than that which has been just expressed. Rule 51, which is to be read in connection with r. 50, deals with advances to be made to members for the purpose of building, and would apply to a case where the land is not held subject to any condition or stipulation for the erection of such buildings. It, therefore, confers a power much wider than that which would accrue from the simple right of possession, and sanctions acts which, according to the tests expressed by LORD SELBORNE, would not be held within the powers of the directors of a society such as the plaintiff society. Rule 53, again, authorises the payment out of the funds of the society of any chief or ground rent not duly paid, and would, as I think, apply although the society had not entered into possession of the property which was the subject of the rent.

It follows from what I have said that the directors had power to enter into possession of the leasehold property mortgaged to them, and to pay the rents reserved by the leases under which Mr. Joseph held, so as to prevent the forfeiture of the demised property under the power of re-entry, and to expend out of the assets of the society all sums necessary for that purpose. Consequently, they cannot be liable for such expenditure. On the other hand, there is at least one considerable item for which it appears to be difficult to find legal justification. At the time when they entered into possession the wages of the miners were in arrear, and the directors paid those arrears, and expended in so doing sums amounting to £2,692 19s. 10d. This expenditure does not appear to me, as at present advised, to be, in the language of LORD SELBORNE,

"a proper consequence of the relation existing between mortgagor and mortgagee, or one of the things which, by working out the legal rights and remedies always existing on the one side or the other, would or might result,"

but to be rather a thing done to meet a temporary inconvenience, and one which there was no potential necessity to do. That is my present opinion upon the evidence before me, but I do not think these items were gone into very carefully, or discussed from the point of view from which I look at them; and, therefore, I mean to leave it open to the defendants to adduce further evidence as to the circumstances under which the wages were paid.

As regards the other items, it is not so easy to lay down any precise rule defining which are proper and which are improper. The difficulty may be illustrated by a passage in LORD SELBORNE's speech, which appears to lay down that directors might complete a building partially erected upon land, although they could not proceed to build where there had been a total failure to perform a contract to erect houses on the land. Under these circumstances I think it would be best that, before the case is finally disposed of, there should be an inquiry as to what assets of the company have been expended by the directors otherwise than in making the advances, or in payment of the rents reserved by the leases under which the various portions of the mortgaged property were held.

The order I propose to make is as follows: Declare that the defendant Allott and the estate of Mr. Henry Loxley, deceased, are jointly and severally liable to make good to the plaintiffs the amounts advanced out of the assets of the plaintiffs to Joseph in the statement of claim mentioned, and also the amounts expended out of the assets of the plaintiffs for the preservation or the maintenance and working of the colliery and securities therein also mentioned, with consequential accounts and inquiries, and order them to pay the costs up to the trial, such costs being properly limited, of course, to such a judgment as would be obtained upon the statement of claim. Dismiss the action, with costs, against the representatives of Mr. Leader. Declare that the remaining defendants are not liable to make good to the plaintiffs the amounts advanced out of the assets of the plaintiffs to Joseph, or expended out of such assets in payment of the rents reserved by the leases under which the leasehold estates comprised in the several securities in the pleadings mentioned were, or are, held. Dismiss the action, with costs, against them, so far as it claims relief in respect of the amounts so advanced and expended as aforesaid. Direct an inquiry, whether any and what amounts have been expended out of the assets of the plaintiffs, for the purposes of the said colliery, otherwise than in accordance with the last preceding declaration, and, if so, for what purposes and under what circumstances, and by which of the directors respectively, and reserve further consideration, and the question of all costs not disposed of by this order.

Order accordingly.

Solicitors: *Geare, Son & Pease* for *B. Wake & Co.*, Sheffield; *Pilgrim & Philips* for *Watson, Esam & Barber*, Sheffield; *Arnold Williams & Co.* for *Parker & Brailsford*; *Torr, Janeways & Co.* for *Burdekin, Benson & Burdekin*, Sheffield.

[Reported by A. PULLING, Esq., Barrister-at-Law.]

GLASGOW CORPORATION v. FARIE

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell and Lord Macnaghten), November 28, 29, December 1, 2, 1887, August 10, 1888]

[Reported 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274;
37 W.R. 627; 4 T.L.R. 781]

Compulsory Purchase—Water undertaking—Reservation of “mines of coal, ironstone, slate or other minerals”—“Minerals”—Subsoil clay—Construction of reservation.

By s. 18 of the Waterworks Clauses Act, 1847: “The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.”

Ordinary subsoil clay, lying at a depth of two or three feet below the surface of the soil and being of varying thickness and normally wrought opencast, is not a “mineral” within s. 18, and so was **held** not to be excepted from the conveyance on a compulsory purchase of land by water undertakers.

Per LORD WATSON: In construing a reservation of mines or minerals, whether it occur in a private deed or in an inclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative positions of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. “Mines” and “minerals” are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used It appears to me that the policy of the [Waterworks and Railway Clauses] Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller My present impression is that “other minerals” must necessarily include all minerals which can reasonably be said to be ejusdem generis with any of those excavated.

Per LORD MACNAGHTEN: The exception in favour of the vendor in s. 18 of the Waterworks Clauses Act, 1847, does not extend to minerals other than minerals of which mines are composed. The word “mines” in its primary significance means underground excavations or workings.

Notes. Section 18 of the Waterworks Clauses Act, 1847, was repealed by the Water Act, 1945 (26 HALSBURY'S STATUTES (2nd Edn.) 913), and replaced by s. 11 of Sched. 3 to that Act. Section 77 of the Railways Clauses Consolidation Act, 1845 (19 HALSBURY'S STATUTES (2nd Edn.) 590), is in the same terms as s. 18 of the Act of 1847.

Considered: *Midland Rail. Co. v. Robinson*, post; *Jersey v. Neath Poor Law Union* (1889), 22 Q.B.D. 555; *Johnstone v. Crompton*, [1899] 2 Ch. 190; *Great Western Rail. Co. v. Blades* [1901] 2 Ch. 624. Explained: *Re Todd, Birleson and North Eastern Rail. Co.*, [1903] 1 K.B. 693. Considered: *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278. Explained and Distinguished: *Great Western Rail. Co. v. Carpallu United China Clay Co.*, [1909] 1 Ch. 218. Considered: *Skey v. Parsons* (1909), 101 L.T. 103; *North British Rail. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *South Staffordshire Mines Drainage Comrs. v. Elwell* (1927), 91 J.P. 113. Applied: *Waring v. Foden*, *Waring v. Booth Crushed Gravel*

Co., Ltd., [1931] All E.R. Rep. 291; *Borys v. Canadian Pacific Rail. Co.* [1953] 1 All E.R. 451. Referred to: *Greville v. Hemingway* (1902), 87 L.T. 443; *Bishop Auckland Industrial Co-operative Flour and Provision Society v. Butterknowle Colliery Co.* (1904), 73 L.J.Ch. 335; *Eden v. North Eastern Rail. Co.*, [1904-7] All E.R. Rep. 513; *Rugby Portland Cement Co. v. London and North Western Rail. Co.*, [1908] 2 K.B. 606; *Scott v. Midland Rail. Co.*, [1910] 1 K.B. 317; *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd. v. Farquharson*, [1911-13] All E.R. Rep. 190; *Australia Commonwealth v. Hazeldell*, [1921] 2 A.C. 373; *R. and W. Paul, Ltd. v. Wheat Commission*, [1936] 2 All E.R. 1243; *Mosley v. George Wimpey & Co.*, [1944] 2 All E.R. 135.

As to the acquisition of land for water undertakings and the exception of minerals, see 39 HALSBURY'S LAWS (3rd Edn.) 327-330, and cases there cited.

Cases referred to :

- (1) *Hext v. Gill* (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957, L.J.J.; 33 Digest (Repl.) 727, 44.
- (2) *Great Western Rail. Co. v. Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 9 Digest (Repl.) 164, 375.
- (3) *Menzies v. Earl of Breadalbane and Holland* (1822), 1 Sh. Sc. App. 225; 33 Digest (Repl.) 731, *13.
- (4) *Darvill v. Roper* (1855), 3 Drew. 294; 3 Eq. Rep. 1004; 25 L.T.O.S. 302; 3 W.R. 467; 61 E.R. 915; sub nom. *Darvell v. Roper*, 24 L.J.Ch. 779; 33 Digest (Repl.) 723, 1.
- (5) *Bell v. Wilson* (1865), 2 Drew. & Sm. 395; 6 New Rep. 81; 34 L.J.Ch. 572; 12 L.T. 529; 11 Jur.N.S. 437; 13 W.R. 708; 62 E.R. 671; on appeal (1866), 1 Ch. App. 303; 35 L.J.Ch. 337; 14 L.T. 115; 12 Jur.N.S. 263; 14 W.R. 493, L.J.J.; 33 Digest (Repl.) 723, 2.
- (6) *Midland Rail. Co. v. Haunchwood Brick and Tile Co.* (1882), 20 Ch.D. 552; 51 L.J.Ch. 778; 46 L.T. 301; 30 W.R. 640; 33 Digest (Repl.) 723, 3.
- (7) *R. v. Wycombe Rail. Co.* (1867), L.R. 2 Q.B. 310; 8 B. & S. 259; 36 L.J.Q.B. 121; 15 L.T. 610; 31 J.P. 197; 15 W.R. 489; 33 Digest (Repl.) 306, 108.
- (8) *Pugh v. Golden Valley Rail. Co.* (1880), 15 Ch.D. 330; 49 L.J.Ch. 721; 42 L.T. 863; 28 W.R. 863, C.A.; 38 Digest (Repl.) 303, 66.
- (9) *Church v. Inclosure Comrs.* (1862), 11 C.B.N.S. 664; 31 L.J.C.P. 201; 8 Jur.N.S. 893; 142 E.R. 956; 11 Digest (Repl.) 74, 960.

Appeal by the plaintiffs in the action from a decision of the First Division of the Court of Session consisting of the Lord President (LORD INGLIS), and LORD SHAND and LORD ADAM (LORD MURE dissenting), reversing a decision of the Lord Ordinary (LORD MACLAREN) in favour of the appellants.

The action was brought by the appellants, the Lord Provost and magistrates of Glasgow, as commissioners under the Glasgow Waterworks Act, 1855, to restrain the respondent from working a bed of clay which formed the subsoil of a piece of land compulsorily purchased by them from the respondent's predecessor in title, for the purposes of their special Act, which incorporated the Waterworks Clauses Act, 1847, and the Lands Clauses Consolidation (Scotland) Act, 1845. The respondent claimed a right to work the clay, contending that it had not passed to the appellants, but was included in the reservation of "other minerals" provided in s. 18 of the Waterworks Clauses Act, 1847.

The Attorney-General (Sir Richard Webster, Q.C.) and Balfour Browne, Q.C. (Robertson, Q.C., with them) for the appellants.

Sir Horace Davey, Q.C., and Byrne for the respondent.

Their Lordships took time for consideration.

Aug. 10, 1888. The following opinions were read.

LORD HALSBURY, L.C.—I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire, therefore, to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships.

That question may be thus summarily stated—whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847. I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by JAMES, L.J., in *Hext v. Gill* (1), to which I shall have occasion hereafter to refer, and although the lord justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) that it is a question of fact what the words “mines and minerals” mean in the vernacular of the mining world, the commercial world, and landowners, at the time when they are used in the instrument it is necessary to consider. I will not at present say how far I think we are bound by authority because, as I have already intimated, I desire to keep myself entirely free if the question should arise in this House with respect to any other statute or with respect to any grant not controlled by the statute in question in which the words “mines and minerals” occur. It may be that I am influenced by the considerations to which WICKENS, V.-C., referred in *Hext v. Gill* (1), when he said (7 Ch. App. at p. 705, n.) that

“it might be thought that some inclination had arisen on the part of judges to give more weight than ought to have been attributed to some small circumstances of context in order to cut down the proper and ordinary meaning of the words ‘mines and minerals.’ ”

I think no one can doubt that if a man purchased a site for his house with a reservation of mines and minerals, neither he nor anybody else would imagine that the vendor had reserved under the reservation of mines and minerals the stratum of clay upon which his house was built.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word “minerals” less certain than when it originally was used in relation to mining operations. I should think that there could be no doubt that the word “minerals” in old times meant the substances got by mining, and I think mining in old times meant subterranean excavation. I doubt whether, in the present state of the authorities, it is accurate to say that in every deed or in every statute the word “minerals” has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten. MELLISH, L.J., in the case to which I have already referred, sums up the authorities by saying (*ibid.* at p. 712) that

“where the word mines is combined with the more general word ‘minerals,’ it does not restrict the meaning of the word ‘minerals,’ ”

and he says that the result of the authorities appears to be

“that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.”

I cannot myself assent to such a definition. In the first place, it introduces as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition, the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next. If, on the other hand, one is to have recourse to etymology or science, and to dis-

regard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would, to some minds, exclude its being regarded as a mineral, while the substance kaolin was held by WICKENS, V.-C., in *Hext v. Gill* (1) (7 Ch. App. at p. 705) to be a mineral :

“According to the evidence, kaolin, or china clay, is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ones, but which it was not commercially profitable to work in England for the purpose of extracting metal from it.”

The difficulty of dealing with this case is not diminished but rather increased by the state of the authorities upon the question.

In *Great Western Rail. Co. v. Bennett* (2) all that was decided in this House was that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used did not apply to a state of things created by the statute, in which the statute itself creates the distinction between the surface owner and the mineowner, and gives power to the mineowner to work his minerals unless the railway company purchases or gives compensation to the mineowner for leaving his mines unworked. In that case it was admitted that the word “minerals” was properly applicable to the substances to be worked, and the only question was the application of the common law principle to which I have adverted. But the legislature must have meant something by the distinction which it recognises and acts upon in drawing the distinction which, as a matter of business and understanding in the mining and commercial world, I think every one must be familiar with.

It appears to me that the effect of some of the decisions pushed to their logical consequences would altogether efface the distinction which all the statutes recognise. One might summarise these decisions and say that a mineral need not be metallic. It need not be subjacent; it need not be worked by a mine; it need not be in any one particular distinguished from any part of the substance of the earth, using the word “earth” as applicable to this habitable globe. Even the word “organic” must be rejected if referred to some of the substances which form part of the earth. The bones of extinct animals are limestone, and as curiosities for research and scientific inquiry would find a ready market. Are they minerals? I find myself called upon to construe the words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland and having relation to Scottish land and Scottish mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be, therefore, assumed to use the same phraseology in the same sense. Still, I am construing the application of general words to a purchase under the statutes made in Scotland, and if there be any difference in the law of Scotland from that of England the legislature must be supposed to have been familiar with it and to have legislated accordingly.

The case is stated by the Lord Ordinary thus :

“Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself: Did anyone who wanted to purchase or acquire a clay field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case

A of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different but the thing to be reserved is, to my mind, essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers, or superiors and feuers."

C If that is the correct view, and I find myself unable to differ from it, I think that *Menzies v. Earl of Breadalbane and Holland* (3) is a binding authority in this House. There the words were "haill mines and minerals of whatever nature and quality," and were held not to include a vein of stone suitable for building. I feel it impossible to resist the reasoning of LORD MURE in this case, but I hold myself free, if the question should arise in England, to consider quite independently of this decision what may be the law as applicable to an English case. I only regret that the test which JAMES, L.J., suggested, and which I think would have been the true one, was not adhered to in *Hert v. Gill* (1). In that case, as I have pointed out before, the substance which was called china clay was assumed to be metalliferous ore, and it was held that, though the lord of the manor had reserved it, he could not work it, because he had not also reserved a right to work it so as not to injure the land he had sold to a copyhold tenant. I hesitated very much to adopt the reasoning of that case, notwithstanding the high authority by which it was decided. I am satisfied with the view so clearly put forward by LORD MURE, and, upon the reasoning of that learned Lord's judgment, I move your Lordships that the interlocutor of the First Division of the Court of Session be reversed.

F LORD WATSON.—The question raised for decision in this appeal, which is one of general importance, has led to differences of judicial opinion in this House, as well as in the Court of Session. For my own part I have experienced considerable difficulty in forming an opinion upon it, owing to the very indefinite terms which the legislature has used to describe the minerals reserved by statute.

G to proprietors whose land is compulsorily purchased, for the purposes of railway or waterworks undertakings. The present controversy is between a statutory body of water commissioners and a landowner, who is now asserting his right to work out a seam of clay within a parcel of ground, about twenty-one acres in extent, which they acquired from him, under compulsory powers, in the year 1871; but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company. The court below disposed of the case without inquiry into the facts; and these must consequently be gathered from the statements made by the parties on record, which are unfortunately, in some respects, conflicting. It appears, however, and it was assumed in the arguments addressed to us, that the seam in dispute is composed of ordinary subsoil clay, such as is generally found throughout the district; that it lies at a depth of not more than two or three feet below the surface of the soil; that it is of considerable but variable thickness; and that it has been wrought opencast by the respondent in close proximity to the appellants' land, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground, the appellants have constructed upon it two reservoirs, each capable of storing nearly four million gallons of water, which have been sunk into and now rest upon the clay.

Section of the Waterworks Clauses Act, 1847, is identical, mutatis mutandis, with s. 77 of the English, and s. 70 of the Scottish Railway Clauses Act, 1845. It enacts:

"The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland, on the one hand, and Scotland, on the other; but it does not appear to me to admit of doubt that the legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries. In considering whether subsoil clay, such as we have to deal with in the present case, is one of the "other minerals" meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies v. Earl of Breadalbane and Holland* (3), in which it was held that the reservation by a superior in a feu-contract of the "haill mines and minerals" that might be found within the lands disposed in feu, did not give him right to a freestone quarry. Nor have I been able to obtain much light from *Hext v. Gill* (1) and other English cases referred to in the opinion of LORD SHAND, which his Lordship seems to regard as almost decisive of the present question.

The only principle which I can extract from the authorities is that in construing a reservation of mines or minerals, whether it occur in a private deed or in an inclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative positions of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. "Mines" and "minerals" are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used. In *Menzies v. Earl of Breadalbane and Holland* (3), LORD ELDON observed that the reservation

"is not contained in a lease, but in a feu, and I take it there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease; it is a question of a very different nature."

In *Hext v. Gill* (1) the controversy, which related to china clay worked for the purpose of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor under a contract which excepted "all mines and minerals," and in these circumstances it was sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Waterworks and Railway Clauses Acts, which follow and are connected with the sections of these Acts already noticed. The relation which they establish between seller and purchaser, in regard to all minerals which may be held to be excepted, appears to me to be, as LORD WESTBURY said in *Great Western Rail. Co. v. Bennett* (2), clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mineowner. The latter, who is forced to part with the surface of his land, and all uses for which it is available, is not compelled to sell his minerals, while he is not in a position to ascertain their marketable value, or the impediments which might be occasioned to the convenient working of his mineral field by his parting with a strip which intersects it. On the other hand, those who deprive him of the right to a portion of the surface and its uses by compulsory purchase, enjoy the benefit of subjacent and adjacent

support to their works without payment, so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that, if they desire such support to be continued, they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out. It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with "minerals" as something which may be different from and additional to "mines." They do not except mines and minerals, but mines of coal, ironstone, slate, and other minerals; that is to say, they only except minerals which, when worked, will constitute "mines" within the meaning of s. 18 of the Act of 1847, and of the corresponding sections of the Railway Clauses Acts.

It, therefore, becomes necessary to consider what meaning ought in these sections to be attributed to the word "mine," and also what are the "other minerals," mines of which are specially excepted? The solution of the second of these queries must necessarily be, in a great measure, dependent upon the answer to be given to the first. There is a class of cases in the English books which determine that the word "mine" is, according to its primary meaning, significant merely of the method of working by which minerals are got, but that is not its only or necessary meaning. Shortly after the passing of the [repealed] Poor Relief Act, 1601, it was established by a series of decisions, the soundness of which has been often doubted, that occupiers of mines other than coal mines are exempted from the incidence of the poor rate. That point being settled beyond recall, the courts gave a restricted meaning to the word "mine," and decided that, in the sense of the Act of Elizabeth, it must be taken to be a subterranean excavation. It was accordingly held that persons who worked lead, freestone, limestone, or even clay, by means of a shaft and underground levels, were not liable to be rated in respect of their occupancy; while others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the courts erred in limiting, so far as they could, the exemption which, for some reason or other, had been established; but I may venture to express a doubt whether any such exemption or distinction with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847. I am unable to assent to the appellants' argument that, in s. 18 of the Waterworks Clauses Act, "mines" must be understood in the same sense which it has been held to bear in the statute of Elizabeth. Such may have been the original meaning of the word, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry. I think most people would naturally call it a gold mine.

The whole frame of s. 18 indicates, in my opinion, that the legislature intended it to include minerals got by open working as well as minerals got by what has been termed mining proper. The clause excepts mines of slate and also of "other minerals"—an expression which must, at the least, include rock strata of the same homogeneous character, and generally worked, or capable of being worked, by the same methods as slate. The fact is of sufficient notoriety to be noticed here that, although in the extreme south-west of the island slate is obtained by subterranean workings, the reverse is the rule in North Wales and in Scotland, where it is quarried. The word "quarry" is no doubt inapplicable

to underground excavations; but the word "mine" may without impropriety be used to denote some quarries. DR. JOHNSON defines a quarry to be a stone mine. In passing s. 18 and the corresponding railway clauses, the legislature plainly intended that waterworks undertakers and railway companies should, at the time when they take land by compulsion, pay full compensation for and become at once proprietors of all surface and other strata which are not excepted.

To adopt in these clauses the same construction of "mines" which has been followed for the purposes of the English poor rate would, in my opinion, lead to consequences which the legislature cannot have contemplated. In that case the extent to which minerals in the land were sold or excepted, at the date of the conveyance, would depend upon the mode, under ground or open cast, by which they might be found, at some future and far distant time, to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate, it would be well-nigh impossible, at the date of the purchase, to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the legislature, in using the expression mines of slate, meant to distinguish between the different methods of getting it, and to enact that slate, which may never be disturbed, shall be taken and paid for at once, if it would naturally be quarried, but shall not be taken and paid for until it is actually worked if it would naturally be got by means of an underground level. It was certainly within the contemplation of the legislature that water or railway works may rest upon excepted minerals; because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain foundations for their works, there is no roof to the excepted minerals; and it is difficult to understand how, in these circumstances, they could be got by proper mining. I am, accordingly, of opinion that in these enactments the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquires, in my opinion, no right, save the right to use that part of the surface; they acquire no right to the minerals themselves, except in so far as these are dug out or excavated in order to construct their works.

The important question still remains: What are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be ejusdem generis with any of those excavated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata. I may add that, so far as I can see, it is possible that there may be some strata which would pass to the compulsory purchasers, if they lay on the surface, but may possibly be reserved to the seller, if they occur at some depth below it. But I desire to say that, in the view which I take of the present case, it is not necessary to determine any of these points. The enactments in question describe the excepted mines of minerals, as lying under the land compulsorily acquired; and they appear to me to contemplate that the purchasers, as soon as they obtain a conveyance, shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface; and the question, therefore, arises what, in ordinary acceptation, is understood to be the surface crust of the earth which overlies its mineral strata? It is, of course, conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust, is not within the exception; but it is also the fact that, in many districts, the cultivable soil is mainly composed of clay, which is a mineral in the sense that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould, or to cultivated clay; but

that it naturally includes, and must be held to include, the upper soil, including the subsoil whether it be clay, sand, or gravel; and that the exceptional depth of the subsoil, while it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals. I am, accordingly, of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed, and that of the Lord Ordinary allowed.

LORD HERSCHELL.—I have the misfortune to differ from the rest of your Lordships who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but, to my mind, it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land from a predecessor in title of the respondent for the purpose of constructing works authorised by the Glasgow Corporation Waterworks Act, 1866, for the sum of £11,000, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of the "whole coal and other minerals in the said lands in terms of the Waterworks Clauses Act, 1847." The Act just named, which is incorporated with the appellants' private Act, under which the land was purchased, provides (s. 18): [His LORDSHIP read the section] I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by the operation of the disposition alone without regard to the statutory provision I have quoted.

It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us. Within and under the lands purchased, and the adjoining land, there is a seam of clay which the respondent had been for some time working in the adjoining lands, and in March, 1885, he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them to state whether they would avail themselves of their right to prevent his working the seam by making him compensation therefor in terms of the Waterworks Clauses Act, 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it. In the fourth condescendence it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoining has been wrought open cast, "but previous tiring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned Lord Ordinary being of opinion that it was unnecessary to do so.

Upon the allegations I have referred to the question arises, and I think it is the sole question in the case, whether this seam of clay was reserved within the terms "mines of coal, slate, ironstone, and other minerals," or whether the whole of it lying under the land conveyed passed by the conveyance. The real question, then, to be determined is the meaning to be given to the words "mines and other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments. Your Lordships were referred to various English authorities for the purpose of showing that clay had been held in a case in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals

had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scottish authorities, and notably on *Menzies' Case* (3) in your Lordships' House, as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone, which could only be obtained by quarrying. LORD MURE, whose judgment in the court below was in favour of the appellants, based his opinion upon the ground that, though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scottish law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all Waterworks Acts, whether in England or Scotland, and that both the Scottish and English Railways Clauses Acts contain similar provisions.

When the object and purview of these various statutes is regarded, it is not to be supposed that the legislature intended the same or similar enactments in these various statutes to have a different meaning. What we have to do, then, is, I think, to look at the purview and intent of the Acts, and to consider what the legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them, it may be well to inquire what was the object of the legislature in reserving the minerals and not vesting them in the undertakers of the works authorised by the Acts with which the general Act is incorporated. This object is, I think, clearly stated by the learned Lords who delivered their opinions in *Great Western Rail. Co. v. Bennett* (2). I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never desire to work, and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the waterworks or railway constructed on the surface of the land. I think, therefore, that we should expect to find reserved all minerals under the land of such a nature as are commonly worked and possess a value independent of the surface.

I propose first to inquire what meaning ought to be attached to the word "minerals," supposing only the words "coals, ironstone, slate or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports, *prima facie*, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things *ejusdem generis* with those specified, or otherwise. There is no common genus within which coal, slate, and ironstone can be comprised, except that they are mineral substances of sufficient value to be commonly worked. But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines" of coal, ironstone, slate, or other minerals under the land purchased. It appears to me that this limits the reservation to mines of

the substances named, and, therefore, to "mines" of the other minerals included in the general term.

What, then, is the interpretation to be put upon the word "mines?" I think the primary idea suggested to the popular mind, by the use of the word, is an underground working in which minerals are being or have been wrought. It is certainly often used in contrast to "quarry," as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing to an underground cavity in which minerals are being or have been wrought would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think, in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings, they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term slate quarry is undoubtedly sometimes made use of, though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing s. 18. It is no doubt exceptional to obtain coal and iron except by underground workings, but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered, and I think this has an important bearing on the view adopted by the learned Lord Ordinary, that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got, even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can only work such portion of them as can be removed without causing disturbance of the surface, or if he remove more he must provide some substituted means of support. Therefore, where it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface. Once this conclusion is arrived at, it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface, and one which came within two feet of it? And if the latter would be within the reservation, how can a seam of clay similarly situated be excluded?

I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants. For, proof not having been led, I cannot assume that the clay might not be got otherwise than by surface operations by working on from the adjoining land, though, of course, its removal would cause subsidence and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived at, but I do not see my way to differ from the judgment of the court below. I think the

reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata, as are commonly worked for profit, and have a value independent of the surface of the land. I desire to guard myself against being supposed to decide more than I do. The pursuers in this action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that, in my opinion, arises for decision is whether they are entitled to do so. I say this because it was contended before us that inasmuch as the statute authorises the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the bottom and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I, therefore, forbear from expressing any opinion upon it or (assuming it to be well founded) upon the further question how much of the clay can be considered as having been used for the purpose of the waterworks, and, therefore, as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

LORD MACNAGHTEN.—Your Lordships are called upon to determine the meaning of the word “mines,” in s. 18 of the Waterworks Clauses Act, 1847. That section is the first and the most important section in the group of clauses collected under the heading “with respect to mines.” Corresponding provisions are to be found in the Railways Clauses Consolidation Act, 1845, s. 77, and the Railways Clauses Consolidation (Scotland) Act, 1845, s. 70. The argument before your Lordships proceeded on the ground that so far as the present question is concerned the three Acts must be construed alike, and that, in regard to mines under or near lands purchased for the purpose of the undertaking, railways are in precisely the same position as waterworks. The case, therefore, is one of considerable importance. But the question lies in a narrow compass, and must, I think, depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railways Acts.

The exception in favour of the vendor in s. 18 of the Waterworks Clauses Act, 1847, comprehends, it will be observed, mines of all sorts—mines of coal, ironstone, and slate, and mines of other minerals—but nothing else. Taking the words in their ordinary signification, and in their grammatical construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the latter part of the section, where the expression “such mines” refers to and sums up everything covered by the words of description previously used. On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word “mines.” It excepts “only such parts” of the mines under the lands purchased “as shall be necessary to be dug or carried away, or used in the construction of the works.”

The meaning of the word “mines” is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral it means little more than veins or seams or strata of that mineral. But, however the word may be used, when we speak of mines in this country, there is always some reference more or less direct to underground working. In *Darvill v. Roper* (4), and again in *Bell v. Wilson* (5), *KINDERSLEY, V.-C.*, had to consider the meaning of the term “mines.” In the latter case he asks the question (2 Drew. & Sm. at p. 399): “What is a mine?” and he answers it thus:

“I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would, perhaps, require some labour to define precisely what

each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally or laterally, whereas a quarry is when the working is sub dio. There is not the slightest doubt in my mind as to the difference between them."

Bell v. Wilson (5) was taken to the Court of Appeal. In his judgment, on the appeal, TURNER, L.J., asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the Vice-Chancellor.

It was admitted that there is no reported case which throws any doubt on the accuracy of the language used by the Vice-Chancellor in defining or describing a mine. If one wanted a recent authority to confirm the Vice-Chancellor, and to emphasise the ordinary meaning of the word "mines," one could not, I think, do better than turn to the judgment of KAY, J., in the *Midland Rail. Co. v. Haunchwood Brick and Tile Co.* (6). In describing the case before him the learned judge says (20 Ch.D. at p. 560):

"The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings."

Dealing, therefore, with s. 18 alone, there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has, indeed, been suggested that the mention of slate tends to show that the word "mines" is used in a loose way, without reference to any particular mode of working, because slate is usually got by open working. But, as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and that slate quarries are not, especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and, therefore, to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and waterworks, in deep cuttings, in tunnelling, or in sinking wells, it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill. And so the Act gives them, as included in their purchase, such parts of the mines, or in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them nothing more. How strictly railway companies are tied down when their powers are limited by reference to what is "necessary" is shown by the decisions on s. 16 of the Railways Clauses Consolidation Act, 1845, as to the diversion of roads and rivers: *R. v. Wycombe Rail. Co.* (7); *Pugh v. Golden Valley Rail Co.* (8).

The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of "mines" all minerals of every description however they might be worked, and, therefore, such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorised to use not merely such parts of the "mines" as might be necessary, but such parts as might be useful or proper for constructing their works, and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mineowner or his

surveyor. So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow s. 18, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term) lying under or near the lands of the undertakers or the company. In these sections we find the expressions "mines or minerals," "such mines," "such mines or minerals," "such minerals," "parts of mines," and "mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

The word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals" when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with "minerals" does not of itself limit the meaning of the latter word. At the same time, it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one, perhaps etymologically more correct, as denoting the contents or products of mines. Nor, indeed, are the authorities all one way in preferring the wider meaning of the word "minerals." In *Church v. Inclosure Comrs.* (9) WILLIAMS, J., observed, and apparently the rest of the court agreed, that "minerals in the ordinary sense" meant "minerals which could be worked in the ordinary way underground leaving the surface or crust unaffected."

In dealing with the sections which follow s. 18 it is to be observed that their scope is not, like the scope of s. 18 and the corresponding section [s. 77] of the Railways Act, limited to mineral property lying under the lands purchased and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company. It would, therefore, not be enough for the respondents to make out that these sections deal with minerals not contained in mines. They must show that on the fair reading of these sections the word "mines" includes minerals, whether got by mining or not. If that could be established it would go far towards proving that the word "mines" must have that meaning in s. 18 and in the corresponding section of the Railways Act. It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is comprehended by the term "minerals" as therein used. But then comes the question: Is the word "minerals" to have its wider signification, and, therefore, to enlarge the meaning of the word "mines," or is the word "mines" to control the meaning of the word "minerals?" In the absence of an explanatory context or some indication to be gathered from the nature of the case it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still it is not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining.

Therefore, if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe. Apart, however, from this argument, it seems

to me that if you look at these enactments carefully, comparing one with the other, you will find enough to show that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in s. 78 of the Railways Clauses Consolidation Act, 1845

"if it appear to the company that the working of such mines or minerals is likely to damage the works of the railways,"

becomes in the Scottish Act, s. 71,

"if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway."

In the rest of the latter section the two expressions, "parts of mines" and "minerals," are used indifferently as convertible terms. The section proceeds as follows :

"and if the company be desirous that such mines, or any parts thereof, be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines . . . which they shall desire to be left unworked . . . and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice."

In s. 72 of the Scottish Act there is a passage which refers to minerals as being contained in mines; and the context shows that the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence :

"If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier [that is, the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance] to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines and minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein."

The expression "the minerals contained therein" must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of the minerals in working is not to get minerals, using the word in its widest signification, but to get minerals contained in the mines.

I ought, perhaps, to refer to the passage in which the word "minerals" originally occurs in the material sections of the Waterworks Clauses Act, 1847. It occurs first in s. 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals," lying under or near the works, "be desirous of working the same," he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of the word may be traced to that passage. If the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous, whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the

mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or even as occupiers of the mines. They might be worked by persons having merely a licence to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and as being a less awkward expression for the draftsman's immediate purpose than the expression "parts of mines" which occurs in s. 18.

At the same time, if the word "minerals" in the sense of "parts of mines," or "minerals contained in mines regarded as separate from the chamber which contains them," be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of s. 18. That section and the corresponding sections of the Railway Acts, *mutatis mutandis*, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expression in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like s. 18 of the Waterworks Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts. There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals for making airways and mining communications, all seem to point in the same direction, and to show that the Acts throughout these sections are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Waterworks Clauses Act. But it may be observed that s. 12 authorises the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees, and other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to show that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Consolidation Act, 1845, it is, I think, worth while to refer to the group of sections prefaced by the heading, "With respect to the temporary occupation of lands near the railway during the construction thereof": ss. 32 to 43 of the English Act, ss. 27 to 36 of the Scottish Act. These sections empower the company, for certain specified purposes, to enter upon and use any lands within a distance from the centre of the line not measured by, or necessarily corresponding with, the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land. The purposes specified in the Acts include [s. 32] "the purpose of taking earth or soil by side cuttings therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers, the company is authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other things that may be found therein useful or proper for constructing the railway." Later comes a proviso

"that no stone or slate quarry, brick field, or other like place, which at the time of the passing of the special Act shall be commonly worked or used for

getting materials therefrom for the purpose of selling or disposing of the same, shall be taken or used by the company."

It is clear, therefore, that in certain cases and for certain purposes a railway company may enter upon lands containing brick earth, and use that brick earth, although the lands may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But, while working as temporary occupiers, they are bound (s. 41) to work in accordance with the directions of the surveyor or agent of the owner of such lands. Section 42 provides that, in all cases where the company enters upon lands for temporary purposes, the owner may "serve a notice in writing on the company requiring them to purchase the said lands." The company thereupon is "bound to purchase the said lands." Nothing is said about mines or minerals in this section, or in this part of the Act, and, as I have already pointed out, there may be cases when the company is not in a position to serve a counter-notice requiring the owner to sell his mines. Section 43 provides: "where the company shall not be required to purchase such lands," compensation shall be made for their temporary occupation, and such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such land."

It seems to follow from the consideration of these sections that, where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner, the purchase vests in the company, as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor. This result, however, seems somewhat incompatible with the view which the respondents take of the meaning of the term "mines" in s. 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and, therefore, to lands which the owner requires the company to purchase under s. 42. If the respondents' view be correct a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the land-owner to sell mines has passed, the company is helpless. Purchase it must. But the purchase prevents its using the lands for the only purpose for which they were wanted, unless indeed you are prepared to do extreme violence to plain language, and to read the provision vesting in the company such parts only of the mines under the lands purchased by them as shall be necessary to be used in the construction of the railway, as vesting in them, to an unlimited extent, whatever may be useful or proper for constructing the railway.

It was urged before your Lordships that the enactments dealing with mines were passed for the benefit of persons authorised to construct waterworks and railways; that, to use KAY, J.'s, language, there was "no reason, therefore, for putting a narrow or restricted construction upon the word 'mines,'" and that consequently the word ought to be held to include minerals of every description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament, to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed. However that may be, it appears to me that the enactments under consideration were not intended to benefit waterworks or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed, if LORD CRANWORTH'S

suggestion in *Great Western Rail. Co. v. Bennett* (2) be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common law rights to compulsory purchases. I doubt whether railway companies were special favourites with the legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is, if the language used has its ordinary and proper signification. Confine the enactment to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals, which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser, it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct waterworks require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. In many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay, and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondents' argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration, without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the legislature unless I found it clearly expressed in an Act of Parliament.

Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface minerals there is no peculiar hardship in taking a strip of minerals. If the landowner were selling a strip of his land to an ordinary purchaser he would, in ordinary course, sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be compelled to sell his property in slices, and to wait for half the price (to take the figures from the present case) until he is in a position to intimidate the railway company? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface, not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil as gravel, clay, and stone.

If the decision under appeal be upheld, railway companies may no doubt protect themselves in future purchases. But I suspect that in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago. It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel, and other surface minerals, in the immediate proximity of their lands. The answer is that railway companies must judge for themselves what extent of land is required, and take sufficient to ensure the stability of their works against accidents which can readily be foreseen when the nature of the subsoil is known. I desire to base my judgment on what seems to me to be the plain meaning of the words of the Act; but, at the same time, it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences. For these reasons, I am of opinion that the interlocutor under appeal should be reversed.

Appeal allowed.

Solicitors: *Simson, Wakeford & Co.*, for *Campbell & Smith*, Edinburgh;
Grahames, Currey & Spens, for *Hamilton, Kinnear & Beatson*, Edinburgh.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

R. v. CLARENCE

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Pollock and Huddleston, BB., Field, Hawkins, Manisty, Stephen, Mathew, A. L. Smith, Wills, Day, Grantham and Charles, JJ.), June 16, November 10, 1888]

[*Reported 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 37 W.R. 166; 5 T.L.R. 61; 16 Cox, C.C. 511*]

Criminal Law—Unlawful wounding—Assault occasioning actual bodily harm—Husband communicating venereal disease to wife—Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 20, s. 47.

By s. 20 of the Offences Against the Person Act, 1861: "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour. . . ." By s. 47: "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable" to imprisonment.

The accused man had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhea. His wife was ignorant of that fact, and, if she had known it she would not have consented to the intercourse, the result of which was that she contracted the disease.

To constitute an offence under s. 20 there must be proved the infliction of a wound or grievous bodily harm by some direct personal violence, whether with a weapon, or without, as by a blow with the fist, or a kick, or by creating a panic in a crowd whereby people trample on one another; at the relevant time the consent by the wife to intercourse implicit in her entering into a marriage with the accused stood unrevoked, and so the act of the accused did not constitute an assault within s. 47; therefore, the accused was not liable to conviction under either section.

So **held** by LORD COLERIDGE, C.J., POLLOCK, B., HUDDLESTON, B., MANISTY, J., STEPHEN, J., MATHEW, J., A. L. SMITH, J., WILLS, J., and GRANTHAM, J., FIELD, J., HAWKINS, J., DAY, J., and CHARLES, J., dissenting. A

Notes. Considered: *R. v. Miller*, [1954] 2 All E.R. 529. Referred to: *R. v. Moss* (1889), 5 T.L.R. 224.

As to unlawful wounding and assault, see 10 HALSBURY'S LAWS (3rd Edn.) 735, 736, 740-745; and for cases see 15 DIGEST (Repl.) 981 et seq. For the Offences Against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 786; for the Matrimonial Causes Act, 1950, see *ibid.*, vol. 29, p. 400; and for the Sexual Offences Act, 1956, see *ibid.* vol. 36, p. 215. B

Cases referred to: C

- (1) *R. v. Bennett* (1866), 4 F. & F. 1105; 15 Digest (Repl.) 1026, 10080.
- (2) *Hegarty v. Shine* (1878), 2 L.R. Ir. 273; 14 Cox, C.C. 124; affirmed, 4 L.R. Ir. 288; 14 Cox, C.C. 145, C.A.; 1 Digest (Repl.) 49, *171.
- (3) *R. v. Martin* (1881), 8 Q.B.D. 54; 51 L.J.M.C. 36; 45 L.T. 444; 46 J.P. 228; 30 W.R. 106; 14 Cox, C.C. 633; 14 Digest (Repl.) 501, 4834.
- (4) *R. v. Taylor* (1869), L.R. 1 C.C.R. 194; 38 L.J.M.C. 106; 20 L.T. 402; 33 J.P. 358; 17 W.R. 623; 11 Cox, C.C. 261, C.C.R.; 14 Digest (Repl.) 359, 3497. D
- (5) *R. v. Vantandillo* (1815), 4 M. & S. 73; 105 E.R. 762; 38 Digest (Repl.) 200, 241.
- (6) *R. v. Button* (1838), 8 C. & P. 660; 15 Digest (Repl.) 982, 9597.
- (7) *R. v. Dilworth* (1843), 2 Mood. & R. 531, N.P.; 15 Digest (Repl.) 1001, 9860.
- (8) *R. v. Hanson* (1849), 2 Car. & Kir. 912; 4 Cox, C.C. 138; 15 Digest (Repl.) 982, 9600. E
- (9) *R. v. Walkden* (1845), 6 L.T.O.S. 194; 1 Cox, C.C. 282; 15 Digest (Repl.) 982, 9599.
- (10) *R. v. Flattery* (1877), 2 Q.B.D. 410; 46 L.J.M.C. 130; 36 L.T. 32; 25 W.R. 398; 13 Cox, C.C. 388, C.C.R.; 15 Digest (Repl.) 1012, 9968.
- (11) *R. v. Barrow* (1868), L.R. 1 C.C.R. 156; 38 L.J.M.C. 20; 19 L.T. 293; 17 W.R. 102; 11 Cox, C.C. 191, C.C.R.; 15 Digest (Repl.) 1013, 9986. F
- (12) *R. v. Dee* (1884), 15 Cox, C.C. 579; 14 L.R. Ir. 468; 15 Digest (Repl.) 1014, *6225.
- (13) *R. v. Sinclair* (1867), 13 Cox, C.C. 28; 15 Digest (Repl.) 1012, 9975.
- (14) *Brown v. Brown* (1865), L.R. 1 P. & D. 46; 35 L.J.P. & M. 13; 13 L.T. 645; 11 Jur.N.S. 1027; 14 W.R. 149; 27 Digest (Repl.) 302, 2485. G
- (15) *R. v. Wilson* (1856), Dears. & B. 127; 26 L.J.M.C. 18; 28 L.T.O.S. 109, 20 J.P. 774; 2 Jur.N.S. 1146; 5 W.R. 70; 7 Cox, C.C. 190, C.C.R.; 15 Digest (Repl.) 1003, 9875.
- (16) *Popkin v. Popkin* (1794), 1 Hag. Ecc. 765, n.; 162 E.R. 745; 27 Digest (Repl.) 297, 2423.
- (17) *Boardman v. Boardman* (1866), L.R. 1 P. & D. 233; 14 W.R. 1024; 27 Digest (Repl.) 305, 2517. H
- (18) *R. v. Saunders* (1838), 8 C. & P. 265; 15 Digest (Repl.) 1013, 9983.
- (19) *R. v. Williams* (1838), 8 C. & P. 286; 15 Digest (Repl.) 1013, 9984.
- (20) *R. v. Rosinski* (1824), 1 Lew. C.C. 11; 1 Mood. C.C. 19, C.C.R.; 15 Digest (Repl.) 991, 9716.
- (21) *R. v. Case* (1850), 1 Den. 580; T. & M. 318; 4 New Sess. Cas. 347; 19 L.J.M.C. 174; 15 L.T.O.S. 306; 14 J.P. 339; 14 Jur. 489; 4 Cox, C.C. 220, C.C.R.; 15 Digest (Repl.) 991, 9717. I

Also referred to in argument:

- R. v. Lord Audley, Earl of Castlehaven's Case* (1631), 3 State Tr. 401; Hut. 115; 1 Hale, P.C. 629; 123 E.R. 1140, H.L.; 15 Digest (Repl.) 1011, 9950.
- R. v. Lock* (1872), L.R. 2 C.C.R. 10; 42 L.J.M.C. 5; 27 L.T. 661; 21 W.R. 144; 12 Cox, C.C. 244; 15 Digest (Repl.) 901, 8689.

Ciocci v. Ciocci (1854), 1 Ecc. & Ad. 121; 18 Jur. 194; 164 E.R. 70; 27 Digest (Repl.) 305, 2522.

R. v. Jackson (1822), Russ. & Ry. 487, C.C.R.; 15 Digest (Repl.) 1013, 9982.

R. v. Clarke (1854), Dears. C.C. 397; 24 L.J.M.C. 25; 24 L.T.O.S. 136; 18 J.P. 743; 18 Jur. 1059; 3 W.R. 20; 3 C.L.R. 86; 6 Cox, C.C. 412, C.C.R.; 15 Digest (Repl.) 1013, 9985.

R. v. Young (1878), 38 L.T. 540; 14 Cox, C.C. 114, C.C.R.; 15 Digest (Repl.) 1013, 9978.

Case Stated by the recorder of the city of London.

At the session of the Central Criminal Court, held on April 23, 1888, Charles James Clarence was tried on an indictment which, in the first count, charged him with unlawfully and maliciously inflicting grievous bodily harm upon his wife, Selina Clarence, and in the second count charged him with an assault upon the said Selina Clarence, occasioning her actual bodily harm. It was proved that on Dec. 20, 1887, the prisoner was suffering from gonorrhœa, and that he knew it. On that night he had sexual intercourse with his wife, she being ignorant that he was suffering from the disease. She would not have consented to intercourse if she had known that the prisoner was so suffering. The result of intercourse was the communication of the disease to the prisoner's wife. The learned recorder directed the jury that, if the evidence established the facts hereinbefore set out to their satisfaction, then, notwithstanding the fact that Selina Clarence was the prisoner's wife, they might find him guilty on both counts, or on either count of the indictment. The jury found the prisoner Guilty, and the recorder respited judgment and directed that he should remain in custody pending the decision of the court on the question whether the direction was correct in point of law, and whether upon such direction and facts the prisoner could properly be convicted on both counts, or either count, of the indictment.

Forrest Fulton for the prisoner.

Poland for the Crown.

Cur. adv. vult.

Nov. 10, 1888. **WILLS, J.**, read the following judgment.—The prisoner in this case has been convicted (i) of "an assault" upon his wife, "occasioning actual bodily harm," under s. 47 of the Offences Against the Person Act, 1861, and (ii) of "unlawfully and maliciously inflicting" upon her "grievous bodily harm" under s. 20 of the same statute. The facts are that he was, to his knowledge, suffering from gonorrhœa; that he had marital intercourse with his wife without informing her of the fact; that he infected her; and that from such infection she suffered grievous bodily harm. The question is whether he was rightly convicted upon either count.

First, was he guilty of an assault? In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband; that had the wife known that her husband was diseased she would not have consented; that the husband was guilty of a fraud in concealing the fact of his illness; that her consent was, therefore, obtained by fraud and so was no consent at all, and, as the act of coition would imply an assault if done without consent, he can be convicted. This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract fraud does not destroy the consent; it only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked

by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect or there would have been no distinction between obtaining money under false pretences and theft. A

A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different that the wife's submission without knowledge of the facts is no consent at all. It is said that such a case rests upon the same footing as the consent to a supposed surgical operation or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion whether it did or did not amount to the crime of rape; but as it certainly would now be rape by virtue of the Criminal Law Amendment Act, 1885, s. 4 [now s. 1 (2) of Sexual Offences Act, 1956], I treat it as so settled. A third way of putting the case is that, inasmuch as the act done amounts to legal cruelty according to the doctrines formerly of the ecclesiastical courts, and now of the Divorce Court, it cannot be said to be within the consent implied by the marital relation. B C

These different ways of putting the argument in favour of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done—a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first it is the fraudulent suppression of the truth which destroys the consent *de facto* given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second, it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material, not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court. D E

It makes a great difference upon which of these grounds a conviction is supported. Each of them covers an area vastly greater than the ground occupied by the circumstances of the present case. If the first view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, is guilty of assault, and, as it seems to me, therefore, of rape. If the second view be correct, it applies in similar events just as much to unmarried as to married people, unless the circumstances should establish that the parties were content to take their chances as to their respective states of health; and the allegation that a man had given an assurance to a prostitute before having intercourse with her that he was sound, when he was not so in fact, might be a ground for putting him upon a trial for rape. If the third view be correct, it places the married man, in the eye of the criminal law, in a much worse position than the unmarried, and makes him guilty of an assault, and possibly of rape, when an unmarried man would not be liable to the same consequences. It may be said that, from the moral point of view, his case is the worse; but there are two sides to this as to most other questions. The man who goes out of his way to seek intercourse under such circumstances—and, be it remembered that the hypothesis I am now dealing with assumes knowledge of his condition on the part of the man—is without excuse. There may be many excuses for the married man suggested by the modes of life with which poverty and overcrowding have to do. F G H I

We are thus introduced, as it seems to me, to a set of very subtle metaphysical questions. If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representing that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse by suppressing the fact that the man is diseased is more nearly

allied to the procurement of intercourse by misrepresentation as to who the man is, or as to what is being done, or to misrepresentations of a thousand kinds in respect of which it has never yet occurred to anyone to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready to accept the embraces of a man stricken with smallpox or leprosy. Take, for example, the case of a man without a single good quality, a gaol bird, heartless, mean, and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of his victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed, than there is between the man bodily sound and the man afflicted with a contagious disease.

Is there to be a distinction in this respect between an act of intercourse with a wife who on this special occasion would have had a right to refuse her consent, and certainly would have refused it had she known the truth, and the intercourse taking place under the general consent inferred from a bigamous marriage obtained by the false representation that the man was capable of contracting a legal marriage? In such a case the man can give no title of wife to the woman whose person he obtains by the false representation that he is unmarried, and by a ceremony which, under the circumstances, is absolutely void. Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband but who is not? Many women would think that, of two cruel wrongs, the bigamist had committed the worse.

These are but specimens of the questions which must be faced before the circumstances of the present case can be pronounced to constitute an assault; and such considerations lead one to pause on the threshold and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act. The description of the offence constituted by s. 47 is as follows: "Whoever shall be convicted of any assault occasioning actual bodily harm." The section is the last of a group of twelve headed "Assaults." None of them except s. 43 implies that any distinction between males and females is thought of, and that section points to nothing of a sexual character. It merely provides that in cases of assaults upon males under fourteen and upon females generally, if the assault or battery is of such an aggravated character that it cannot in the opinion of the justices be sufficiently punished as a common assault or battery, it shall be lawful for them to inflict a heavier punishment. Indecent assaults, as such, upon females are dealt with by s. 52 [Sexual Offences Act, 1956, s. 14], and upon males by s. 62 [ibid., s. 15], and there is, therefore, no ground for supposing that anything specially between the sexes is pointed at either by this section, or by any of those in the group to which it belongs. The next group of eight sections (48-55) is headed "Rape, abduction, or defilement of women," and deals specially with sexual crimes. Surely this was the place in which to find an enactment dealing with the very peculiar circumstances now before us, and it cannot really

have been intended that they should be embraced by a section whose terms are applicable to, and as it seems to me satisfied by, the class of cases which would naturally occur to one's mind, those of direct violence. A

The worst of the contagious diseases of this class has, I believe, been known in this country for close upon four centuries. The circumstances which have happened in this case cannot have been of infrequent occurrence during that interval, and cannot have failed justly to give rise to the bitterest resentment. B
It seems to my mind a very cogent argument against the conviction that, if the view of the law upon which it is founded be correct, thousands of offending husbands, and as I think also of offending wives, must have rendered themselves amenable to the criminal law; and yet it was reserved for the year 1866, when *R. v. Bennett* (1) was decided, to discover that such transgressors might have been indicted and criminally dealt with during all that long period. It is true that women take a different place in social position, and have by Act of Parliament many rights and by common usage much social liberty which no one would have claimed for them centuries ago. This fact, however, seems to me a strangely insufficient reason for a new reading of the criminal law fraught with consequences which no one can deny to be of a very serious and widespread character. C

The principle upon which a conviction in this case must be upheld will or will not apply to the intercourse of unmarried, as well as of married, men and women, according to the ground or grounds selected upon which to justify it. If it is based upon the notion of cruelty as understood in the Divorce Court, the case of the unmarried man and woman falls without its purview. If suppression of the truth be a material element in the inquiry, actual misrepresentation on the subject of health would put an unmarried man or woman in the same position as the married man or woman who conceals that fact against which the married state ought to be a sufficient guarantee. I intentionally refer to women as well as men, for it is a great mistake to look at questions of this kind as if sexual faults and transgressions were all on the side of one sex. The unmarried woman who solicits and tempts a perhaps reluctant man to intercourse which he would avoid like death itself if he knew the truth as to her health, must surely, under some circumstances at least, come under the same criminal liability as the man. If, again, the conviction be upheld on the ground of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most, cases of seduction and to other forms of illicit intercourse, including at least theoretically the case of prostitution, and if such difference be the true ground upon which to base a confirmation of the conviction, knowledge of his or her condition on the part of the person affected is immaterial. It is the knowledge or want of knowledge on the part of the person who suffers from contagion alone that is the material element. D E F G

Surely these considerations point to the conclusion that a wide door will be opened to inquiries not of a wholesome kind, in which the difficulties in the way of arriving at truth are often enormous, and in which the danger of going wrong is as great as it is by people in general inadequately appreciated. A new field of extortion may be developed, and very possibly a fresh illustration afforded of the futility of trying to teach morals by the application of the criminal law to cases occupying the doubtful ground between immorality and crime, and of the dangers which always beset such attempts. Of course, if by legislation such cases should be brought within the criminal law, all we shall have to do will be to face the difficulties and do our best to administer the law. It seems to me, however, that such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the legislature and the legislature only. I understand the process of expansion by which the doctrines of the common law are properly made by judicial construction to apply to altered modes of life and to new circumstances and results thus brought about which would have startled our ancestors could they have foreseen them. I do not understand such a process H I

A and I do not think it legitimate, when every fact and every circumstance which goes to constitute the alleged offence is identical with what it has been for many hundreds of years past. Whether further legislation in this direction is desirable is a question for legislators rather than lawyers, and the only remark that I desire to make upon this subject is that, apart from cases of actual violence, and of children so young that the very fact of touching them in the way of sexual relation may fairly be treated as a crime, the mysteries of sexual impulses and intercourse are well nigh insoluble, and the difficulty of arriving at the truth in the case of imputed misconduct enormous; and I doubt whether they can be thoroughly appreciated without the experience gained by trying cases of intercourse with girls near the age of sixteen, and they certainly suggest the necessity of the utmost care in dealing by way of legislation with the subject under discussion.

If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible—a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I cannot understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent to even a distant approach to it. I greatly prefer the reasoning of those who say that, because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me. I am well aware of the respect due to the opinion of the very learned judges from whom I differ; but I cannot help saying that to me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. In other words, it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me, under such circumstances, to be anything but rape. Of course, the thing done in the present case is wicked and cruel enough. No one wishes to say a word in palliation of it. But that seems to me to be no reason for describing it as something else than it is, in order to bring within the criminal law an act which, up to a very recent time, no one ever thought was within it. If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault because no mischief ensues to the woman, nor, indeed, where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there might be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. In all such cases, therefore, apart from the suggested impossibility of rape upon a wife, rape must be committed, and a great many rapes must be constantly taking place without either of the parties having the least idea of the fact.

The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having smallpox or scarlet fever, or other like diseases quite free from the sexual element, and while so afflicted coming into a personal contact with others which would certainly have been against the will of those touched had they known the truth. This species of assault, if assault it be, must have been of much longer standing than the four centuries I have alluded to, and it involves no con-

considerations depending upon the social status of women, yet no one has ever been prosecuted for an assault so constituted. On this point I desire only to express my concurrence in the observations of my brother STEPHEN, which I have had the opportunity of reading. A

I wish to observe that, if an assault can be committed by coition to which consent has been procured by suppression of the truth or misrepresentation as to the state of health of one of the parties, questions of the kind I have indicated will be triable, may be tried now, at petty sessions. The observation is not, of course, conclusive; but it is well to appreciate whither a conviction in the present case must lead us, not only as regards the subject-matter of the criminal law, but as to the tribunals which will have to administer it. When the Offences Against the Person Act, 1861, was passed, it had never occurred to any human being, so far as our legal history affords any clue, that the circumstances now under consideration constituted an assault. The term is as old as any in our law, but it had never been so applied. The doctrine owes its origin to the remarks of WILLES, J., at the Taunton Assizes, held in 1866, and reported in *R. v. Bennett* (1). It was pointed out in the Irish case of *Hegarty v. Shine* (2), that the conviction might be upheld, on the ground that the girl was, as she alleged, asleep when intercourse took place, and, therefore, gave no consent. In spite of all my respect for everything that fell from the lips of that very great lawyer, I am compelled to think that it was a case in which he strained the law for the purpose of punishing a great wrong, and I confess myself unable to follow his view that the thing done in that case might be an assault and yet not a rape. Were it, however, possible that the mere words of the section would apply to the transaction in question, and that it were capable of being described as an assault, I am still of opinion that the context shows that sexual crimes were intended to be dealt with as a class by themselves, the only rational way of legislating upon such a subject, and if the letter of the section could be satisfied by the present circumstances, there never was a case to which the maxim *qui haeret in litera haeret in cortice* more emphatically applied. B C D E

I proceed to inquire whether the conviction under s. 20 can be supported. That section says, F

"Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour. . . ."

While of opinion that it is not every breach of moral duty that will satisfy the term "unlawfully," I am clearly of opinion that an act which would give a right to a judicial separation is abundantly sufficient to answer to it. I am also of opinion that an unlawful act done wilfully and intentionally, and without any circumstances to justify it and take away its *prima facie* character of unlawfulness, is malicious within the meaning of the section. But I think the section clearly points to the infliction of direct and intentional violence, whether with a weapon or the fist, or the foot, or any other part of the person, or in any other way not involving the use of a weapon, as, for instance, by creating a panic at a theatre whereby people trampled upon one another: *R. v. Martin* (3). The prisoner in that case did what was certain to make people crush one another, perhaps to death, and the grievous bodily harm was as truly inflicted by him as if he had hurled a stone at somebody's head. Take also the illustration of my brother STEPHEN, of a man who digs a pit for another to fall into, whereby that other is injured. I do not think this section was ever intended to apply to the administration of poison, and most of the arguments I have used to show that sexual offences were not intended to be dealt with in s. 47 apply with equal force to s. 20. The Court for the Consideration of Crown Cases Reserved, in *R. v. Taylor* (4), decided that in the offence of "unlawfully and maliciously inflicting grievous bodily harm" an assault is necessarily included. So far as that decision is concerned the same G H I

question may be said to arise under s. 20 as under s. 47. But I think the argument is even stronger here, for the context seems to me to show that direct personal violence of some kind was intended; so that, even if the constructive assault contended for by those who support a conviction under s. 47 were established, a conviction under this section would still be wrong. I am of opinion, therefore, that the conviction should be quashed.

A. L. SMITH, J., read the following judgment.—In my judgment, this conviction cannot be supported. I have had the opportunity of reading the judgment of my brother **STEPHEN**, and I agree in it and in his reasons. There is one point I wish to add, which also appears to me to show that this conviction is erroneous. At marriage the wife consents to the husband's exercising the marital right. The consent then given is not confined to a husband when sane in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? In the present case, at the time the incriminatory act was committed, the consent given at marriage stood unrevoked. Then how is it an assault? The utmost the Crown can say is that the wife would have withdrawn her consent if she had known what her husband knew; or, in other words, that the husband is guilty of a crime, viz., an assault, because he did not inform the wife of what he then knew. In my judgment, in this case the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife. As to the unlawfully and maliciously inflicting grievous bodily harm, it appears to me that this offence cannot be committed unless an assault has in fact been committed, and indeed this has been so held; and, inasmuch as, in my judgment, in this case no assault has been committed, the graver offence equally has not been committed.

MATHEW, J.—I am of opinion that this conviction must be quashed, and agree with the judgment of my brother **STEPHEN**.

STEPHEN, J., read the following judgment.—The question in this case is whether a man who knows that he has gonorrhœa, and who by having connection with his wife who does not know it infects her, is or is not guilty of an offence either under s. 20 of the Offences Against the Person Act, 1861, or under s. 47 of the same Act. Section 20 punishes everyone who "unlawfully and maliciously inflicts any grievous bodily harm upon any other person." Section 47 punishes everyone who is convicted of "an assault occasioning actual bodily harm to any person."

Before discussing in detail the meaning of these words I will make one general observation. The present case is the first, so far as appears, in which any person has ever been indicted for, or, at all events, convicted of, any offence whatever for infecting another with a disease of any kind, although diseases of this kind are unhappily common, and legislation in reference to them has taken place. The legislation in question is contained in the Contagious Diseases Act, 1866, and some other Acts which amend it. These Acts were repealed in 1886 [by the Contagious Diseases Acts Repeal Act, 1886]. They authorised the detention in hospitals of diseased women under certain circumstances, but they contained nothing to suggest that the communication of the disease was in itself a crime. If such had been the case the Acts in question would probably have been made supplementary to the ordinary administration of criminal justice. If the present conviction is right it must be so on some principle which would apply to women as well as to men, and to unmarried women as well as to wives. Section 47 indeed could hardly apply to women, but s. 20 would make no distinction between the sexes. It is also, I think, clear that, unless some distinction can be pointed out which does not occur

to me, the sections must be held to apply, not only to venereal diseases, but to infection of every kind which is in fact communicated by one person to another by any act likely to produce it. A man who, knowing that he has scarlet fever or small-pox, shakes hands with a friend may be said to fall under s. 20 or s. 47 as much as the prisoner in this case. To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and, if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case. A

Not only is there no general principle which makes the communication of infection criminal, but such authority as exists is opposed to such a doctrine in relation to any disease. The following are the authorities on this subject. By 1 Jac. 1, c. 31, s. 7 [the repealed Plague Act, 1603], it was made felony for any person who had, under other provisions of the Act, been commanded to keep his house "to go abroad and converse in company having any infectious sore upon him uncured." Upon this HALE (1 P.C. 432) remarks that the statute is now discontinued, and he adds : B

"But what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might be a question; but if no such intention evidently appears, though de facto by his conversation another is infected, it is no felony by the common law, though it be a great misdemeanour, and the reasons are: (i) Because it is hard to discern whether the infection arises from the party or from the contagion of the air. It is God's arrow. (ii) Nature prompts every man in what condition soever to preserve himself, which cannot be well without mutual conversation. (iii) Contagious diseases, as plague, pestilential fevers, small-pox, etc., are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far and give too great latitude and loose to severe punishments." C

Some of the expressions in this passage would scarcely be employed now, but it may be taken as a caution against wide and uncertain extensions of the criminal law, and as a distinct proof that HALE did not regard the transmission of disease as an ordinary case of the infliction of bodily harm. His statement that, though not a felony, it would be a great misdemeanour at common law to infect another unintentionally by going about with a plague sore may at first sight appear to favour the maintenance of the conviction in this place, but it is, I think, explained, and its generality is limited, by *R. v. Vantandillo* (5). It was held in that case to be an indictable misdemeanour to carry a child which had the small-pox along a street, and the passage from LORD HALE was the principal authority relied upon. The offence referred to by LORD HALE is, therefore, the offence of committing a public nuisance, and his authority is opposed rather than favourable to the notion that to infect another with a contagious disease is in the nature of an offence against the person. The provisions of the Public Health Act, 1875, ss. 120, 130, and, in particular, s. 126 [see now Public Health Act, 1936, Part 5], treat offences by spreading infection in the same way. By that section an infected person who without proper precaution exposes himself in any street, etc., is liable to a penalty of £5. These considerations make it antecedently improbable that the abominable conduct of which the prisoner has been convicted should be in the strict legal sense of the word a crime. D

I now come to the construction of the precise words of the statute. Section 20 punishes E

"whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person either with or without any weapon or instrument." F

It is said upon s. 20 that the prisoner did not act "unlawfully" because he had by law a right to have intercourse with his wife. It is said in answer to this that he did act unlawfully because his right ceased when he knew himself to be suffering under the disease which he communicated, and because the word "unlawfully" must here be construed to mean "unlawfully" in the wide general sense in which the word is used with reference to acts which, if done by conspirators, are indictable, though not if they are done by individuals. This general sense may, I think, be said to be "immoral and mischievous to the public." I do not agree with the doctrine that the word "unlawfully" is used here in this wide sense. The use of the word in relation to conspiracy appears to me to be exceptional. I think that no act can for this purpose be regarded as unlawful merely because it is immoral. It must I think be forbidden by some definite law; but I pass this over, for I think that in this case the word "unlawfully" applies because the act done is forbidden by the law relating to marriage according to which it constitutes cruelty, and is as such a cause for a judicial separation, while it is strong evidence of adultery which coupled with cruelty [but see now Matrimonial Causes Act, 1950, s. 1 (1) (a)] would be a ground for a complete divorce. The word "maliciously" obviously applies.

But is there an "infliction of bodily harm, either with or without any weapon or instrument?" I think there is not, for the following reasons. The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon as by a blow with the fist or by pushing a person down. Indeed, though the word "assault" is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result. This is supported by *R. v. Taylor* (4), in which it was held that a prisoner could upon an indictment under that section be convicted of a common assault because each offence, "wounding" and "inflicting grievous bodily harm," "necessarily includes an assault," though the word does not occur in the section. It is further illustrated by reference to s. 4 of the Prevention of Offences Act, 1851 [repealed], of which the present section is a re-enactment. It begins with the preamble: "And whereas it is expedient to make further provision for the punishment of aggravated assaults," and then proceeds in the words of the present section with a trifling and unimportant difference in their arrangement. Infection by the application of an animal poison appears to me to be of a different character from an assault. The administration of poison is dealt with by s. 24, which would be superfluous if poisoning were an "infliction of grievous bodily harm either with or without a weapon or instrument." The one act differs from the other in the immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is communicated. If a man by a grasp of the hand infects another with small-pox it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act "inflicted" small-pox on another. It would be wrong in interpreting an Act of Parliament to lay much stress on etymology, but I may just observe that "inflict" is derived from "infigo," to which in FACCIOLOTTI'S LEXICON three Italian and three Latin equivalents are given, all meaning "to strike," viz., dare, ferire, and percuotere in Italian, and infero, impingo, and percutio in Latin.

There is authority for the proposition that poisoning is not an assault, though in *R. v. Button* (6), in 1838, SERJEANT ARABIN, after consulting the Recorder of London, MR. LAW, held that it was. In *R. v. Dilworth* (7), in 1843, a man was indicted for administering poison with intent to murder, and it was suggested that if the intent was not made out the prisoner might be convicted under the [repealed] Offences Against the Person Act, 1837, of a common assault, as it was involved in the charge, and *R. v. Button* (6) was cited, but COLTMAN, J., said that he disagreed with *R. v. Button* (6), and that the prisoner must either be

convicted or acquitted of the whole charge. In *R. v. Hanson* (8), in 1849, A
 VAUGHAN WILLIAMS, J., after consulting CRESSWELL, J., held that the administration of cantharides was neither a common assault nor a common law misdemeanour; and *R. v. Walkden* (9) was a decision to the same effect by PARKE, B. Upon these grounds I am of opinion that s. 20 does not apply to the case.

Is the case, then, within s. 47 as "an assault occasioning actual bodily harm?" B
 The question here is whether there is an assault. It is said there is none because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner's silence was a fraud. Apart altogether from this question I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning. It is the application of an animal poison, and poisoning, as already shown, is not an assault. Apart, however, from this, is the man's concealment of the fact that he was infected such a fraud as vitiated his wife's consent to his marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the words, and without qualification. It is too short to be true as a mathematical formula is true. If we apply it in that sense to the present case it is difficult to say that Clarence was not guilty of rape, for the definition of rape is having connection with a woman without her consent, and, if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. C

These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. I do not at all deny that it some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children. A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. D
 The child merely submits without consenting. The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud, as to the identity of the person by whom it is done, the law is not quite clear. In *R. v. Flattery* (10) in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, E
 there was before the passing of the Criminal Law Amendment Act, 1885, a conflict of authority. The last decision in England, *R. v. Barrow* (11), decided that the act was not rape, and *R. v. Dee* (12), decided in Ireland in 1884, decided that it was. The Criminal Law Amendment Act, 1885, "declared and enacted" that thenceforth it should be deemed to be rape, thus favouring the view taken in *R. v. Dee* (12) [see now Sexual Offences Act, 1956, s. 1 (2)]. F

I do not propose to examine in detail the controversies connected with these cases. The judgments in *R. v. Dee* (12) examine all of them minutely, and I think they justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape, are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds G
 as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence H

of a consent not procured by force or fraud is essential, but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is part of a great relation based upon the greatest of all contracts, but standing on a footing peculiar to itself. In all other cases the immorality of the act is inconsistent with any contract relating to it.

Thus in no case can considerations relating to contract apply to it. The effect of fraud upon a contract is to render it voidable at the option of the party defrauded. This clearly cannot apply to sexual intercourse. It is either criminal if the woman does not consent, or if her consent is obtained by certain kinds of fraud, or it is, as this was, a breach of matrimonial duty, or it is not criminal at all. The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud, either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not stated at what interval after Dec. 20 the disease showed itself, but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event.

In some instances no doubt such an interval might elapse. If a man laid a trap for another, into which he fell after an interval, the man who laid it would, during the interval, be guilty of an attempt to assault, and of an actual assault as soon as the man fell in. In the case of death inflicted by violence, the criminal might at first be guilty of an assault or an unlawful wounding, and his crime would become murder or manslaughter on the death of the person wounded; but in the case of an attempt the intention to consummate the crime exists from the first, and in the case of murder the act which ultimately becomes murder is in itself a crime whether death ensues or not. In this case there was no intention, and, therefore, no attempt, to infect, and it seems anomalous to make a consequence, which, though highly probable, was neither intended nor necessary, relate back on its occurrence in such a way as to make an act not punishable itself into a crime.

Two authorities were quoted to show that such an act as this is a crime. They are *R. v. Bennett* (1), in which WILLES, J., decided, in 1860, that a man who infected his niece, a girl of thirteen, might be convicted of an indecent assault, though she consented to sleep with him; and *R. v. Sinclair* (13), in which this decision was followed, in 1867, by SHEE, J. *R. v. Bennett* (1) was disapproved of in *Hegarty v. Shine* (2), though, as the Irish courts point out, the verdict may possibly have been justified by the facts as proved, the girl having sworn that she was asleep and could not say what happened to her. If this was believed, there was evidence of indecent assault at least, if not of rape. *R. v. Sinclair* (13) was decided on the authority of *R. v. Bennett* (1).

For these reasons I think there was no assault in the present case, and that, therefore, it does not fall within s. 47. I wish to observe, on a matter personal to myself, that I was quoted as having said in my DIGEST OF THE CRIMINAL LAW that I thought a husband might, under certain circumstances, be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (1887 Edn., p. 124, note) it will be found that that statement was withdrawn. I think that this conviction should be quashed. No one can doubt the abominable nature of the prisoner's conduct, but, if it is to be treated as a crime, it must, I think, be done upon express statutory authority. The whole matter is

surrounded with difficulties with which the legislature alone is competent to deal, and to which it would be out of place to refer. I am informed that **GRANTHAM, J.**, agrees with this judgment. A

HAWKINS, J., read the following judgment.—I am of opinion that the prisoner was rightly convicted upon both counts of the indictment. The first count was framed under s. 20 of the Offences Against the Person Act, 1861, and charged the prisoner with “unlawfully and maliciously inflicting grievous bodily harm” upon Selina Clarence. The second count was framed under s. 47 of the same Act, and charged him with an “assault” upon the said Selina Clarence, “occasioning” her “actual bodily harm.” At the time of the committing of the offences charged Selina Clarence was and still is the wife of the prisoner. At that time the prisoner was suffering from gonorrhœa, as he knew, but his wife was ignorant of the fact. In this condition of things, the prisoner had sexual intercourse with his wife, and in so doing communicated to her his disease, and thereby caused her grievous bodily harm. It must also be taken as a fact that, had the prisoner’s wife known that he was so suffering, she would have refused to submit to such intercourse. On the prisoner’s behalf it was contended that the conviction was wrong upon several grounds: first, that the injury caused to the wife was the result of a lawful act—viz., the sexual communion of a husband with his wife; secondly, that the charge in the first count involved, and that in the second count was based on, an assault, and that no assault could be committed by a husband in merely exercising his marital right upon the person of his wife; and, thirdly, that the sections of the statute under which the indictment was framed had no application to such circumstances as those above mentioned. B C D E

About the unlawfulness and maliciousness of the prisoner’s conduct it seems to me impossible to raise a doubt. It has long been established by authority that, if a husband knowingly communicates to his wife a venereal disease, such misconduct amounts to legal cruelty, and is ground for judicial separation; and, in the absence of evidence to the contrary, it may be presumed that a man suffering under venereal disease knows it, and knows also that, if he has communion with his wife, he will in all human probability communicate his malady to her: see *Brown v. Brown* (14). It is equally clear that wilfully to do an unlawful act to the prejudice of another is to do it maliciously. We have, then, these elements established, grievous bodily harm unlawfully and maliciously caused. To complete the offence, according to the language of s. 20, it is only necessary to prove that such injury was “inflicted” by the prisoner within the meaning of that word as used in s. 20. For the prisoner it was contended that bodily harm cannot legally be said to be “inflicted,” unless it has been brought about by some act amounting to an assault, and that there was no evidence of any assault in the present case. I think both these contentions untenable, and that the first count may be supported, even assuming no assault to have been proved. I think moreover that an assault was proved. I will, however, defer what I have to say upon that point until I come to deal with the second count. F G H

With reference to the question, whether it was necessary to prove an assault in order to establish the first count, it may be, though I do not say it is so, that some support is afforded to the argument of the prisoner’s counsel if the word “inflict” is read only according to its strict etymological interpretation. I am aware also that the argument has the support of the dictum of **KELLY, C.B.**, in delivering the judgment of the court in *R. v. Taylor* (4). In that case the prisoner was indicted in one count for unlawfully wounding, and another for “unlawfully and maliciously inflicting grievous bodily harm.” The jury found him guilty of “an assault,” and the conviction was affirmed, the Lord Chief Baron saying, “each of the counts is for an offence which necessarily includes an assault.” With reference to this dictum it will be seen at a glance that it was not at all essential for the judgment, inasmuch as the conviction for an assault might be supported if either I

count involved an assault, which the count for wounding most unquestionably did. I feel, therefore, at liberty respectfully to dissent from that dictum so far as it applies to the count for "inflicting grievous bodily injury," and I do so with the more confidence because I do not find it supported by any later authority.

In my opinion the legislature, in framing the various sections of the statute already and hereafter referred to, used the words "inflict," "cause," and "occasion" as synonymous terms for the following among other reasons. Let me begin by calling attention to the language of s. 18 which runs thus :

"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . shall be guilty of felony. . . ."

If the prisoner had been indicted under this section, could anybody doubt that, upon proof of his intention to cause the grievous bodily harm he in fact occasioned, he would have fallen within not only the spirit but the precise language of the section according to the strictest interpretation which could be applied to it?

I next ask myself, what was the object of s. 20? Clearly it was to provide for cases in which the grievous bodily harm mentioned in s. 18, though unlawfully and maliciously caused, was unaccompanied by the felonious intent, which is the aggravating feature of the felony created by that section, and accordingly s. 20 made such last-mentioned offence a misdemeanour only, by enacting as follows :

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour."

Surely the object of these two sections could only have been to make the doing of grievous bodily harm with intent a felony, without intent a mere misdemeanour; and to hold that no man could be convicted under s. 20 without proof of an assault would practically amount to holding that maliciously to do grievous bodily harm to another without felonious intent is unpunishable unless such harm is done through the medium of an assault. It is impossible that the legislature could have intended this.

I must refer now to s. 47, which enacts :

"Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable"

to imprisonment. Here it will be observed that where the legislature intends that an assault shall be the foundation of the offence it says so in express terms. If, in using the word "inflict" in s. 20, it had intended that it should be interpreted as "cause by means of an assault," s. 47 would have been superfluous; for by merely substituting the word "actual" for "grievous" in s. 20, the whole object of both sections would have been attained; for the punishment awarded in each is the same, and "actual" harm of necessity includes "grievous" harm, and if for any reason, which I am unable to discover, the legislature had thought fit to separate the two sections, applying one to an assault causing "grievous," the other to an assault causing "actual," bodily harm, I should at least have expected it to use the same phraseology in each. If, on the other hand, it intended s. 20 to bear the construction I put upon it, I should expect to find that which I do, viz., difference in the language. As the sections now stand, construing them as I do, it looks as if the framers of the Act intended, as I think they did, that when grievous bodily harm was maliciously caused by any means, the offender should be liable to a punishment of five years' penal servitude, and that the same punishment might follow upon a conviction for occasioning any actual injury, though short of that which could be termed "grievous" if such injury was caused by an assault.

I am not without authority for the view I have expressed upon this part of the case. By s. 23 of the same Act it is enacted : A

“Whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person any poison, or other destructive or noxious thing, so as . . . thereby to inflict upon any such person any grievous bodily harm, shall be guilty of felony. . . .” B

Clearly there may be an administering or a causing of poison, etc., to be taken so as to inflict harm under that section without even the semblance of an assault : see *R. v. Dilworth* (7), per COLTMAN, J., and note b to the case; see also *R. v. Wilson* (15), where, upon the trial of an indictment under the [repealed] Offences Against the Person Act, 1837, s. 6, the prisoner was charged with administering or causing to be taken by a woman a noxious drug with intent to procure her miscarriage; it was proved that the prisoner had procured the drug and given it to the woman at her own request, and she had taken it in his absence: it was held that he might be convicted of causing it to be taken. Under such circumstances, no one could say the prisoner had committed an assault in procuring and handing the drug to the woman in compliance with her request. These considerations lead me to the conclusion that the word “inflict,” when used in the statute, was not intended to be construed as involving an assault, whatever may be its strict etymological interpretation, as to which I do not think it necessary to enter upon a discussion: see also *R. v. Martin* (3), where the prisoner was convicted upon an indictment under s. 20 of “inflicting grievous bodily harm” under circumstances which it would be difficult to say amounted to an assault. It is right, however, to say that the point under consideration was not raised in that case, although it is unlikely to have escaped the attention of the four astute judges by whom, with myself, that case was decided. C D E

I proceed now to consider the question whether there was in fact an assault by the prisoner on his wife occasioning her either grievous or actual, bodily harm. I answer this question also in the affirmative. By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. LORD STOWELL in *Popkin v. Popkin* (16) said (1 Hag. Ecc. at p. 767, n.): F G

“The husband has a right to the person of his wife, but not if her health is endangered.” H

So, to endanger her health, and cause her to suffer from loathsome disease contracted through his own infidelity cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and, although I can cite no direct authority upon the subject, I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power—nay, even to the death, if necessary—the sexual embraces of a husband suffering from such contagious disorder. In my judgment, wilfully to place his diseased person in contact with hers without her express consent amounts to an assault. I

It has been argued that, to hold this would be to hold that a man who, suffering from gonorrhœa, has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and, the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of

sexual communion is lawful; but there is a wide difference between a simple act of communion which is lawful and an act of communion combined with infectious contagion endangering health and causing harm which is unlawful. It may be said that, assuming a man to be diseased, still, as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and therefore cannot be criminal. My reply to this argument is that, if a person, having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege, and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct.

I may further illustrate my view upon this part of the case by applying, by way of test, to an indictment for assault the old form of civil pleadings. This: Indictment for an assault; plea of justification, that the alleged assault was the having sexual communion with the prosecutrix, she being the prisoner's wife; new assignment, that the assault charged was not that charged in the plea, but the unlawful and malicious contact of her person with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment? I ought, perhaps, to state that, even if to hold a husband liable for an assault under such circumstances would be to subject him also to a charge of rape, the opinion I have expressed would not be changed. No jury would be found to convict a husband of rape on his wife except under very exceptional circumstances, any more than they would convict of larceny a servant who stealthily appropriated to her own use a pin from her mistress's pincushion. I can, however, readily imagine a state of circumstances under which a husband might deservedly be punished with the penalty attached to rape, and a person committing a theft even of a pin to the penalty attached to larceny. The cases put of a person suffering from small-pox, diphtheria, or any other infectious disorder, thoughtlessly giving a wife or child a mere affectionate kiss or shake of the hand from which serious consequences never contemplated ensued, seem to me cases in which it is impossible to suppose any criminal prosecution would be tolerated, or could, if tolerated, result in a conviction; but I can picture to myself a state of things in which a kiss or shake of the hand given by a diseased person, maliciously with a view to communicate his disorder, might well form the subject of criminal proceedings.

I will not, however, stop to discuss such imaginary cases further. *R. v. Bennett* (1), decided in 1866, is an authority directly in support of the view I have taken. The indictment was for an indecent assault on a girl who had consented to sleep with the prisoner, who had connection with her, and communicated to her a foul disease. *WILLES, J.*, before whom the case was tried, in summing-up, told the jury that, though it would have been impossible to have established rape, yet, if the girl did not consent to the aggravated circumstances—i.e., to connection with a diseased man—his act would be an assault. *WILLES, J.*, no doubt, according to the report, based his observations upon the rule that fraud vitiates consent; but it is clear his mind was alive to the point I have been considering, viz., that, though there might be such consent to sexual intercourse as to make the connection no rape, nevertheless the infectious contact might amount to an assault: see also *Hegarty v. Shine* (2); and *R. v. Sinclair* (13).

In dealing with the present case my judgment is not based upon the doctrine that fraud vitiates consent, because I do not think that doctrine applies in the case of sexual communion between husband and wife. The sexual communion between them is, by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons. My judgment is based on the fact that the wrongful act charged against the prisoner was not involved in or sanctioned by his marital privilege, and was one for which no consent was ever given at all. For this reason it is unnecessary to discuss or

express any opinion upon the various cases cited during the argument relating to connection obtained by fraud, and I accordingly abstain from doing so. A

Another argument used for the prisoner was that such cases as the present were not contemplated by the statute under which he was indicted, and it was also said that, if it had been intended that the communication of a venereal disease to a woman during an act of sexual intercourse, consented to by her, should be punishable as a crime, some special enactment to that effect would have been introduced into one or other of the Acts of Parliament relating to women and offences against them. This is an argument to which I attach no weight, assuming the facts bring the case within the fair interpretation of the sections to which I have referred. Moreover, I may point out that *R. v. Bennett* (1), to which I have referred, was tried in the year 1866, and it is strange, if the law as there laid down was thought to be contrary to the law of the land or to the intention of the legislature, that in no subsequent legislation during the twenty-two years which have since elapsed has any enactment been introduced in which any expression is to be found indicative of a disapproval of that decision or that the intention of the statute was at variance with it. I think the legislature contemplated the punishment of all grievous bodily harm, however caused, if caused unlawfully and maliciously; and I cannot bring my mind for an instant to believe that, even had the circumstances before us been present to the minds of the framers of the Act, they would have excluded from its operation an offence as cruel and as contrary to the obligation a man owes to his wife to protect her from harm as can well be conceived. B C D

It has been urged that the case of husband and wife does not differ from that of unmarried persons, and that to affirm this conviction would tend to encourage undesirable prosecutions where disease has been communicated during illicit communion. I do not by any means assent to these propositions. I think the two cases are substantially different. The wife submits to her husband's embraces, because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but in mere submission to an obligation imposed upon her by law. Consent is immaterial. In the case of unmarried persons, however, consent is necessary previous to every act of communion, and if a common prostitute were to charge with a criminal offence a man who, in having had connection with her, had infected her with disease, few juries would under ordinary circumstances hesitate to find that each party entered into the immoral communion tacitly consenting to take all risks. In the case of women other than prostitutes, the circumstances of each particular case would have to be considered, and the question how far fraud vitiates consent to such communion would also have to be dealt with. In such cases, too, shame would deter most decent women from appealing to the law; and, if a man were the sufferer, seldom would he incur the ridicule and exposure which would be brought upon him. E F G H

Considering how few prosecutions have been instituted for such causes since the decision in *R. v. Bennett* (1), and entertaining moreover, as I do, a doubt whether any person, man or woman, could, as against the public interest, consent to the infliction of grievous bodily harm, so as to give a legal defence to a criminal prosecution, although such consent might afford a good defence to a civil action, I do not see any reason for such fears on the subject as have been entertained. I Anyhow they cannot affect the law. Fortified in my opinion, as I believe myself to be, by the plain words of the statute, and by the authority of WILLES, J., one of the greatest and most accurate lawyers of modern times, I have arrived at the conclusion that this conviction is right and in accordance with the law, and I cannot, therefore, be a party to a judgment which in effect would proclaim to the world that by the law of England in this year 1888 a man may deliberately, knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocious I

barbarity. I may state that this judgment has been read by **DAY, J.**, who requests me to say that he thoroughly concurs in it.

MANISTY, J.—I am of opinion that this conviction should be quashed. I abstain from giving the reasons stated by my learned brothers who take the same view that I take, and propose only to add a few words. This is a statute which relates to circumstances of violence to the person. It is so stated in the title of the Act, which is "An Act to consolidate and amend the statute law of England and Ireland relating to offences against the person," and all the crimes of violence include an assault. What is an assault? It is either an act of infliction of violence on a person, or it is an attempt with force or violence to do or inflict, whether by force or by holding up the fist with threatening words, coupled with the capability of doing actual violence to the person of another. That being the principle of the Act it seems to me that what the prisoner here has done is not within the purview of the Act. I question whether it was ever intended or thought of, and I am of opinion that no assault was committed. An assault is a crime of violence, and the opinion of my learned brothers, who are of opinion that this conviction should be supported, is founded chiefly on this being a case of an assault. If it be a crime punishable by statute to act as the prisoner did, I should have expected to find it provided for among the statutes relating to the communication of contagious diseases, some of which have lately been repealed. That is the real nature of the crime alleged here; but I believe you will not find anything in those statutes as to this case. I need say no more, therefore, than that it is not, in my opinion, within the purview of this Act. If it had been it would have been mentioned.

HUDDLESTON, B.—I am of opinion that this conviction cannot be affirmed. I have had the advantage of reading the judgment of my brother **STEPHEN**, and entirely concur with it. I also concur with the judgments of my brother **WILLS** and my brother **A. L. SMITH**.

FIELD, J., read the following judgment.—This indictment contained two counts expressed respectively in the actual words of ss. 20 and 47 of the Offences Against the Person Act, 1861, and charging the prisoner under s. 20 with "unlawfully and maliciously inflicting" upon his wife "grievous bodily harm;" under s. 47, with "an assault" upon his wife "occasioning actual bodily harm." The facts proved were, that the prisoner had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhœa, his wife being ignorant of this fact; that had she known of it she would not have consented to the intercourse, and that the result of the connection was to communicate to her the disease. The learned Recorder of London directed the jury that if those facts were established they might find the prisoner guilty on both or either of the counts. The jury found the prisoner Guilty, and the learned recorder has stated the Case now before us, in which he asks the opinion of this court whether his direction was right in point of law, and whether upon these facts the prisoner could be properly convicted on both or either of the counts.

The answer to this question depends on the true construction of the Act under which the indictment was preferred; and on a consideration of the authorities, and I have come to the conclusion that the direction of the learned recorder was right, and that the prisoner was properly convicted on both counts. The questions then are: First, Did the prisoner "unlawfully and maliciously inflict grievous bodily harm" on his wife; secondly, Did the prisoner "occasion bodily harm" to his wife by an "assault?" It has long been established that a man who takes indecent liberties with a woman or has or attempts to have connection with her, may be properly convicted either of indecent assault or rape, which includes an assault,

according to the circumstances of the case, if the acts were done without her consent, express or implied, or against her will. It is, I think, also clear that if the condition of the man is such that it is an ordinary and natural consequence of the contact to communicate an infectious disease to the woman, and he does so, he does in fact inflict upon her both "actual" and "grievous bodily harm." Such an act produces what a great authority, LORD STOWELL, describes as "an injury of a most malignant kind:" see *Popkin v. Popkin* (16), 1 Hag. Ecc. at p. 768, n. It is also well settled that every sane man must be taken to intend the natural and reasonable consequences of his acts, and the intentional infliction of grievous bodily harm, unless justified or excused by law, is, to my mind, "malicious and unlawful."

Thus far the case rests upon what seem to me to be known and generally accepted principles. But it is argued that here there is no offence because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from HALE'S PLEAS OF THE CROWN, vol. 1, p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife,

"for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband which she cannot retract."

The authority of LORD HALE, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act, would anyone say that the matrimonial consent would render this no crime? And there is the great authority of LORD STOWELL for saying that the husband has no right to the person of his wife if her health is endangered: *Popkin v. Popkin* (16).

It seems to me, however, unnecessary to decide that question in the present case, because the prisoner's wife undoubtedly did consent in fact to the act of intercourse, and, therefore, consented to all natural and ordinary attendant circumstances or consequences of the act, and also to such as were reasonably within her knowledge and contemplation. Had then the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and healthy connection, or had she known, or had reasonable grounds for thinking, that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offence would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute who gains her livelihood by promiscuous intercourse, it may well be implied that he accepts all the consequences. Also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication, and I think, therefore, that, upon the construction which I am putting upon the Act, there will be no danger of bringing within its definitions an injury caused by an innocent or merely thoughtless act of affection between husband and wife.

But I have said that here there undoubtedly was consent on the part of the prisoner's wife to the act of intercourse, and it is now necessary to consider what were the actual circumstances attending this act of intercourse, and what was the nature and condition of the intercourse to which the consent was given. The

actual circumstances were, that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited it. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances I think that her consent to the intercourse in fact was given upon the implied condition that to the knowledge of the prisoner the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, i.e., a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which in all probability would communicate to her a foul disease, and to which the jury had found that she would not have consented had she known the state of his health. It seems to me, therefore, to follow that the mere consent of the prisoner's wife to an act innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did; and, moreover, that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease. Such an act between husband and wife is, I cannot doubt, unlawful. In the Divorce Court it has been held that the wilful or reckless communication of disease by the one to the other amounts to legal cruelty, involving the liability to rescission of the marriage contract so far as regards cohabitation and intercourse: *Boardman v. Boardman* (17) [and now to dissolution of the marriage: Matrimonial Causes Act, 1950, s. 1 (1) (c)]. There was, I think, a clear duty cast upon the prisoner before he solicited the intercourse to communicate his condition to his wife, and the imposition of intercourse without such communication amounted to a false representation by act and conduct that he was in the same healthy and natural condition as he had been upon previous occasions of lawful intercourse.

The result, therefore, at which I have arrived is that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because, although he knew, yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act. This being so, it follows that there was both an assault and a criminal infliction of harm. I have arrived at this result by my own unaided construction of the statute and consideration of the law.

I now proceed to consider the authorities. They may be divided, according to the facts which they present, into three classes of cases. The first class consists of cases in which a wife's consent has been obtained by the fraud of the prisoner inducing her to believe that he was her husband: *R. v. Saunders* (18); *R. v. Williams* (19). The second class consists of cases in which the woman's consent was obtained by fraudulent conduct, inducing her to believe that she was undergoing medical treatment or examination: *R. v. Rosinski* (20); *R. v. Case* (21); *R. v. Flattery* (10). The third class consists of cases in which, as in the present case, the consent of the woman was given in consequence of the wilful and unlawful suppression of an injurious change of natural and previously known condition: *R. v. Bennett* (1); *R. v. Sinclair* (13); *Hegarty v. Shine* (2). Although these cases differ in themselves as to the facts and as to the language used by the court, all of them, except *Hegarty v. Shine* (2), are, as it seems to me, governed by the same principle, which is that, though the woman consented to the act of intercourse, she did not consent to it in its actual nature and conditions.

In *R. v. Case* (21) the girl did not resist from a bona fide belief wilfully induced by the prisoner that she was being treated medically, and the learned Recorder of London, a judge of wide experience in criminal cases, directed the jury that, if they were satisfied that the act was committed under such circumstances, the prisoner's conduct amounted to an assault. This direction was approved on appeal. WILDE, C.J., says in his judgment (4 Cox, C.C. at p. 223):

"She made no resistance to an act which she supposed to be quite different from what was done, and, therefore, that which was done was done without her consent."

C'OLERIDGE, J., whose knowledge and experience in those matters could not be surpassed, said (*ibid.*): A

"She makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent the defendant's act would have been indisputably an assault."

PLATT, B., said (*ibid.* at pp. 223, 224): B

"The girl consents to one thing, and the defendant does another, that other involving an assault."

This was a decision of the Court for the Consideration of Crown Cases Reserved. In *R. v. Flattery* (10), in the same court, a case of the second class, the same doctrine was held, KELLY, C.B., saying (2 Q.B.D. at p. 413): C

"The girl only submitted to the plaintiff touching her person in consequence of the fraud and false pretences of the prisoner, and the only thing she consented to was the surgical operation."

In these cases the fraud by which the consent was obtained was a fraud as to person and circumstances, and did not, as in this case, relate to the very act of connection, its physical nature and conditions, and it seems to me to follow that a consent induced by a fraud relating to the physical nature and conditions of the act itself falls still more clearly within this principle. Accordingly so it was held in *R. v. Bennett* (1). There that very eminent judge, WILLES, J., applied this doctrine and held that the consent to one act obtained by fraud as to its physical nature was no consent to a different act injurious in its nature and to which the consent was never intended to be applied. In this respect he was followed by SHEE, J., in *R. v. Sinclair* (13). It is true that in *Hegarty v. Shine* (2) some of the judges in the Irish courts expressed disapproval of the ruling of WILLES, J., in *R. v. Bennett* (1), as tending to show that any fraud is sufficient to convert a civil act of breach of duty into a criminal one, and reliance was placed on this in the argument against the conviction. But I think this disapproval rests upon a misunderstanding of the direction, as I understand that very learned judge never meant to say that any fraud must vitiate the consent, but that a consent obtained to one act is not a consent to an act of a different nature, and if obtained by a fraud as to its nature would not render the act lawful. In *Hegarty v. Shine* (2) in the Court of Appeal *R. v. Bennett* (1) was distinguished and in no way departed from, and the actual decision in *Hegarty v. Shine* (2) does not seem to me in any way to touch the present case. I think, therefore, that the conviction should be affirmed. I am desired to add that CHARLES, J., concurs in this judgment. D
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POLLOCK, B., read the following judgment.—I agree with the judgment delivered by my learned brothers who are against the conviction, and had I seen these judgments before I prepared my own I might have been content to say simply that I assent to them; but, as I have set out my own reasons, I think it is only respectful to those from whom I differ that I should read them. H

The first count of the indictment is based upon s. 20 of the Offences Against the Person Act, 1861, which provides that

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour. . . ." I

This provision is founded upon and in continuation of the earlier legislation upon the same subject contained in s. 4 [repealed] of the Prevention of Offences Act, 1851, which was as follows:

"And whereas it is expedient to make further provision for the punishment of aggravated assaults; be it enacted that, if any person shall unlawfully and

maliciously inflict upon any other person either with or without any weapon or instrument any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanour."

Looking at the language of these two Acts, it appears to me that the "grievous bodily harm" which is "unlawfully" inflicted must be the natural consequence of some act in the nature of a blow, wound, or other violence, which is in itself illegal and not merely the result of conduct which is immoral and injurious by reason only of a fraud or breach of good faith; or, to put the proposition in another form, "grievous bodily harm" which is the ultimate effect of treachery in the doing of that which is not a "wounding or inflicting etc., with or without any weapon or instrument," but is the doing of an act of an entirely different character, is not within the terms of the statute. It is also to be observed that, although a man is by law held to be responsible for the necessary consequences of his acts, in the case before us it cannot be suggested that the real intent of the prisoner was to inflict grievous bodily harm, or indeed any harm, upon his wife.

The second count charges an assault, and upon this more difficulty arises. Some of the observations which I have already made are equally applicable to this question. Apart from authority I should be inclined to hold that, in this case also, an assault must in all cases be an act which in itself is illegal, and it is not unimportant to notice that the case is one of first impression, as no trace can be found of any previous attempt to bring such conduct, foul and cruel though it be, within the scope of the criminal law. As to this count, however, there is some authority. In *R. v. Bennett* (1) an uncle was indicted for an indecent assault upon his niece, he being diseased and she ignorant of the fact. It was held by WILLES, J., that the prisoner could be properly convicted, and in his summing-up that learned judge said:

"An assault is within the rule that fraud vitiates consent, and, therefore, if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault."

This case was followed by *R. v. Sinclair* (13), in which the prisoner being diseased had connection with a girl who, being ignorant of the fact, consented.

As far as I can discover, these are the only decisions which have any material bearing upon the case now before us. They are not binding upon this court, and they have been much questioned in the civil case in Ireland of *Hegarty v. Shine* (2). As at present advised I see great difficulty in adopting them in their entirety. If the reasoning upon which they are founded be sound, I should have thought that the offence of which the prisoners were guilty was not an assault but rape. Without, however, further argument and consideration, I am not prepared to say that they should be overruled, especially as in cases of a similar kind, which may well arise, they are undoubtedly important and useful in the administration of the criminal law; but I cannot assent to the proposition that there is any true analogy between the case of a man who does an act which in the absence of consent amounts to an indecent assault upon his niece, or any woman other than his wife, and the case of a man having connection with his wife. In the one case the act is, taken by itself, in its inception an unlawful act, and it would continue to be unlawful but for the consent. The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract, and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent. As is said by LORD HALE in his *PLEAS OF THE CROWN* (p. 1629):

"By their mutual matrimonial consent and contract the wife hath given A
up herself in this kind unto her husband which she cannot retract."

Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection; or, as here, where the condition of the husband is such that the wife will suffer.

To hold that an act in itself innocent becomes a criminal assault by reason of the concealment of a material fact, which, if communicated, might give rise to an objection by the person affected by the act, would, where there is disease, include a variety of cases beyond that which is now under discussion; such as a kiss given by a parent suffering from small-pox or scarlet fever to his child, or even the shaking of a friend's hand by one who is suffering from a contagious disease. On C
the other hand, to say that the prisoner has been properly convicted would not under all circumstances cope with the evil and moral wrong which it is desired to punish, for I suppose no one would contend that if a wife, being diseased, encouraged her husband to have connection with her she was guilty of an assault. All this goes to show that the real offence is not an assault, but the suppression or concealment of that which ought to have been communicated; and that, if it be D
desirable to bring it within the criminal law, it should be done by legislation.

As to the decision of *R. v. Case* (2), and *R. v. Flattery* (10), cited by counsel for the prosecution, in which medical men, who, under the pretence of affording medical or surgical assistance to girls, had connection with them, were held guilty of rape, they afford no assistance. In these cases the intent of the prisoners to commit a rape was clear, though the means by which they accomplished their E
purpose was fraud, the fraud being of such a nature that, under the pretence of performing an act in itself lawful and beneficial to their patient, they committed an act of a totally different character, which was in itself illegal and criminal. These considerations have led me to the conclusion that this conviction cannot be supported.

LORD COLERIDGE, C.J.—I was for some time of opinion that this conviction F
could be sustained; and, of course, everyone, I suppose, would desire to sustain the conviction in this particular case if it could be done without violating the principles of sound law. I confess that the logical deduction drawn from the words of the statute by my brothers FIELD and HAWKINS is one that I find it difficult to contradict. Yet, if in construing a statute a logical construction leads one to a G
result which it is impossible to believe was intended, that is a reason for making one believe that that is not the meaning of the statute. If this conviction can be sustained it seems to me impossible logically to deny that a conviction could be sustained for inflicting grievous bodily harm on a child by communicating small pox to it, if its father or a relative, being aware that he had the small-pox, were to kiss the child and so infect it. I give that simply as an example, and upon that H
ground it is that I am unable to believe that the statute could have contemplated results which nevertheless logically follow the construction placed upon the statute by my learned brothers who would uphold the conviction. I am unable to agree with them; and I am, therefore, of opinion that this conviction must be quashed, and I agree with the whole or nearly the whole of the judgment of my brother WILLS, I
which I have had the opportunity and satisfaction of reading.

Conviction quashed.

Solicitor : *Solicitor to the Treasury.*

[Reported by R. CUNNINGHAM GLEN, ESQ., Barrister-at-Law.]

Re POOLEY

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.J.J.), October 31, 1888]

[Reported 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73;
37 W.R. 17; 5 T.L.R. 21]

Solicitor—Trustee—Right to profit costs—Charging clause—Attesting witness to will—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 15.

Will—Beneficiary—Capacity to benefit—Attesting witness—Solicitor-trustee—Charging clause—Right to profit costs—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 15.

By s. 15 of the Wills Act, 1837: “... If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.”

The testatrix appointed B. and P. executors and trustees of her will which contained a charging clause providing that any trustee who might be a solicitor should be entitled to charge the estate for all business done by him in relation to the estate in the same manner as if he had been engaged to do such business by the executors as their solicitor. P., a solicitor, was an attesting witness and proved the will, and later brought in a bill of costs against the estate.

Held: apart from the charging clause P. would not be entitled to any professional charges; the charging clause gave him a beneficial interest which, as an attesting witness, s. 15 of the Wills Act, 1837, precluded him from claiming; and, therefore, he was not entitled to any profit costs.

Notes. See however *Re Royce's Will Trusts, Tildesley v. Tildesley*, [1959] 3 All E.R. 278, where a solicitor was appointed trustee subsequent to the death of the testator.

Applied: *Re Royce's Will Trusts, Tildesley v. Tildesley*, [1958] 3 All E.R. 586. Referred to: *Re Thorley, Thorley v. Massam*, [1891] 2 Ch. 613; *Re White, Pennell v. Franklin*, [1895-9] All E.R. Rep. 229.

As to gift to a witness attesting the execution of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 870; and for cases see 42 DIGEST 120 et seq. For s. 15 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1338.

Case referred to:

(1) *Re Barber, Burgess v. Vinnicome* (1886), 31 Ch.D. 665; 55 L.J.Ch. 373; 54 L.T. 375; 34 W.R. 395; 42 Digest 122, 1177.

Also referred to in argument:

Gurney v. Gurney (1855), 3 Drew. 208; 3 Eq. Rep. 569; 24 L.J.Ch. 656; 25 L.T.O.S. 30; 1 Jur.N.S. 298; 3 W.R. 353; 61 E.R. 882; 44 Digest 275, 1076.

Appeal by Edmund Pooley, a solicitor and trustee of the will of the testatrix, from a decision of STIRLING, J., upholding, on a summons for review of taxation, the order of the taxing master disallowing all profit costs.

By her will, the testatrix, Jane Johnson, who died in July, 1887, appointed A
H. C. Brown and Pooley, executors and trustees, and declared that:

"any trustee of this my will who may be a solicitor shall be entitled to charge my estate for all business done by him in relation to my estate in the same manner as if he had been engaged to do such business by my executors as their solicitor."

Pooley, a solicitor, was one of the witnesses who attested the will, and he proved the will in July, 1887, leave being reserved to Brown to come in and prove. In February, 1888, Pooley brought in a bill of costs as solicitor against the estate. Brown and the tenant for life having obtained the common order for taxation, the taxing master, following *Re Barber, Burgess v. Vinnicome* (1), disallowed all the professional costs. B

Pooley took out a summons for review of taxation which was dismissed by C
STIRLING, J. Pooley appealed.

Cozens-Hardy, Q.C., and *W. F. Hamilton* for Pooley.

Wintle for Brown and the tenant for life, was not called on to argue.

COTTON, L.J.—This is an appeal from a decision of STIRLING, J., who followed D
the decision of CHITTY, J., in *Re Barber* (1). I am of opinion that the decision of CHITTY, J., was right, and that STIRLING, J., was right in following it. The question is, whether, under s. 15 of the Wills Act, 1837, a direction in the testatrix's will, that every trustee of the will who is a solicitor shall be entitled to charge for professional business done for the estate, is void as regards the solicitor by reason of his being an attesting witness to the will. In my opinion, it is void as E
regards him. Pooley, as a trustee of the will, could not charge profit costs in respect of professional work done for the estate. It is urged that if we hold a clause enabling a trustee to do so to have the effect of giving him a legacy, a difficulty will arise, for that in that case a solicitor-trustee will be liable to pay legacy duty on his profit costs. I decline to give any opinion on that point; it may hereafter come before us for decision, and I do not wish to bind myself upon it; but F
that consideration ought not to prevent us from giving a fair construction to the words of the enactment now before us. [His LORDSHIP read s. 15 of the Wills Act, 1837, and continued:] It is contended that if we hold this to be a legacy to Mr. Pooley, it will be a legacy to any future trustee of the will who may be a solicitor, and that the consequences as to legacy duty will follow. That may possibly be so, but, as regards Pooley, we have only to consider whether this direction is not G
in substance a gift to him of so much of the estate as is required to pay the profit costs, and, therefore, void. It is urged that it is not a gift, for that he has to work for what he receives. That is true; but the clause gives him a right, which he would not otherwise have, to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of s. 15 of the Wills Act, 1837. H

LINDLEY, L.J.—I think it is impossible to escape from the words of s. 15 of the Wills Act, 1837, and the case appears to me to fall within its policy. I think that under the old law Mr. Pooley would have taken, by force of this clause, such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Wills Act, 1837, was to leave the will good and to make void the gift which would have made the witness incompetent. Apart I
from this clause, Mr. Pooley could not get anything out of the estate for his services, and I cannot say that a clause which enables him to get something out of the estate is not a gift to him within the meaning of s. 15 of the Wills Act, 1837.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *C. H. Bryson; Lowe & Co.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

Re RANDELL. RANDELL v. DIXON

[CHANCERY DIVISION (North, J.), February 9, 10, 1888]

[Reported 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626;
36 W.R. 543; 4 T.L.R. 307]*Charity—Cy-près doctrine—General charitable intent—Gift limited for so long as condition observed.**Perpetuities—Gift over—Direction that on failure of condition gift to go as it would otherwise go by law.*

By her will, dated June 16, 1885, the testatrix gave £14,000 to her trustees upon trust to be invested and to pay the annual income therefrom to W., the incumbent of the district church at H., so long as he should permit all sittings in the church to be occupied free of pew rents, but, if W. or any later incumbent should claim and receive pew rents, the testatrix directed that the £14,000 should fall into and be dealt with as part of her personal residuary estate. The testatrix also gave a field of three acres of arable land for the benefit of the church at H. upon the same trusts and conditions as the gift of £14,000.

Held: (i) the income of the £14,000 was a charitable gift limited for so long as the condition was observed and was not one for general charitable purposes enabling a cy-près scheme to be applied on failure of the condition; the gift over being a direction that on failure of the condition the fund should go in the manner in which it would otherwise necessarily go by law, the gift over was not void for perpetuity: (ii) the gift of the field being a gift of land for a charitable purpose and not being one which could be supported as a gift for glebe under the Gifts for Churches Acts, 1803 and 1811, was void in mortmain.

Notes. The law of mortmain was repealed by s. 38 of the Charities Act, 1960, which Act repealed the material provisions of the Gifts for Churches Acts, 1803 and 1811.

Considered: *Re Bowen, Lloyd Phillips v. Davis*, [1891-4] All E.R. Rep. 238. Followed: *Re Blunt's Trusts, Wigan v. Clinch*, [1904] 2 Ch. 767. Considered: *Re Peel's Release*, [1921] All E.R. Rep. 103. Referred to: *Re Talbot, Jubb v. Sheard*, [1933] All E.R. Rep. 126; *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985; *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v. Fielding-Ould*, [1950] 1 All E.R. 689; *Re Hanbey's Will Trusts, Cutlers' Co. (Sheffield) v. London Corpn.*, [1955] 3 All E.R. 874; *Re Cooper's Conveyance Trusts, Crewdson v. Bagot*, [1956] 3 All E.R. 28.

As to the application of the rule against perpetuities and the duration of limitations, see 29 HALSBURY'S LAWS (3rd Edn.) 311 et seq. As to assurances for glebe land and as to the rules applicable to the creation of charitable trusts in relation to limited gifts, see, respectively, 4 HALSBURY'S LAWS (3rd Edn.) 244, 298 et seq., and for cases see 8 DIGEST (Repl.) 434, 435. For s. 10 of the Clergy Residences Act, 1776, see 7 HALSBURY'S STATUTES (2nd Edn.) 711.

Case referred to:

- (1) *Walsh v. Secretary of State for India* (1863), 10 H.L. Cas. 367; 2 New Rep. 339; 32 L.J.Ch. 585; 8 L.T. 839; 9 Jur.N.S. 757; 11 W.R. 823; 11 E.R. 1068, H.L.; 8 Digest (Repl.) 442, 1322.

Also referred to in argument:

- Christ's Hospital v. Grainger* (1849), 1 Mac. & G. 460; 1 H. & Tw. 533; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 14 Jur. 339; 41 E.R. 1343, L.C.; 8 Digest (Repl.) 440, 1308.

Summons by the trustees of the will of the testatrix to determine, among other questions, (i) whether on the ground of perpetuity or otherwise the proviso in the will carrying over the bequest of £14,000 into the residue was void in a certain event; and (ii) whether the gift of the Red Lion Field [about three acres] was valid as a gift of glebe under the Gifts for Churches Acts, 1803 and 1811.

By her will, dated Nov. 16, 1885, the testatrix, Elizabeth Randell, gave £14,000, free from legacy duty, out of her pure personal estate, and on which the same should, after the payment of the thereafter mentioned charitable legacies, be a primary charge to trustees upon trust to invest as therein mentioned, and proceeded:

"And in case the Rev. J. I. Penfold Wyatt, the present incumbent of the district church of Holy Trinity at Hawley, shall be such incumbent at my decease, and shall during his incumbency, or during such part thereof as he shall permit all the sittings in the said church to be occupied free of all claim for pew rents, pay to him the interest, dividends, and annual proceeds arising from the said sum of £14,000 and the investments thereof; and from and after the determination of the said incumbency of the said J. I. Penfold Wyatt by death or otherwise do and shall, so long as his successors, incumbents of the said district church, shall permit all the sittings of the said district church to be occupied free of all claims for pew rents, pay the interest, dividends, and annual proceeds of the stocks, funds, and securities in or upon which the . . . £14,000 may be invested to the incumbent for the time being of the said district church, and I direct and declare that in case any such incumbent shall make any claim for and receive any such payment as aforesaid in respect of the occupation of any pews or sittings in the . . . church that from thenceforth the said trust moneys and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my residuary personal estate."

The testatrix devised a piece of arable land, about three acres, called the Red Lion Field, to the same trustees for the benefit of the church of the Holy Trinity at Hawley, upon the same trusts and conditions as those respecting the £14,000 bequeathed. The testatrix then disposed of the advowson of the church, and gave a number of charitable and pecuniary legacies, and she gave all the residue of her real and personal estate, subject to the payment thereof of her debts and funeral and testamentary expenses, to Mary Jane Dixon and Jesse Michell in equal shares.

Medd for the trustees.

Cozens-Hardy, Q.C., and *F. Vaughan Hawkins* for the incumbent of Holy Trinity, Hawley.

G. F. Hamilton for the residuary devisees.

Carson for the pecuniary legatees.

Cur. adv. vult.

Feb. 10, 1888. **NORTH, J.**—For the purpose of deciding the point on which I reserved my judgment, it is necessary to deal with the gift of the £14,000 now, because the land in question, which is three acres, is to be held upon the same trusts and conditions as those respecting the £14,000 bequeathed by the will.

The effect of the gift of the £14,000 is, that the gift of the income of this £14,000 is a charitable gift, and is not in itself obnoxious to any rule against perpetuities. But it seems to me that the charitable gift is one for a definite limited particular purpose. It is intended to be devoted to one thing and nothing else; it is intended to continue so long as the pews in the church are allowed to be used without payment of any pew rents of any sort and no longer. Then the gift over is (whatever its construction may be) important as showing that

the testatrix intended the gift to be for a limited special purpose and no other, because it says that in case the definite purpose specified can no longer be carried into effect then the property is to fall into the residue of the personal estate. Under these circumstances it seems to me that there is a charity created for a definite limited time and no longer, and there is no general purpose of charity with respect to which a scheme could be made, altering entirely the destination of the income of these investments.

It seems to me startling to say that the Charity Commissioners might, if they pleased, make a new scheme for the application of this income in any way they pleased, possibly for the benefit of the incumbent and possibly not, and that when they have done that, although the purpose for which the money is given can no longer be carried into effect, yet the money is to be applied for a totally different purpose. I know no case at all like it, but the case that most resembles it is *Walsh v. Secretary of State for India* (1). There was beyond all question a trust for charity for a limited period, but there it was held that when the trust came to an end it fell into the estate of Lord Clive. In the present case it seems to me that there is a definite particular special charitable bequest which must have effect given to it so long as it lasts, and no longer, and that when it comes to an end there is no general devotion of the fund to general charitable purposes at all, the intention of the testatrix being distinctly opposite, and that, on the construction of the will, the charity is for a particular limited purpose, and nothing beyond that is declared; as soon as that particular purpose comes to an end the fund which was subjected to that particular trust falls into the residue of the estate, and it would do so just as much if there was no such limitation as this in the will, as it does when the limitation is found here. The limitation is that in that case

“the trust moneys, and the interest, dividends, and annual income arising therefrom, shall fall into and be dealt with as part of my residuary personal estate.”

If the testatrix had said that it would fall into and form part of her residuary personal estate, she would simply have been stating what the law is; but saying that it shall do so, is simply directing what the law would do without such a statement.

In my opinion, a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction cannot be said to be an invalid gift or contrary to the policy of the law. In my opinion, therefore, this direction means that the fund is to go as the law, independently of direction, would give it, and that therefore that gift is not obnoxious to any rules of law. That being so, it belongs (subject of course to the trust created) to the residuary legatees, and they take it just as they would take it if there were no gift, or if the gift failed for perpetuity. It goes to them as part of the estate of the testatrix. I feel, therefore, able to answer the question in the summons in this way: that the direction in the will in the events therein mentioned, that the trust moneys arising from the investment of the £14,000, and the interest, dividends, and annual produce thereof shall fall into and be dealt with as part of my residuary personal estate, is not void on the ground of perpetuity. The question is perpetuity or otherwise, but no objection has been made except that for perpetuity.

There remains the question upon which I specifically reserved judgment, as to the operation of the gift of all that piece of arable land (describing it), which contains about three acres, now in the occupation of the present incumbent, to the trustees of the will, their heirs, executors, and assigns, as trustees for the benefit of the district church of the Holy Trinity upon the same trusts and conditions as those respecting the £14,000 bequeathed. The trust of the £14,000 is clearly a charitable gift to a limited extent. This, therefore, is a gift of land

for a charitable purpose, and that gift is void, unless it can be brought within the Gifts for Churches Act, 1803. [His LORDSHIP read the preamble and s. 1 of the Act of 1803, and continued:] It is said that the devotion of those three acres in the way I have mentioned is a gift of glebe within the meaning of that statute. I postponed judgment in order to look into the Acts to which counsel for the incumbent of the district church referred in general terms, dealing with the glebe to see whether I could find anything in them which would enable me to put a larger construction on the word "glebe," as used in this Act, than I otherwise could have done. I have looked at several Acts upon the subject. One of them was the Clergy Residences Repair Act, 1776. [His LORDSHIP then read s. 10 of the Act of 1776, and continued:] It seems to me to be impossible to hold that such a gift as this, which, in my view, is one which would come to an end as soon as the purposes for which the limited charity is created failed, is a gift of land within the meaning of the Gift for Churches Act, 1803, and, under those circumstances, although I would have held otherwise if I could, I must hold that that gift of three acres is contrary to the Statute of Mortmain, and is inoperative.

Order accordingly.

Solicitors: *Houseman & Co.; Maples, Teesdale & Co.; Reep, Lane & Co.*

[*Reported by J. R. BROOKE, Esq., Barrister-at-Law.*]

SOUTH STAFFORDSHIRE WATERWORKS CO. v. R. MASON & SONS

[QUEEN'S BENCH DIVISION (Wills and Grantham, JJ.), December 16, 1886]

[*Reported 56 L.J.Q.B. 255; 57 L.T. 116; 3 T.L.R. 217*]

Water Supply—Pipes—Right of support—Mining—Pipes damaged by subsidence—Failure by undertakers to deposit map of pipes pursuant to Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), ss. 19, 20.

The deposit of the map of the district, showing the situation of all existing pipes, prescribed by ss. 19 and 20 of the Waterworks Clauses Act, 1847, is a condition precedent to the right of the water undertakers to recover from the owner of minerals lying under the pipes for damage caused to the pipes by working the minerals.

Notes. The Waterworks Clauses Act, 1847, has been repealed by the Water Act, 1945, the third schedule to which provides a new waterworks code which is intended to replace the code under the 1847 Act. The code under the 1847 Act, however, continues to apply where that Act has been incorporated into a special Act unless the special Act has been varied by order of the Minister of Housing and Local Government by the substitution of a new code: see the Water Act, 1945, s. 32(2). The Water Act, 1945, Sched. 3, Pt. IV, ss. 12, 13, 14, 19, correspond to ss. 19, 22, and 28 of the Waterworks Clauses Act, 1847, respectively. The 1945 Act does not reproduce s. 20 of the 1847 Act.

Referred to: *Newcastle-under-Lyme Corpn. v. Wolstanton, Ltd.*, [1946] 2 All E.R. 447; *Bolsover U.D.C. v. Bolsover Colliery Co.*, [1947] 1 All E.R. 130.

As to rights of support and compensation in mining areas, see 26 HALSBURY'S LAWS (3rd Edn.) 349 et seq.; as to minerals underlying waterworks, see *ibid.*, vol. 39, pp. 327, 328. For cases see 11 DIGEST (Repl.) 162 et seq. For the Waterworks Clauses Act, 1847, see 26 HALSBURY'S STATUTES (2nd Edn.) 729, and for the Water Act, 1945, see *ibid.*, p. 786.

Cases referred to :

- (1) *Re Dudley Corpn.* (1881), 8 Q.B.D. 86; 51 L.J.Q.B. 121; 45 L.T. 733; 46 J.P. 340, C.A.; 11 Digest (Repl.) 170, 410.
- (2) *Normanton Gas Co. v. Pope and Pearson, Ltd.* (1883), 52 L.J.Q.B. 629; 49 L.T. 798; 32 W.R. 134, C.A.; 11 Digest (Repl.) 167, 387.

Action by the South Staffordshire Waterworks Co. against Richard Mason & Sons, to recover a sum of £709 12s. 3d. in respect of injury caused to the plaintiffs' pipes by a subsidence of the soil by reason of the working of the defendants' collieries.

In 1877 and 1881 the plaintiffs in pursuance of the powers conferred on them by the several Acts of Parliament which incorporated the provisions of the Waterworks Clauses Act, 1847, caused certain main water pipes to be laid in and under certain roads known as the Bridge Road, and Toll End Road, in the parish of Tipton, and the plaintiffs in their statement of claim contended that they thereby acquired under the Acts a right to subjacent and lateral support for their mains from the soil and minerals in and above which they were laid. The defendants were possessed of two collieries, comprising minerals lying under and adjoining Bridge Road and Toll End Road, in which the plaintiffs' mains had been laid. The defendants, after the laying of the plaintiffs' mains, so worked their collieries and minerals as to cause the same and the soil which supported them from time to time to subside, and thereby caused the mains to break and become damaged, and the plaintiffs were put to expense in raising and repairing their mains consequent on the subsidence. The defendants in their statement of defence did not admit the right of the plaintiffs to the subjacent and lateral support alleged in their statement of claim, and denied that they had so worked their collieries as to cause the plaintiffs' mains and the soil supporting them to subside, and that the leaking of the mains was occasioned by any subsidence of the soil, or withdrawal of subjacent or lateral support. The defendants also said that the plaintiffs had not, as required by ss. 19 and 20 of the Waterworks Clauses Act, 1847, caused a survey map to be made of the district or situation of the main water pipes alleged to have been laid in 1877 and 1881 in and under the roadways mentioned, and had not deposited the same with the clerk of the peace for the parish of Tipton, and that there had been no plan or map open to the inspection of the defendants as required by the said sections. The plaintiffs in their reply joined issue, save that with respect to the allegations of the defendants as to the survey, plan, and map, which they did not admit, they further contended that compliance with the provisions of ss. 19 and 20 of the Waterworks Clauses Act, 1847, was not in point of law a condition precedent to the acquisition of the right to support for their main water pipes, and that independently of any such compliance they became and were entitled under and by virtue of the said Act to subjacent and lateral support for their pipes from the defendants' soil and minerals from and after the time of the laying of the same. It was ordered that the point of law thereby raised should be set down for hearing, and disposed of before the trial of the action under Ord. 25, r. 2, and this was the point of law which now came on for hearing.

By the Waterworks Clauses Act, 1847 :

Section 19. "The undertakers shall from time to time within six months from the time at which any pipes, conduits, or underground works, shall have been laid down or formed by them, cause a survey map to be made of the district within which any such pipes or underground works shall be laid, on a scale not less than one foot to a mile, and shall cause to be marked thereon the

course and situation of all existing pipes or conduits for the collection, passage, or distribution of water and underground works belonging to them in order to show all such underground works within the said district, and shall within six months from the making of any alterations or additions cause the said map to be from time to time corrected, and such additions made thereto as may show the line and situation of all such pipes, conduits, and underground works as may be laid down or formed by them from time to time after the passing of the special Act; such map and plan, or a copy thereof, with the date expressed thereon of the last time when the same shall have been so corrected as aforesaid, shall be kept in the office of the undertakers, and shall be open to the inspection of all persons interested in the same within the district."

Section 20. "The undertakers shall from time to time within three months from the time at which any such map or plan, or any such correction thereof or addition thereto shall have been made, deposit with the clerks of the peace in England of every county in which such district or any part thereof may be situate, and also with the parish clerks of the several parishes in England in which such underground works shall be situate, copies of the map or plan with all such particulars and all such corrections and additions so far as relates to such counties and parishes respectively."

Section 22. "Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier, of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground, and shall be described in the map or plan which shall be so kept and deposited as hereinbefore mentioned, or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier, shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any persons appointed by them for the purpose; and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same."

Section 28. "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels, within or under such sheds and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works and engines."

Wills (with him *Jelf*, *Q.C.*) for the plaintiff company.

Henn Collins, *Q.C.* (with him *Johnston Watson*) for the defendants.

WILLS, J.—In this case I have come to the conclusion that our decision must be in favour of the defendants, on the broad, simple, and intelligible ground that in the Waterworks Clauses Act, 1847, there is a group of sections expressly intended to meet and cover the class of cases to which this belongs, and to do away with the effect of the construction placed by the Court of Appeal on a similar enactment in *Re Dudley Corpn.* (1). If s. 28 of the Act stood alone it would, on the authority of that case, prevail; and it would be a necessary implication that the ordinary right of action for personal injury remained, and was not interfered with. But it seems to me that to decide in that way would be to pass over the fact that the legislature has provided for the mutual protection of water companies and mineowners, by a group of sections containing

provisions beneficial to both, and expressly intended to meet such cases as the present.

I think, therefore, that the existence of the body of legislation contained in ss. 18 to 23, prevents us from giving a like meaning to s. 28 to that given by the Court of Appeal in the case I have mentioned to the section there discussed. These sections, in my judgment, form a code which is perfectly adequate to do justice between the rival owners of water pipes and of mines, and provide the machinery, into the details of which I will not go, for the regulation of their conflicting rights. The owner of the pipes is not to be called upon to compensate the owner of the minerals until there is a danger that the necessary support will be taken away and the pipes interfered with, and then he is at once relieved from the danger by taking the steps provided by the Act.

The knowledge of the existence of pipes resting upon the support of the minerals is doubtless in some cases a temptation to mineowners, and there may have been cases in which when markets have been dull mineowners have worked in a particular direction with the object of obtaining the compensation provided by the Act, but in this case the plaintiffs have, either from negligence or design, failed to deposit the plan prescribed by the Act for the purpose of giving information to the mineowner when he is in danger of damaging the pipes of the water company. Their failure to do so has made it impossible for us to apply s. 22 of the Act. No plan was deposited showing the pipes laid down by them. Consequently the mineowner was deprived of his chance of making use of the section, and it would, therefore, be highly unreasonable for us to hold that the plaintiffs had a right to compensation for the interference with their pipes, when by their conduct they had rendered it impossible for the mineowner to take advantage of the provisions of the statute. It seems to me plain that where these sections are applicable the general right of support does not exist, and the plaintiffs having rendered it impossible for the mineowner to act under the sections, cannot avail themselves of that right to bring an action for interference with their pipes. Their right it must be remembered is not founded on common law, but is a right given by statute, and their claim to exercise it when they have shut the defendants out from the statute is unreasonable.

GRANTHAM, J.—The whole of the argument on which the learned counsel for the plaintiffs relies, is based upon a statute and a decision dealing with an entirely dissimilar state of circumstances. Were it not for the judgment of the Court of Appeal in *Re Dudley Corpn.* (1), and perhaps also *Normanton Gas Co. v. Pope and Pearson, Ltd.* (2), there would be nothing to be said in favour of the plaintiffs. The circumstances of those cases are different, and they do not apply.

With reference to the circumstances of this case, I can imagine many cases in which great injustice would be done if we decided in favour of the plaintiffs. It is urged on their behalf that the pipes were laid in a public street, and that, therefore, it cannot be said that the owner of the mine did not know that they were there; but I can easily understand that many cases might occur in which the mineowner would be able to say that he did not know they were there. The Waterworks Clauses Act, 1847, s. 22, provides that the mines lying near the pipes shall not be worked until the owners have given notice of their intention to do so to the company; and if no distance is prescribed by the special Act, forty yards is mentioned as the distance. This distance was taken, I imagine, from the Railways Clauses Act, as in many respects it is not applicable to water companies, and no doubt, if the provision had been originally framed for water companies, a different distance would have been prescribed. Still that distance was prescribed by the legislature, and the provision is perfectly clear.

Then it is said that the mineowner might have known notwithstanding the failure to deposit the map that the pipes were there. Let us see what might

have happened. The plaintiffs date their origin from the year 1834 when the Dudley Waterworks Co. were incorporated, and the pipes might have been laid so long ago as that. It is true that the plaintiff company had nothing to do with this district until the year 1860; but they seem at that time to have purchased the whole undertaking of the Dudley company, and it is, therefore, quite possible that they might not themselves know exactly where some of their own pipes were situate. On the other hand, the mine might also have changed hands frequently since that time. I think that if we listened to this argument we should be throwing a great burden where it ought not to be thrown. It is suggested that by a strained interpretation of a later section in the Act we might hold that the plaintiffs are entitled to an absolute right of support, but in the face of these specific provisions giving the undertakers, if they choose to act in accordance with them, every protection which they need, I do not feel justified in giving that effect to the later section which the plaintiffs suggest.

Judgment for defendants.

Solicitors: *Burton, Yeates, Hart & Burton*, for *Johnson & Co.*, Birmingham, *Robinson & Dees*, for *Shakespeare*, Oldbury.

[*Reported by* JOSEPH SMITH, Esq., *Barrister-at-Law.*]

LANCASHIRE AND YORKSHIRE RAIL. CO. v. BURY CORPORATION

[HOUSE OF LORDS (Lord Herschell, Lord FitzGerald and Lord Macnaghten), July 25, 1889]

[Reported 14 App. Cas. 417; 59 L.J.Q.B. 85; 61 L.T. 417;
54 J.P. 197]

Bridge—Maintenance—Bridge over railway—Liability of railway company to maintain roadway over bridge—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 46.

Where a railway crosses a highway, and the road is carried over the line on a bridge in accordance with the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company are bound to keep the roadway over the bridge in repair.

Notes. Considered: *A.-G. and Derbyshire County Council v. Midland Rail Co.* (1908), 99 L.T. 961; *Macclesfield Corpn. v. Great Central Rail. Co.*, [1911] 2 K.B. 528; *London and North Eastern Rail. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E.R. 692; *Monmouthshire County Council v. British Transport Commission*, [1957] 3 All E.R. 384. Referred to: *West Lancashire Rural Council and London and Yorkshire Rail. Co.* (1903), 72 L.J.K.B. 675.

As to liability to repair bridges, see 19 HALSBURY'S LAWS (3rd Edn.) 470-472; and for cases see 26 DIGEST (Repl.) 653. For maintenance of road over or under railway, see 31 HALSBURY'S LAWS (3rd Edn.) 590; and for cases see 38 DIGEST (Repl.) 312 et seq. For the Railways Clauses Consolidation Act, 1845, s. 46, see 19 HALSBURY'S STATUTES (2nd Edn.) 616.

Cases referred to :

- (1) *North Staffordshire Rail. Co. v. Dale* (1858), 8 E. & B. 836; 27 L.J.M.C. 147; 4 Jur.N.S. 631; 120 E.R. 312; 38 Digest (Repl.) 313, 148.
- (2) *Newcastle-under-Lyne and Leek Turnpike Roads Trustees v. North Staffordshire Rail. Co.* (1860), 5 H. & N. 160; 157 E.R. 1140; sub nom. *Leech v. North Staffordshire Rail. Co.*, 29 L.J.M.C. 150; 1 L.T. 332; 24 J.P. 71; 8 W.R. 216; 38 Digest (Repl.) 313, 149.

Also referred to in argument :

- North of England Rail. Co. v. Langbaugh* (1871), 24 L.T. 544; 35 J.P. 581; 38 Digest (Repl.) 313, 150.
- R. v. South Eastern Rail. Co.* (1875), 32 L.T. 858; 40 J.P. 200, D.C.; 38 Digest (Repl.) 312, 146.
- London and North Western Rail. Co. v. Skerton* (1864), 5 B. & S. 559; 4 New Rep. 424; 33 L.J.M.C. 158; 10 L.T. 648; 28 J.P. 518; 12 W.R. 1102; 122 E.R. 940; 38 Digest (Repl.) 311, 138.
- Waterford and Limerick Rail. Co. v. Kearney* (1860), 3 L.T. 90; 12 I.C.L.R. 224; 38 Digest (Repl.) 319, *354.
- Fosberry v. Waterford and Limerick Rail. Co.* (1862), 13 I.C.L.R. 494; 38 Digest (Repl.) 312, *316.
- Great Eastern Rail. Co. v. Hackney Board of Works* (1883), 8 App. Cas. 687; 52 L.J.M.C. 105; 49 L.T. 509; 48 J.P. 52; 31 W.R. 769, H.L.; 26 Digest (Repl.) 560, 2275.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., FRY and LOPES, L.JJ.), reported 20 Q.B.D. 483, affirming a decision of the Queen's Bench Division (MATHEW and CAVE, JJ.), reported 57 L.T. 99, upon a Special Case.

The action was brought in April, 1886, by the respondents, who were the urban sanitary authority of the borough of Bury, for the purposes of the Public Health Act, 1875, against the appellants, a railway company, to recover the sum of £273 18s. 3d. for work done and materials provided in paving and flagging a railway bridge in Manchester Road, Bury. The question raised was, whether under s. 46 of the Railways Clauses Consolidation Act, 1845, the appellants were liable to maintain the roadway of the bridge as well as the fabric of the structure in repair. The courts below held that the appellants were liable to repair the road in question.

By the Railways Clauses Consolidation Act, 1845, s. 46 :

"If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, . . . and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company. . . ."

Sir Richard Webster, Q.C., and *W. Graham (Henn Collins, Q.C.)*, with them) for the appellants.

Sir Charles Russell, Q.C., and *R. S. Wright* for the respondents, were not called upon to address the House.

LORD HERSCHELL.—I am of opinion that this appeal should be dismissed, and that the judgment appealed from should be affirmed. The question turns upon the construction of s. 46 of the Railways Clauses Consolidation Act, 1845, the point involved being whether the appellant company are bound to maintain in repair the roadway passing over a bridge constructed by them under the authority of their special Act, which incorporated the Railways Clauses Consolidation Act, 1845.

I think that there are reasons in this case which should induce your Lordships to exercise very great caution before yielding to the argument of the learned counsel for the appellants, because a construction was put upon the clause with which we are now dealing as long ago as the year 1858 by very learned judges in the Court of Queen's Bench in *North Staffordshire Rail. Co. v. Dale* (1). The view so taken was shortly afterwards approved and followed by the Court of Exchequer in *Newcastle-under-Lyne and Leek Turnpike Roads Trustees v. North Staffordshire Rail. Co.* (2), and there are, as it seems to me, special reasons why a judgment so given should not be disturbed, unless it be clearly shown to have proceeded upon an erroneous view of the law, inasmuch as the clause which then received construction was contained in an enactment which did not of itself produce any legal results. It only had effect if incorporated by a subsequent Act of the legislature in statutes giving powers to railway companies; and one cannot but see that the construction put upon an enactment of that description may well have affected the action of the legislature in subsequent cases when they had to consider what obligations they should or should not impose upon the railway companies to whom they were giving powers. At the same time, if it could be established that the decision was manifestly erroneous, your Lordships would be bound to give effect to that view, and to hold that the statute must be construed according to its natural meaning, notwithstanding the interpretation which had so long ago been put upon it by eminent judges.

But, when we come to consider the terms of the enactment, I myself see no reason to question the propriety of the decision which was pronounced by the Court of Queen's Bench so long ago, and has been often followed since. I quite admit that a plausible argument has been advanced on behalf of the railway company by the learned counsel for the appellants, drawn from a consideration of the subsequent sections of the Act, and of the circumstances arising when the road, instead of being carried over the railway by means of a bridge, is carried under the railway, the railway passing by means of a bridge over the road. It is suggested that there is no more reason why the railway company should be bound permanently to maintain the roadway in the one case than in the other. But I think that we have first of all to look at the language used in s. 46, and to see whether, according to its natural meaning apart from the other provisions of the Act, with which I will deal in a moment, the road which passes over the bridge is a part of the bridge within the meaning of s. 46. It appears to me, that according to the natural use of language, it would be spoken of and considered as a part of the bridge, and I think that the Court of Queen's Bench were justified in saying that the language was in its natural use such as to create the obligation which is contended for on the part of the respondents.

But it is said that it is possible to construe the word "bridge" as excluding the highway passing over it, inasmuch as that distinction has been recognised in the Turnpike Acts, which were in force at the time when this statute was passed. I quite agree that it is possible to do so; but I do not think that in the language of s. 46 any such distinction is to be discovered, and it appears to me that the Court of Queen's Bench showed good reasons why the legislature should not so have distinguished it in the present case. They pointed out that there would be an inconvenience, not only in the case of the bridge itself, but still more so in some respects in the case of the approaches, in having two different authorities to repair the bridge structurally and the road, inasmuch as it might, especially in the case of the approaches, often be a question of some nicety to determine how much was what is here called the approach, and how much was the road upon the approach, between which the learned counsel for the appellants seem to make a distinction. And then, too, it may have been considered by the legislature that, as a general rule, there being an ascent and a descent contemplated on either side of the bridge, the cost of repairs would be enhanced by the fact that the road passed over the bridge instead of passing in its former

course, and that that would be a reason for imposing this perpetual obligation upon the railway company.

It is said by the learned counsel for the appellants that similar reasons, at all events as regards the latter point, might exist where a road was to be carried under a bridge, and I quite admit that that is the case; but in such an enactment as the present I do not feel pressed by that argument, and for this reason, that all that the Railways Clauses Consolidation Act, 1845, does is to lay down what one may call a general rule, which has no force or effect, except in so far as that general rule is made effective by subsequent special legislation, and when you come to deal with the matter in the special Act, if in the particular case the general rule is not the best rule, or a rule which would be fair or just, it can be accepted or modified as the legislature may think fit; and, therefore, in either case, whether as regards the road under the railway, or as regards the road over the railway, when the special Act is passed the legislature is not bound to incorporate in its exact terms either the provision relating to the one or the provision relating to the other, but may make it suitable, as it may deem fit, to the particular circumstances of the case. Therefore, it seems to me that in the present case it is of very little force to show that a different general rule has been laid down as regards roads under a bridge from the rule laid down in relation to roads over a bridge, because it may well be that, while in the one case it was thought that in most instances it would be more just and more convenient to leave the railway company to carry out those works of repairs, in the other case it may have been thought that the same principle was not so fully applicable.

For these reasons I think that the proper construction has been put upon s. 46, if one reads that section without reference to the other parts of the Act, and I find nothing in the other parts of the Act to justify a departure from its natural interpretation. I, therefore, move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD FITZGERALD.—I am of the same opinion. There appears to me to be no distinction in fact between the case now before your Lordships and the case which was decided thirty-one years ago in the Court of Queen's Bench, a decision subsequently adopted and universally acted upon down to the present time. To disturb a decision of that kind we should require to be satisfied that there was some cardinal error connected with it, and I am not satisfied at all that there is any error. On the contrary, forming the best opinion that I can, I should say that the decision of the Court of Queen's Bench in 1858 was a decision according to law, according to the true interpretation of s. 46 of the Railways Clauses Consolidation Act, 1845. It might have been very convenient indeed at the time when this Act was framed to have established one general rule if it was consistent with its provisions, namely, that when the railway company had given back the road into the hands of the county authorities unaltered in its character, repaired and made perfectly fit for use, the expense of repairs should afterwards rest with the latter body; but the statute does not say so; the decisions are to the contrary, and I adhere to the decision of the Court of Queen's Bench.

LORD MACNAGHTEN. I am of the same opinion.

Appeal dismissed.

Solicitors: *Clarke, Woodcock & Ryland*, for *C. Moorhouse*, Manchester; *Andrew, Mellor & Smith*, for *J. Haslam*, Bury.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

HETHERINGTON v. HETHERINGTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), February 22, 1887]

[Reported 12 P.D. 112; 56 L.J.P. 78; 57 L.T. 533; 51 J.P. 294;
36 W.R. 12]

Legitimacy—Presumption of legitimacy—Reversal of presumption—Spouses living apart under separation order—Non-access—Matrimonial Causes Act, 1878 (41 & 42 Vict., c. 19), s. 4.

From the moment when a separation decree or order is made authorising a husband and wife to live apart the presumptions which exist in the case of married persons as to access and legitimacy of children are reversed. If, therefore, a child is born more than nine months after the separation, unless it be shown as a matter of fact that the husband and wife came together again, it is presumed that such child is illegitimate.

Notes. The Matrimonial Causes Act, 1878, has been repealed. Where a husband has committed an aggravated assault on his wife, the wife may apply to the magistrates' court under s. 1 of the Matrimonial Proceedings (Magistrates' Court) Act, 1960, for a "matrimonial order," such an order has the same effect with regard to cohabitation as a separation order under the Act of 1878. The procedure for discharging or varying a "matrimonial order" and for appeal is contained in the Act of 1960, and in so far as this case relates to the interpretation of the 1878 Act with regard to the jurisdiction of the Probate, Divorce and Admiralty Division to entertain proceedings under the Act, it is obsolete. So much of the holding as concerns the presumption of legitimacy, however, remains authoritative.

Considered: *Russell v. Russell*, [1924] A.C. 687; *Mart v. Mart*, [1926] P. 24; *Ettenfield v. Ettenfield*, [1940] 1 All E.R. 293. Referred to: *Manders v. Manders*, [1897] 1 Q.B. 474; *Andrews v. Andrews and Chalmers* (1924), 132 L.T. 400; *Re Bromage, Public Trustee v. Cuthbert*, [1935] All E.R. Rep. 80; *Stafford v. Kidd*, [1936] 3 All E.R. 1023.

As to presumption of legitimacy, see 3 HALSBURY'S LAWS (3rd Edn.) 87 et seq.; and for cases see 3 DIGEST (Repl.) 398 et seq. For the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, see 40 HALSBURY'S STATUTES (2nd Edn.) 394.

Case referred to:

(1) *Parish of St. George v. Parish of St. Margaret* (1706), 1 Salk. 123; 91 E.R. 115; 3 Digest (Repl.) 400, 23.

Also referred to in argument:

Re Sharpe (1864), 4 New Rep. 145; 33 L.J.M.C. 152; 10 L.T. 458; 10 Jur.N.S. 1018; 12 W.R. 756; 27 Digest (Repl.) 723, 6917.

Babbage v. Babbage (1870), L.R. 2 P. & D. 222; 27 Digest (Repl.) 520, 4626.

Motion for the discharge of an order made by justices of Chester Ward, Durham.

On Jan. 1, 1883, William George Hetherington, the applicant, was convicted under s. 43 of the Offences Against the Person Act, 1861, of an aggravated assault upon his wife Elizabeth Hetherington, and an order was made under s. 4 of the Matrimonial Causes Act, 1878, that she no longer be bound to cohabit with him. On Sept. 20, 1886, the husband appeared before the magistrates on a warrant for payment of arrears of maintenance under the order. During cross-examination the wife admitted that she had given birth to a child of which her husband was not, and could not be, the father, as she had not cohabited with him since the date of the order in 1883. After these admissions, the husband took

out a summons to vary the original order, and this summons was heard at Consett Police Court on Oct. 9 and 16, 1886. The magistrates refused to admit the evidence of the husband as to non-access or the admissions made by the wife, on the grounds that neither husband nor wife was competent to give evidence tending to bastardise a child born in wedlock.

Pritchard for the husband.

Back for the wife.

SIR JAMES HANNEN, P.—I regret very much that this litigation has reached the pitch that it has, and I hope that the opinion I am about to express upon the main point of the case will, in some way or other, bring the controversy to an end; the point being, whether or not there is evidence upon which the magistrates might have acted to discharge the original order of 1883. It appears that an order was then made equivalent by the Act of Parliament to a judicial separation, and a judicial separation is equivalent to the ancient divorce *a mensa et thoro*. From the time that the decree was pronounced the parties were forced to live apart, and the husband was bound not to molest his wife in any way, or to resume cohabitation. From that moment the presumptions which exist in the case of married persons as to access and legitimacy of children are reversed, and from that moment, if a child is born more than nine months after the separation, unless it be shown, as a matter of fact, that the husband and wife came together again, it is presumed that such child is illegitimate, and that appears to have been lost sight of altogether when this matter was before the magistrates. If it had not been lost sight of, it probably would have led them to a different decision. That point has been settled long ago in law by *Parish of St. George v. Parish of St. Margaret* (1). The wife seems to have made certain statements with regard to the birth of her child: that it was born eight weeks before the matter came on for hearing in 1886. Upon that point, I think it does, by implication, lead to an inference, a conclusive inference, of the illegitimacy of the child. A woman, though she be a married woman, may prove that a child was born at a particular time, and it must depend on other circumstances whether the child was legitimate or not. It was proved that the child was born eight weeks before the hearing in 1886, and there was a legal presumption that any child born after 1883 was illegitimate. The magistrates seem, however, to have been led to think that this was an issue of bastardy, but it was not; it was an issue of adultery.

HIS LORDSHIP considered the jurisdiction of the court under s. 4 of the Matrimonial Causes Act, 1878, now obsolete, and refused the application.

Solicitors: *Pritchard & Sons*, for *T. W. Welford*, Consett; *T. Cray*, for *Die & Warlow*, Newcastle-upon-Tyne.

[Reported by H. DURLEY GRAZEBROOK, ESQ., Barrister-at-Law.]

THOMAS v. OWEN

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), November 2, December 14, 1887]

B

[Reported 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162;
52 J.P. 516; 86 W.R. 440]

*Easement—Right of way—No express reservation in lease of servient tenement
Implication of right to dominant tenement—Demise of dominant tenement
together with “appurtenances”—“Appurtenances” sufficient to pass existing
right.*

C

The plaintiff and the defendant were the tenants from year to year of adjoining farms, A and B, both of which were in the ownership of the same landlord. A private road over farm A led to the highway, but the most convenient way from that farm to the highway was by a lane leading from a point on the private road on farm A and passing through farm B. Though the lane was on farm B, it had no communication with that farm except at the end where it joined the highway and it served no purpose for farm B. The lane was a made and fenced road subsisting visibly for the convenience of farm A and had been used by the plaintiff without the defendant's permission for some 30 or 40 years, being repaired by the plaintiff from time to time. Before 1873 the defendant occupied farm B as a tenant from year to year, but in 1873 the landlord granted him a lease which was silent as to the lane in question and any user thereof. In 1878 farm A was demised to the plaintiff, who had held the farm as a yearly tenant up to that time, together with “all houses, buildings and appurtenances thereto.” The defendant interfered with the plaintiff's right of way over the lane over farm B.

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Held: (i) although the demise of farm B to the defendant was silent as to the lane the right of using the lane constituted an easement of farm A, and no demise could be made of the soil of the lane free from that right without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted; (ii) the mere grant of “appurtenances” in the demise of farm A to the plaintiff was not sufficient to create a new right of way not pre-existing at the date of grant, but was sufficient to pass the right of way already reserved for the benefit of farm A.

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Notes. By s. 62 (1) of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 559), a conveyance of land after 1881 is deemed to include and operates to convey, inter alia, “all . . . easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.”

H

Considered: *Gordon v. Ogilvie* (1899), 15 T.L.R. 239; *Derry v. Sanders*, [1919] 1 K.B. 223. Applied: *Hansford v. Jago*, [1920] All E.R. Rep. 580; *Westwood v. Heywood*, [1921] All E.R. Rep. 721. Explained: *Aldridge v. Wright*, [1929] 2 K.B. 117. Distinguished: *Liddiard v. Waldron*, [1933] All E.R. Rep. 276. Referred to: *Roe v. Siddons* (1888), 22 Q.B.D. 224; *Nicholls v. Nicholls* (1899), 81 L.T. 811; *Schwann v. Cotton*, [1916] 2 Ch. 125; *Simpson v. Gilley* (1922), 128 L.T. 622; *Re Webb, Sandom v. Webb*, [1951] 2 All E.R. 131.

I

As to the creation of easements, see 12 HALSBURY'S LAWS (3rd Edn.) 529 et seq.; and for cases see 19 DIGEST (Repl.) 22 et seq. As to general words conveying appurtenances and conveying or creating easements, see 11 HALSBURY'S LAWS (3rd Edn.) et seq.

Cases referred to :

- (1) *Hall v. Lund* (1863), H. & C. 676; 1 New Rep. 287; 32 L.J.Ex. 113; 7 L.T. 692; 9 Jur.N.S. 205; 11 W.R. 271; 158 E.R. 1055; 19 Digest (Repl.) 51, 283.
- (2) *Doe d. Freeland v. Burt* (1787), 1 Term Rep. 701; 99 E.R. 1330; 38 Digest (Repl.) 782, 5.
- (3) *Polden v. Bastard* (1865), L.R. 1 Q.B. 156; 7 B. & S. 130; 35 L.J.Q.B. 92; 13 L.T. 441; 30 J.P. 73; 14 W.R. 198, Ex. Ch.; 19 Digest (Repl.) 19, 60.
- (4) *Langley v. Hammond* (1868), L.R. 3 Exch. 161; 37 L.J.Ex. 118; 18 L.T. 858; 16 W.R. 937; 19 Digest (Repl.) 34, 174.
- (5) *Watts v. Kelson* (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.J.J.; 19 Digest (Repl.) 48, 265.
- (6) *Kay v. Oxley* (1875), L.R. 10 Q.B. 360; 44 L.J.Q.B. 210; 33 L.T. 164; 40 J.P. 277; 19 Digest (Repl.) 34, 177.
- (7) *Hill v. Grange* (1555), 1 Plowd. 164; 2 Dyer, 130 b; 75 E.R. 253; 31 Digest (Repl.) 25, 1835.
- (8) *Nicholas v. Chamberlain* (1606), Cro. Jac. 121; 79 E.R. 105; 19 Digest (Repl.) 33, 162.
- (9) *Ewart v. Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur.N.S. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest (Repl.) 47, 262.

Also referred to in argument :

- Glave v. Harding* (1858), 27 L.J.Ex. 286; 22 J.P. 531; 19 Digest (Repl.) 47, 264.
- Skull v. Glenister* (1864), 16 C.B.N.S. 81; 3 New Rep. 389; 33 L.J.C.P. 185; 9 L.T. 763; 12 W.R. 554; 143 E.R. 1055; 19 Digest (Repl.) 119, 742.
- Pearson v. Spencer* (1863), 3 B. & S. 761; 8 L.T. 166; 11 W.R. 471; 122 E.R. 285; sub nom. *R. v. Pearson*, 1 New Rep. 373, Ex. Ch.; 19 Digest (Repl.) 109, 663.
- Bayley v. Great Western Rail. Co.* (1884), 26 Ch.D. 434; 51 L.T. 337, C.A.; 19 Digest (Repl.) 35, 179.
- Pyer v. Carter* (1857), 1 H. & N. 916; 26 L.J.Ex. 258; 28 L.T.O.S. 371; 21 J.P. 247; 5 W.R. 371; 156 E.R. 1472; 19 Digest (Repl.) 43, 228.

Appeal by the defendant from a decision of the Queen's Bench Division (MATHEW and CAVE, JJ.), refusing a new trial.

This was an action for interference with a right of way tried before Mr. MCINTYRE, Q.C., sitting as commissioner, at Anglesey, with a jury. The jury found that the plaintiff was entitled by reason of user to the right of way claimed, and judgment was entered for the plaintiff accordingly. The Divisional Court refused to order a new trial, and the defendant appealed.

Clement Higgins, Q.C., with him *J. E. Vincent* for the defendant.

F. Marshall and *J. H. Williams* for the plaintiff, were not called on to argue.

Cur. adv. vult.

Dec. 14, 1887. **FRY, L.J.**, read the following judgment of the court.—This is an action brought for interference with a right of way, and the question is whether the plaintiff has the right of way which he claims.

The plaintiff and the defendant are tenants of adjoining farms in the island of Anglesey under Sir Richard Bulkley, the plaintiff's farm being known as Ty Wian, and the defendant's farm as Caerau. A parish road, leading from Llanrhyddlad to a place on the coast known as Cemlyn Bay, passes through Caerau, the defendant's farm; the plaintiff's farm communicates with this highway by a road which, from the plans and other evidence before us, we hold to be a private road. This private road joins the parish road at a place called the Old Bar. From a point on the plaintiff's farm, and on this private road about half way between the home-stead of Ty Wian and the Old Bar, a lane known as Lon Car Glas, runs westward, and leads from the plaintiff's farm and the private road to a spot on the parish

road nearer to Cemlyn Bay than to the Old Bar. It is, therefore, the nearest way from Ty Wian to Cemlyn Bay and the parts thereabout, and besides being nearer than the private road, it is level, while the private road is steep and hilly. The right of way claimed by the plaintiff is along this Lon Car Glas. A

This lane is, we conclude from the evidence before us, an ancient lane; it is 418 yards in length and twenty-two yards wide; for a short distance on one side near its eastern end the lane is bounded by the plaintiff's land; but with this slight exception it has the defendant's land on both sides; it is bounded by turf banks with hedges on the top for its whole length; it has no communication on either side with the defendant's land. The roadway is made with cobble stones, and is partly grown over with grass. The lane is a made road perfectly visible; it is a long strip between two roads intersecting the defendant's farm, separated from that farm on both sides, and only open to the defendant's access at its western end where it joins the parish road; it subserves no use for the defendant's farm except so far as it may be grazed by his cattle; but it leads from the high road to the plaintiff's land and towards the plaintiff's farmhouse, and that is its only visible purpose and reason for existence. B

Such is the present condition of the road, and such we conclude from the evidence has been its condition for thirty or forty years before the action was brought. It has for many years past been used by the plaintiff as occasion required, both for himself and his family, in going to chapel and elsewhere, and by his carts in bringing coal, gravel, seaweed, and guano from Cemlyn Bay; and it has from time to time been repaired by him. These acts have been done by the plaintiff without asking or receiving permission from the defendant, and until immediately before action, without interference on his part. We conclude from the evidence that the user for thirty or forty years past has been in accordance with the modern user by the plaintiff, as we have stated it. C

The defendant has occupied his farm prior to 1873 as tenant from year to year. But in that year he accepted a lease from Sir Richard Bulkley, under which he now holds. By that lease the landlord demised to the defendant, among other things, all those tenements usually known by the name of Caerau, containing by admeasurement 305a. 1r. 24p., described as then in the tenure or occupation of the defendant. This description was followed by general words, and by reservations of timber, mines, and game. The lease is silent as to the lane in question and any user thereof, but it is admitted by the plaintiff that the lane is comprised in the 305a. 1r. 24p. of Caerau. The plaintiff had occupied his farm as tenant from year to year to Sir Richard Bulkley down to the year 1878, when he accepted a lease from his landlord, under which he now holds. By this instrument the lessor demised to the plaintiff the messuage known as Ty Wian, together with all the land and all houses, buildings, and appurtenances thereto belonging, subject to reservations of timber, mines, and game. This lease contains no other general words than the word appurtenances. D

We think it a just inference or conclusion from the evidence before us that, both in 1873 and 1878, the use of the lane in question was visibly necessary to the comfortable enjoyment of the plaintiff's farm in the manner in which it was enjoyed at and before those dates respectively. We think further that, in construing the leases of 1873 and 1878, we are bound to attend to the previous user of the plaintiff's and defendant's farms respectively: *Hall v. Lund* (1). The defendant interfered with the plaintiff's user of the lane, and thereupon this action was brought. It was tried before Mr. Commissioner McINTYRE and a jury, who found that the plaintiff was entitled to a right of way along the lane by reason of user. Judgment was entered for the plaintiff accordingly; and from that judgment this appeal is brought. E

The main contention of the defendant has been that, even assuming the user as found by the jury, and as we have stated it, the plaintiff cannot recover. The defendant has, in addition, raised certain contentions as to the facts, in respect F

of which we have already stated our conclusions. The evidence, in our opinion, amply justifies the verdict and judgment in point of fact, if they can be justified in point of law. The defendant has contended before us that, according to the true construction of the lease of 1873, Sir Richard Bulkley thereby purported to demise to him Lon Car Glas free from all rights of way in the plaintiff; that the lessor was estopped by this lease, and that the plaintiff, having taken a subsequent lease from Sir Richard Bulkley, is likewise estopped from denying the defendant's title to the lane free from any right of way. The defendant further contends that, even if Sir Richard Bulkley was able to grant a right of way to the plaintiff over Lon Car Glas, he did not in fact grant it by the lease of 1878, under which the plaintiff claims, and consequently that the plaintiff has no title to the way claimed.

With regard to the lease of 1873, it is not necessary to consider how the matter would have stood if the lessor had himself been in possession of the plaintiff's farm at the date of this lease to the defendant, for this was not the case. On the contrary, at the date in question, the material facts stood thus: The farm, now the plaintiff's, was then in his occupation as tenant from year to year under Sir Richard Bulkley. The lane in question was a made and fenced road, subsisting visibly for the convenience of the plaintiff's farm, and of no use as a road to the defendant. It was, and had been, openly used by the plaintiff and his predecessors in title for many years, and had been repaired by them. The right of using this road constituted an easement of the farm occupied by the plaintiff, and no demise could be made of the soil of the lane free from that right without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted. In this state of circumstances, the presumption that the demise in question of Lon Car Glas was one free from any right of way is, in our opinion, rebutted by a consideration of these circumstances, just as in *Doe d. Freeland v. Burt* (2) the presumption that the demise of a house extended to the centre of the earth was rebutted by the existence at the time of the demise of a cellar by the same lessor, and the occupation of that cellar by a person claiming under that demise.

But then it was urged that alike in implied reservations and in implied grants a rule exists to this effect, that while such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden v. Bastard* (3) is cited, and many other authorities might have been invoked. But on this principle as established by such decisions there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (per BRAMWELL, B., in *Langley v. Hammond* (4); *Watts v. Kelson* (5)); and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case. For these reasons we are of opinion that the lease of 1873 was according to its true construction subject to the right of way over Lon Car Glas then existing in the plaintiff, and that consequently no question of estoppel can arise.

Then arises the question whether the lease of 1878 from Sir Richard Bulkley to the plaintiff conveyed to him the right of way in question. Under the circumstances of this case as we have found them, it appears to us to follow from *Watts v. Kelson* (5) and *Kay v. Oxley* (6) that the right to the way in question would pass if the lease had contained general words descriptive of easements and rights usually enjoyed with the demised premises. But it was contended before us that the absence in the lease of 1878 of any other general words than the word appurtenances made an important difference and distinguished this case from the earlier authorities to which we have referred. No doubt the word appurtenances is not apt for the creation of a new right; and the word appurtenant is not apt to describe a right which had never previously existed; and, therefore, the mere

grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as 1557 (*Hill v. Grange* (7)) the word appurtenances has easily admitted of a secondary meaning, and as equivalent in that case to usually occupied. Here at the date of the lease of 1878 *Lon Car Glas* was not in the occupation of the lessor but in that of the defendant, and the defendant had, as we have held, acquired an estate in it as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff; and under these circumstances we think that the right of way did pass under the word appurtenances. This conclusion is, we think, aided by sufficient authority; for which purpose it will suffice to refer to *Nicholas v. Chamberlain* (8), *Hall v. Lund* (1) and *Ewart v. Cochrane* (9). For these reasons we hold the judgment appealed from to be right. and dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Winter & Co.* for *D. Owen and Griffith*, Bangor; *Ullithorne, Currey & Villiers*, for *J. Rice Roberts & Laurie*, Llangefni.

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.]

LISTER v. LISTER

[COURT OF APPEAL (Cotton and Fry, L.JJ.), November 7, 19, 1889]

[Reported 15 P.D. 4; 62 L.T. 90; 38 W.R. 81;
6 T.L.R. 51]

Divorce—Maintenance of wife—Order—Dum sola clause—Discretion of court—Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), s. 32.

When making an order for the permanent maintenance of a wife after a divorce, the court has an unfettered discretion to decide whether or not in the circumstances of the case the maintenance should be payable for the wife's whole life or until her second marriage.

In December, 1876, when she was 17 years of age, the petitioner married the respondent. On Aug. 3, 1888, she obtained a decree nisi for dissolution on the grounds of the adultery and cruelty of the respondent, which decree was subsequently made absolute. There were no children of the marriage. On Mar. 1, 1889, the petitioner filed a petition for permanent maintenance. The registrar in his report stated that the petitioner had no property of her own, but the respondent had property producing an income of about £560, and he recommended that the respondent be ordered to secure for the permanent maintenance of the petitioner the sum of £195 per annum "for her life, or until she marry again." The petitioner applied for a variation of the report by the omission of the limitation "until she marry again." The judge held that he had an absolute discretion whether to strike out the limitation or not and ordered that the limitation be struck out.

Held: in the circumstances of the case the discretion of the judge had not been improperly exercised in removing the limitation "until she marry again" from the registrar's report.

Notes. The Matrimonial Causes Act, 1857, s. 32, was repealed by the Matrimonial Causes Act, 1907. Substantially the same power to make an order for

maintenance is now contained in s. 19 (2) of the Matrimonial Causes Act, 1950. The effect of a dum sola clause has now lost much of its significance as a result of the increased powers of the court to vary a maintenance order, see s. 28 of the Matrimonial Causes Act, 1950.

Considered: *Wood v. Wood*, [1891-4] All E.R. Rep. 506; *Perkins v. Perkins*, [1938] 3 All E.R. 116. Referred to: *Bellenden (formerly Satterthwaite) v. Satterthwaite*, [1948] 1 All E.R. 343.

As to the limitations dum sola et casta, see 12 HALSBURY'S LAWS (3rd Edn.) 438; and for cases see 27 DIGEST (Repl.) 625, 626. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

Cases referred to in argument:

Fisher v. Fisher (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 8 Jur.N.S. 103; 10 W.R. 122; 164 E.R. 1055; 27 Digest (Repl.) 613, 5740.

Chetwynd v. Chetwynd (1865), L.R. 1 P. & D. 39; 35 L.J.P. & M. 21; 13 L.T. 474; 11 Jur.N.S. 958; 14 W.R. 184; 27 Digest (Repl.) 665, 6297.

Sidney v. Sidney (1865), 4 Sw. & Tr. 178; 34 L.J.P.M. & A. 122; 12 L.T. 826; 11 Jur.N.S. 815; 164 E.R. 1485; on appeal (1866), L.R. 1 P. & D. 78; (1867), 36 L.J.P. & M. 73, H.L.; 27 Digest (Repl.) 618, 5773.

Gladstone v. Gladstone (1876), 1 P.D. 442; 45 L.J.P. 82; 35 L.T. 380; 24 W.R. 739; 27 Digest (Repl.) 625, 5844.

Medley v. Medley (1882), 7 P.D. 122; 51 L.J.P. 74; 47 L.T. 556; 30 W.R. 937, C.A.; 27 Digest (Repl.) 628, 5895.

Hart v. Hart (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 27 Digest (Repl.) 239, 1923.

Harrison v. Harrison (1887), 12 P.D. 130, 145; 56 L.J.P. 76; 57 L.T. 119; 35 W.R. 703; 27 Digest (Repl.) 632, 5930.

Corbett v. Corbett (1888), 13 P.D. 136, 57 L.J.P. 97; 59 L.T. 183; 37 W.R. 30; affirmed, 14 P.D. 7; 58 L.J.P. 17; 60 L.T. 74; 37 W.R. 114, C.A.; 27 Digest (Repl.) 619, 5780.

Appeal from a decision of BUTT, J., reported 14 P.D. 175, upon a motion by the petitioner for the removal of a limitation "until she marry again" contained in a report of the registrar recommending that a sum be secured for the permanent maintenance of the petitioner.

The petitioner, Rosa Caroline Fredericka Lister, was married to the respondent, George Leopold Greville Lister, in December, 1876. At that time the petitioner was only seventeen years of age. There was no issue of the marriage. On Aug. 3, 1888, the petitioner obtained a decre nisi for dissolution on the grounds of the adultery and cruelty of the respondent, and on Feb. 12, 1889, that decree was made absolute. On Mar. 1, 1889, the wife filed a petition for permanent maintenance. The registrar reported that the petitioner was without means; that the respondent was possessed of securities from which he derived an income amounting to £567 10s. per annum, after deducting income tax. The registrar recommended that the respondent be ordered to secure, upon the securities named in the report, for the permanent maintenance of the petitioner, the sum of £195 per annum "for her life, or until she marry again."

On July 23, 1889, a motion, on behalf of the petitioner, was made to BUTT, J., to vary the report by omitting the limitation "until she marry again." BUTT, J., held that the judge has an absolute discretion to decide whether the words "until she marry again" ought to be included or omitted and ordered that the words of limitation be struck out. The respondent appealed.

Finlay, Q.C., and *H. Stokes* for the respondent.

Inderwick, Q.C., and *Searle* for the petitioner.

Cur. adv. vult.

Nov. 19, 1889. **COTTON, L.J.**—This is an appeal by a husband from an order of **BUTT, J.**, directing the husband to secure payment to his wife of an annual sum as permanent alimony. The wife had obtained against her husband a decree for dissolution of the marriage on the ground of his cruelty and adultery, and the appeal was brought on the ground that the learned judge had excluded from the order the clause which was for a long time usually introduced into such orders, limiting the allowance to the period during which the wife should remain unmarried. It was said that **BUTT, J.**, had laid down a general rule that the clause "so long as she remain unmarried" should be left out of orders for permanent maintenance, and that the allowance should be made to the wife for her life absolutely. If he had laid down any such general rule fixing the practice of the court, I think I should have desired to have had the case re-argued before the full Court of Appeal. But it appears from his judgment that **BUTT, J.**, did not lay down any such general rule, but under the particular circumstances of the case considered that he had an absolute discretion to make the order now appealed from. I think he had such a discretion under the Act of Parliament, Section 32 of the Matrimonial Causes Act, 1857 [see now s. 19 (2) of the Matrimonial Causes Act, 1950] provides that

"the court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable."

In my opinion, the section leaves the matter entirely within the discretion of the judge, though I do not say that it is a discretion the exercise of which is not subject to an appeal. I think an appeal does lie in such a case. But I see no reason in the present case for differing from the learned judge as to how his discretion should be exercised. He must have known more about the facts of the case and the circumstances of the parties than we can possibly do. In my opinion, it would be wrong to interfere with his discretion, and the appeal must, therefore, be dismissed.

FRY, L.J.—The discretion to be exercised by the judge in allowing permanent alimony is a discretion given by s. 32 of the Matrimonial Causes Act, 1857. By that section the court may order the husband to secure to the wife either such gross sum of money or such sum of money as, having regard to the circumstances of the case and the conduct of the parties, it shall deem reasonable. It was said that **BUTT, J.**, had laid down the general rule that permanent maintenance ought to be secured during the life of the wife obtaining the divorce; but a reference to his judgment shows that he laid down no such rule. It was also said that the rule ought to be to give the wife the annual sum allowed as alimony only until her second marriage. In my opinion, that proposition is equally untenable. The Act empowers the judge to give the wife an annual sum for any period not exceeding her life, or, in the alternative, to give her a gross sum of money, and it could not be said that the enjoyment of the latter could be taken from her on her second marriage. Therefore, it must be inferred that the legislature was clearly not unfavourable to the grant of the alimony being for the whole life of an innocent wife.

It appears to me that the effect of the section is to leave an unfettered discretion in the judge in each case, and it would be wrong to lay down any *prima facie* rule whether the annual sum should be payable during the wife's whole life or until her second marriage. It is the duty of the judge to exercise his discretion according to the particular circumstances of each case, and the only question therefore in the present case is whether the learned judge has exercised his discretion in a proper manner. The facts of the case are these: The

wife was married at the age of seventeen. She had no property of her own, but the husband had property producing an income of about £560 a year. The respondent has been a cruel husband and an unfaithful husband, and he has made the life of his wife unbearable. His conduct has driven her from his home and compelled her to seek the aid of the Divorce Court. That is as great a wrong as it is possible for a man to inflict on his wife. She is now about thirty-two or thirty-three years of age, and under these circumstances the judge has allowed her an annuity of £195, about a third of her husband's income, out of his property for life. Can it be said that this is an unreasonable compensation to be paid by a man who has violated his marital duties in this manner? I think the amount of the allowance is not excessive, and that the term for which it is given is not unreasonable, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Smith, Fawcett & Low*, for *Wright, Williams & Wright*, Leicester; *Roche & Son*.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

ABRATH v. NORTH EASTERN RAIL CO.

[HOUSE OF LORDS (The Earl of Selborne, Lord Watson, Lord Bramwell and Lord FitzGerald), March 11, 12, 15, 1886]

[Reported 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63;
50 J.P. 657; 2 T.L.R. 416]

Malicious Prosecution—Evidence—Reasonable and probable cause—Onus of proof.

In an action for malicious prosecution the jury was directed that the burden of proof as to the want of reasonable and probable cause for the prosecution and as to malice lay on the plaintiff, and that it was for him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case. The following questions were left to the jury: "Did the defendants take reasonable care to inform themselves of the true facts of the case and did the defendants honestly believe in the case which they laid before the magistrates?" Both questions having been answered in the affirmative by the jury, judgment was entered for the defendants.

Held: there was no misdirection and judgment was rightly entered for the defendants.

Notes. LORD BRAMWELL stated in his opinion that an action for malicious prosecution would not lie against a corporation aggregate as it was incapable of malice or motive. Because of this opinion and of other cases following it, doubt existed whether such an action would lie against a corporation, but now it appears that such an action will lie: see 25 HALSBURY'S LAWS (3rd Edn.) 352, and the cases there cited.

Applied: *Abbott v. Refuge Assurance Co., Ltd.*, [1961] 3 All E.R. 1074. Referred to: *Penfold v. Grosvenor Bank* (1886), 2 T.L.R. 759; *Edwards v. Annett* (1887), 3 T.L.R. 671; *Lea v. Charrington* (1889), 61 L.T. 222; *Brown v. Hawkes*, [1891] 2 Q.B. 718; *Cornford v. Carlton Bank*, [1899] 1 Q.B. 392; *Citizens' Life Assurance v. Brown*, [1904-7] All E.R. Rep. 925; *Cox v. English, Scottish and Australian Bank*, [1905] A.C. 168; *Wiffen v. Bailey and Romford U.D.C.* (1914), 78 J.P. 187; *Bradshaw v. Waterloo*, [1915] 3 K.B. 527.

As to essentials of an action for damages for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 353 et seq.; and for cases see 33 DIGEST (Repl.) 399 et seq. As to evidence and the onus of proof in an action of malicious prosecution, see 15 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 42 DIGEST (Repl.) 41 et seq.

Cases referred to in argument :

Ellis v. Abrahams (1846), 8 Q.B. 709; 15 L.J.Q.B. 221; 7 L.T.O.S. 82; 10 J.P. 820; 10 Jur. 593; 115 E.R. 1039; 33 Digest (Repl.) 437, 574.

Reed v. Taylor (1812), 4 Taunt. 616; 128 E.R. 472; 33 Digest (Repl.) 437, 573.

Sutton v. Johnstone (1785), 1 Term Rep. 493; 99 E.R. 1215; on appeal sub nom. *Johnstone v. Sutton* (1786), 1 Term Rep. 510, Ex. Ch.; sub nom.

Sutton v. Johnstone (1787), 1 Term Rep. 784; 1 Bro. Parl. Cas. 76, H.L.; 33 Digest (Repl.) 393, 60.

Fitzjohn v. Mackinder (1861), 9 C.B.N.S. 505; 30 L.J.C.P. 257; 4 L.T. 149; 25 J.P. 244; 7 Jur.N.S. 1283; 9 W.R. 477; 142 E.R. 199, Ex. Ch.; 33 Digest (Repl.) 393, 58.

Appeal by the plaintiff, in an action for malicious prosecution, from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BOWEN and FRY, L.JJ.), reported 11 Q.B.D. 440, reversing a decision of the Divisional Court (GROVE and LOPES, JJ.), reported in 11 Q.B.D. 79, making absolute a rule for a new trial on the ground of misdirection at the trial before CAVE J., with a jury.

The action was brought by the appellant, who was a doctor of medicine and surgery of the University of Heidelberg, and a licentiate of the Apothecaries Company of London, practising in Sunderland, against the North Eastern Railway Co. to recover damages for the alleged malicious prosecution. The matter arose out of a claim put forward by Michael M'Mann, a general dealer in Sunderland, in respect of personal injuries which he alleged he had sustained in an accident which occurred on the respondents' railway on Sept. 10, 1880. The claim of M'Mann was settled by the respondents paying him £725 and £300 costs. Shortly after the settlement the respondents brought a charge of conspiracy against the appellant and M'Mann, alleging that the symptoms from which the latter appeared to be suffering at the time of the settlement had been simulated by him with the aid of the appellant. When the charge of conspiracy came on for trial the accused were acquitted. The present action for malicious prosecution was then brought by the appellant.

CAVE, J., who tried the cause at the Durham Summer Assizes, 1882, left to the jury the following questions:—Did the defendants take reasonable care to inform themselves of the true facts of the case, and did they honestly believe in the case which they laid before the magistrates? The jury answered both these questions in the affirmative, and the judge directed a verdict to be entered for the respondents, and gave judgment for them.

Sir Charles Russell, Q.C., McClymont, and H. Adkins for the appellant.

Digby Seymour, Q.C., Sir Henry James, Q.C., G. Bruce, Q.C., and J. Lawson Walton for the respondents.

THE EARL OF SELBORNE.—The argument of counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question really is one of the weight of evidence and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does. The learned judge having left the two questions of fact to the jury, they found, first, that proper care had been used by the prosecutors to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates. In

my judgment the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law, and the only question is, is there any ground for saying that upon the weight of evidence the jury miscarried and that a new trial ought to be directed?

Speaking for myself, I cannot imagine a more hopeless case in that point of view. The railway company had to determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be. The statements of certain persons were obtained, carefully considered, and laid before counsel, and counsel advised a prosecution upon those materials. A prosecution having been instituted, it was thought by the magistrates that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which, if believed, tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How it can be said that taking such a body of evidence as that, without the suggestion, much less proof, of the use of any fraudulent or improper means to obtain it, shows a want of reasonable care on the part of the company to inform themselves about the facts, I cannot imagine. I cannot conceive better *prima facie* evidence of reasonable care in that respect. [His LORDSHIP discussed the evidence, and concluded:] So far from thinking that there is a preponderance of evidence against reasonable and probable cause, my doubt is rather on the other side, whether on the whole evidence there was really anything to go to the jury in favour of that conclusion. I move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—I am of the same opinion. I have no doubt that the learned judge rightly directed the jury, and that there is nothing to show than the defendants acted without reasonable and probable cause. The authorities cited by counsel for the appellant in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that a slight amount of evidence may be sufficient to launch the plaintiff's case, when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here. As to the finding of the jury being contrary to the evidence, I concur in the observations which have been made by the noble and learned Earl. I entertain considerable doubt whether there was any evidence to go to the jury. It is unnecessary to determine that point, but of this I feel persuaded from the argument which we have heard, that looking at the evidence which was before the jury they could not honestly and fairly have given any other verdict.

LORD BRAMWELL.—I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice, or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet, and in so many words to say, "prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it," no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even, by resolution at their board, or by

order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive no action would lie against the corporation, because the act on the part of the directors would be ultra vires; they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution.

I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very directors ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual, or individuals of the company, have such malice or motive. In the case which I put, an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice, and had not ordered or caused or procured the prosecution, because, although the two ingredients existed, which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor, and, unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor, an action is not maintainable. It is not enough, therefore, to show that there was an absence of reasonable and probable cause, and that the subordinate had malice—not that I for a moment suggest that that is the case here.

In my opinion, this is not merely what is commonly called a technical point, although if a point were untechnical it would be very objectionable. This is a substantial objection, because every one, or every counsel and solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort is, that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it, and perhaps there is a sort of hope of confusion; it is said "the man was innocent; somebody ought to be punished for it; here is a railway company; there was an improper motive"; and so there is a jumble; the case gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons it is in an action for malicious prosecution, and for two reasons: First of all a prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country are undertaken not by the state, but by private persons, or, as in this case, corporations.

One may venture to quote BENTHAM even upon this matter. He said that laws would be of very little use if there were no informers, and that it is necessary for the benefit of the public that people when they prosecute, and prosecute duly, should be protected. And there is an additional reason. A man brings an action for a malicious prosecution; he gives evidence which shows or goes to show that he is innocent. You may tell the jury over and over again that that is not the question, but they never, or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all important that these actions should not be permitted to be brought against persons or bodies, or others who are not properly liable in respect of them. It may be said "Well, but this is rather hard upon a man who has been prosecuted, and improperly prosecuted." That is to say the corporation is innocent, but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information; he prosecutes upon that information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person, or possibly he may be liable

for having procured the prosecution; and it may be that, in such a case as this, some of the people employed by the company were actuated by an indirect motive. I do not say that they were—it is impossible to say so; but what I say is, that it is no harder upon a man that he has no remedy against a public company, who has prosecuted him when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice, but somebody who gave him information having malice. It is said that this is an old-fashioned sort of notion. It is; but this opinion is one that I have entertained ever since I have known anything about the law; and, although it is an old-fashioned one, I trust that it is one which will not die out, for reasons which I have given.

But it is said, "Well, but a variety of actions have been allowed against corporations which did not formerly exist." I deny it. It is certain a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation is not *ultra vires*. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons who it believes are doing some wrong to the company. If a person is so authorised, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given makes a mistake, and takes up a person who is not cheating, it may in such a case be said properly to be the act of the company, and they are properly liable. But in that case there is neither malice nor motive in question. So also they may be liable for the publication of a libel. That unfortunate word "malice" has got into cases of action for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication, he would be liable although he had not a particle of malice against the man, so would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation, in order to see whether it should be published or not, and that it contained a libel, an action lies there, because there is no question of actual malice or ill will or motive.

For these reasons, which I dwell upon at no greater length, more particularly as counsel for the appellant did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company. But, assuming that the difficulty did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether *Cave, J.*, needed to have left to the jury the question whether reasonable care had been used. I doubt it very much indeed. I doubt very much whether he might not—I will not say ought not—to have said to the jury:

"If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there not only was no absence of reasonable and probable cause, but it existed in abundance."

However, he did put the question, and the jury did answer it: and it does seem to me, I must say, one of the strongest cases of an unfounded action that ever was brought, even for a malicious prosecution.

LORD FITZGERALD.—I do not intend to make any observation upon the grave question on which my noble and learned friend **LORD BRAMWELL** has expressed his opinion so forcibly, whether this action lies against a corporation. That question is not now properly before us. We have had no argument upon it, and

in the view which your Lordships have taken it is unnecessary for the decision A
of the case. I have no doubt that the weighty observations of my noble and
learned friend will be instructive in future and will always carry with them
that force before any tribunal which they so eminently deserve. But I shall
only say of corporations, and of these trading corporations especially, that I
have often heard it observed that they certainly are very frequently without
conscience and sometimes very malicious. B

To deal with the case as it comes before us, I do not entertain any doubt
that the issue upon the question of probable cause, as well as upon the question
of malice, lies upon the plaintiff in this sense, that the plaintiff is bound to offer
evidence sufficient, if uncontradicted, to sustain both these issues on his behalf.
At the close of the plaintiff's case, supposing it had closed there, and no evidence
had been offered directly on behalf of the defendants, was there such a case C
upon the two issues as that it could be said that there was evidence to sustain
the issues for the plaintiff? I so far differ from the opinion of my noble and
learned friend that I think there was evidence upon both issues, if uncontro-
verted, from which the jury might have found, and the judge who presided,
drawing the proper inference from the facts himself, might have found in the
plaintiff's favour. It is unnecessary for me here to point out in detail what that D
evidence was. But upon the whole of the evidence produced on both sides, the
learned judge put two questions, and, in my opinion, two very proper questions,
to the jury for the purpose of informing his mind as to what was the proper
inference for the judge to draw upon this very question of the presence or absence
of probable cause. The jury answered the two questions in the defendant's
favour, and though possibly I might myself have come to a different conclusion E
upon the first question, I cannot say that the verdict was an unreasonable one, or
so far against the weight of evidence that it ought not to stand. As to the alleged
misdirection, I do not think that the summing-up of the learned judge, taken as a
whole, and together with the questions he put, could have misled the jury.

THE EARL OF SELBORNE.—My noble and learned friend, LORD BRAMWELL, F
has raised a question which has not been argued before your Lordships, a ques-
tion of the greatest importance, whether it is of the essence of an action of this
sort that malice should be proved in a sense not imputable to a corporation. The
importance of that question would certainly have led me, before I could arrive
satisfactorily at an opinion of my own upon it, to desire to hear it argued. G
It has not been argued at your Lordships' Bar. It was not, as far as I can see, a
ground of decision in the court below. What has been said by my noble and
learned friend, I am sure, will have the weight due to all opinions of his when-
ever the question comes to be solemnly examined, but I do not think that your
Lordships' decision in the present case can properly be regarded as determining
that question.

Appeal dismissed. H

Solicitors: *J. Balfour Allan*, for *W. M. Skinner*, Sunderland; *Williamson, Hill
& Co.*, for *G. S. Gibb*, York.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*] I

Re MILLS, Ex parte OFFICIAL RECEIVER

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), February 3, 1888]

[Reported 58 L.T. 871; 4 T.L.R. 284; 5 Morr. 55]

Bankruptcy—Fraudulent preference—Need to prove intention of debtor to prefer creditor to whom payment made.

In 1882 the debtor borrowed from W. to buy stock-in-trade and gave two promissory notes which were signed by himself and G. who signed as surety. In January, 1887, the debtor, being insolvent, sold the stock-in-trade at valuation, and at the debtor's request the purchaser paid the sum due to W. The payment so made was not intended to give W. a preference, but to benefit G., the surety. On April 22, 1887, a petition in bankruptcy was filed against the debtor and subsequently a receiving order was made. The official receiver claimed the sum paid to W., as being a fraudulent preference within s. 48 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 44].

Held: in order to make it a payment made "... with a view to giving ... a preference" within s. 48 of the Act of 1883, there must be an intent in the mind of the debtor at the time of making the payment to prefer the particular creditor to whom the payment was made, and, therefore, the payment to W. having been made to benefit the surety and not to prefer W., was not a fraudulent preference within s. 48.

Notes. Fraudulent preference was extended to include a payment to a creditor in order to prefer a surety or guarantor by insertion of the words "or any surety or guarantor for the debt due to such creditor" (by s. 27, Sched. 2 (repealed) of the Bankruptcy and Deeds of Arrangement Act, 1913), as an amendment to s. 48 of the Bankruptcy Act, 1883, which has now been replaced by s. 44 of the Bankruptcy Act, 1914: see 2 HALSBURY'S STATUTES (2nd Edn.) 381. Although the law in this case has been altered, by the extension mentioned, it is considered that a report of it will be useful as showing that an "intention to prefer" is necessary and also as showing the early statutory law: see *Re Conley, Ex parte Trustee v. Barclays Bank, Ltd.* (per SIR WILFRID GREEN, M.R.), [1938] 2 All E.R. at p. 130, where the present case is cited.

Applied: *Re Warren, Ex parte Trustee*, [1900] 2 Q.B. 138. Considered: *Re Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77. Applied: *Re Stenotyper, Hastings v. Stenotyper*, [1901] 1 Ch. 250. Considered: *Re Stanley* (1924), 69 Sol. Jo. 36; *Re Conley, Ex parte Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E.R. 127. Referred to: *Re Lane, Ex parte Gaze* (1889), 23 Q.B.D. 74.

As to the meaning of fraudulent preference, see 2 HALSBURY'S LAWS (3rd Edn.) 554; and for cases see 5 DIGEST (Repl.) 958, 959.

Cases referred to:

- (1) *Marshall v. Lamb* (1843), 5 Q.B. 115; 1 Dav. & Mer. 315; 13 L.J.Q.B. 75; 1 L.T.O.S. 385; 7 Jur. 850; 114 E.R. 1192; 5 Digest (Repl.) 961, 7799.
- (2) *Re Goldsmid, Ex parte Taylor* (1886), 18 Q.B.D. 295; 56 L.J.Q.B. 195; 35 W.R. 148; 3 T.L.R. 109, C.A.; 5 Digest (Repl.) 930, 7638.

Appeal (by the official receiver) from a decision of the Divisional Court (CAVE and A. L. SMITH, JJ.), affirming a decision of the county court judge at Oldham refusing to set aside a payment as a fraudulent preference.

In 1882 the debtor, Mills, borrowed from Whittaker £260, to buy the stock-in-trade of a hotel, and gave him two promissory notes, one for £200, the other for £60, which were signed by himself and by Greenwood, who signed as surety.

In January, 1887, the debtor was insolvent, and desired to give up his tenancy of the hotel. Roberts agreed to become tenant in his place, and a valuation was made of the stock-in-trade, the amount of which was £223 12s. 9d. Roberts gave a cheque for that amount to the valuer, who handed it to Whittaker at the request of the debtor. On April 22, 1887, a petition in bankruptcy was filed against the debtor, and a receiving order subsequently made. The official receiver claimed in the bankruptcy repayment of the £223 12s. 9d. by Whittaker. The county court judge found as a fact that the payment of that sum by the debtor was not made with a view of giving Whittaker a preference, but with a view of easing Greenwood, the surety to the promissory notes. The official receiver appealed.

M. Muir Mackenzie for the official receiver.

Winslow, Q.C., and *Herbert Reed* for the creditor were not called on to argue.

LORD ESHER, M.R.—I am of opinion that *Marshall v. Lamb* (1) is distinguishable from the present case. It was decided before there was any statutory definition of fraudulent preference; but I am not going to rely upon that or to say that the question as to whether there has been a fraudulent preference is a different question since the statute from what it was before, because I am of opinion that it was always left to the jury to say whether the payment was made with the intention of preferring the particular creditor. In the face of the finding of the county court judge it would be impossible to say that there had been a fraudulent preference in the present case without going directly contrary to the decision in *Re Goldsmid, Ex parte Taylor* (2). That case decided that there must be a finding as to the debtor's intent in making the payment, his intent being that which was in his mind at the time. The question is, was the payment made with intent to prefer the particular creditor to whom it was made? It is not within s. 48 of the Bankruptcy Act, 1883, if the debtor pays one creditor in order to benefit another. Still less is it within s. 48 if he pays a creditor with intent to benefit someone else who is not a creditor. In the present case, the debtor made a payment to Whittaker. The county court judge has found that in making that payment, he did not intend to benefit Whittaker, but intended to benefit Greenwood. To hold that that was a fraudulent preference would be to come to a decision in direct conflict with that in *Re Goldsmid, Ex parte Taylor* (2) and to do what the court says in that case cannot be done, namely, to strike out from s. 48 the words, "with a view of giving such creditor a preference over the other creditors."

FRY, L.J.—I am of the same opinion. A payment was made by the debtor in favour of Whittaker within three months before he was adjudged bankrupt. The county court judge has found that the payment was not made with a view of giving Whittaker a preference over the other creditors, but with a view of benefiting Greenwood, the surety. Greenwood was not a creditor of the debtor at all. It was held in *Re Goldsmid, Ex parte Taylor* (2) that a payment, in order to amount to a fraudulent preference, must be made with a view of giving a preference to the creditor to whom it was made. We could not hold the payment in this case to be a fraudulent preference without contravening the decision in *Re Goldsmid, Ex parte Taylor* (2). In that case, **LINDLEY, L.J.**, said (18 Q.B.D. at p. 301):

"Regard must be had to the view with which the payment was made. It was urged that it is sufficient if the creditor was actually preferred. That would be to strike out from s. 48 [Bankruptcy Act, 1883], the words 'with a view of giving such creditor a preference over the other creditors.'"

I entirely agree with the decision in that case. It is immaterial whether the

statute has altered the earlier law on the subject; the question has now to be decided upon its words whether it has, or has not, altered the law.

LOPES, L.J.—The finding of the county court judge, and the decision in *Re Goldsmid, Ex parte Taylor* (2), dispose of this case. I expressed my view as to the construction of the statute in *Re Goldsmid, Ex parte Taylor* (2) (18 Q.B.D. at p. 302), and I have no desire to repeat it.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; Shaw & Tremellen, for A. & H. Eastwood.*

[*Reported by ADAM H. BITTLESTON, ESQ., Barrister-at-Law.*]

Re MOORE. TRAFFORD v. MACONOCHIE

[COURT OF APPEAL (Cotton, Bowen and Fry, L.J.J.), June 7, 8, 9, 1888]

[Reported 39 Ch.D. 116; 57 L.J.Ch. 936; 59 L.T. 681; 52 J.P. 596;
37 W.R. 83; 4 T.L.R. 591]

Will—Gift—Limited gift—Illegal limitation—Gift to sister “during such period as she may live apart from her husband”—Gift terminable on resumption of cohabitation.

The testator gave all his property on trust, after payment of debts, to pay his sister M. “during such time as she may live apart from her husband before my son attains the age of twenty-one years, £2 10s. per week for her maintenance while so living apart from her husband”, and on trust to pay one moiety of the trust estate to his son on attaining twenty-one and the other moiety on his attaining twenty-five. M. and her husband had lived together since their marriage before the date of the will and until sometime after the testator’s death. The son was still under twenty-one.

Held: the gift of the weekly payments was not a gift of an annuity subject to a condition, but was a limited gift, the commencement and duration of which were fixed in a way which the law did not allow; and M. was not entitled to the weekly payments.

Notes. Considered: *Corbett v. Corbett* (1888), 14 P.D. 7; *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470; *Re Wagstaff, Wagstaff v. Jalland*, [1907] 2 Ch. 35. Distinguished: *Re Charlton, Bracey v. Sherwin* (1911), 55 Sol. Jo. 330; *Re Lovell, Sparks v. Southall*, [1920] 1 Ch. 122. Considered: *Re Wilkinson, Page v. Public Trustee*, [1926] All E.R. Rep. 357; *Davies v. Elmslie*, [1937] 4 All E.R. 68; *Re Thompson, Lloyds Bank, Ltd. v. George*, [1939] 1 All E.R. 681; *Re Elliott, Lloyds Bank, Ltd. v. Burton-on-Trent Hospital Management Committee*, [1952] 1 All E.R. 145. Referred to: *Re Caborne, Hodge v. Smith*, [1943] 2 All E.R. 7; *Re Piper, Dodd v. Piper*, [1946] 2 All E.R. 503; *Re Wolffe’s Will Trusts, Shapley v. Wolffe*, [1953] 2 All E.R. 697.

As to conditions attached to gifts under a will and the effect of invalidity, see 39 HALSBURY’S LAWS (3rd Edn.) 916; and for cases see 44 DIGEST 435 et seq.

Cases referred to :

- (1) *Tenant v. Braie* (1608), Toth. 78; 21 E.R. 128; 44 Digest 453, 2754.
- (2) *Brown v. Peck* (1758), 1 Eden, 140; 28 E.R. 637; 44 Digest 453, 2755.
- (3) *Wren v. Bradley* (1848), 2 De G. & Sm. 49; 17 L.J.Ch. 172; 10 L.T.O.S. 438; 12 Jur. 168; 64 E.R. 23; 44 Digest 453, 2756.
- (4) *Harvey v. Lady Aston* (1737), 1 Atk. 361; 2 Com. 726; 2 Eq. Cas. Abr. 539; 26 E.R. 230; sub nom. *Hervey v. Aston*, West temp. Hard. 350; 44 Digest 507, 3257.
- (5) *Reynish v. Martin* (1746), 3 Atk. 330; 26 E.R. 991; sub nom. *Rhenish v. Martin*, 1 Wils. 130, L.C.; 44 Digest 486, 3057.

Also referred to in argument :

- Cartwright v. Cartwright* (1853), 3 De G.M. & G. 982; 1 Eq. Rep. 138; 22 L.J.Ch. 841; 31 L.T.O.S. 214; 17 Jur. 584; 1 W.R. 245; 43 E.R. 385, L.JJ.; 27 Digest (Repl.) 217, 1728.
- Bean v. Griffiths* (1855), 1 Jur.N.S. 1045; sub nom. *Benn v. Griffiths*, 26 L.T.O.S. 56; 3 W.R. 640; 44 Digest 454, 2757.
- Bellairs v. Bellairs* (1874), L.R. 18 Eq. 510; 43 L.J.Ch. 669; 22 W.R. 942; 44 Digest 455, 2774.
- Stackpole v. Beaumont* (1796), 3 Ves. 89; 30 E.R. 909, L.C.; 44 Digest 484, 3031.
- Cocksedge v. Cocksedge* (1844), 14 Sim. 244; 13 L.J.Ch. 384; 3 L.T.O.S. 374; 8 Jur. 659; 60 E.R. 351; 27 Digest (Repl.) 217, 1727.
- Earl of Westmeath v. Countess of Westmeath* (1821), Jac. 126; 37 E.R. 797, L.C.; 27 Digest (Repl.) 216, 1720.
- Webster v. Webster* (1853), 4 De G.M. & G. 437; 22 L.J.Ch. 837; 1 W.R. 509; 43 E.R. 577, L.JJ.; 27 Digest (Repl.) 243, 1960.

Appeal by Mrs. Maconochie, sister of the testator and a legatee, from a decision of KAY, J., on a summons taken out by the trustee of the will to determine, whether a gift to Mrs. Maconochie in the will was wholly void as being inseparable from a condition which was contra bonos mores and, therefore, illegal, or whether the illegal condition could be separated from the gift so as to enable the court to declare that there was a good gift coupled with a void condition which could be rejected without destroying the gift itself. KAY, J., held that the gift was not given on a condition, but was a limited gift, the limits of which the court had no power to alter, and that Mrs. Maconochie was not entitled to the weekly payments comprised in the gift.

By his will, the testator, John Moore gave all his property to a trustee upon trust, after payment of debts,

"to pay to my sister Mary Maconochie during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance while so living apart from her husband,"

and upon trust as to one moiety of the trust estate to be paid to his son on attaining twenty-one, and as to the other moiety to be paid to him on attaining twenty-five. The will contained a gift of residue. At the date of the will Mrs. Maconochie had been married for some years, and had lived with her husband up to the date of these proceedings. The testator's son was still under the age of twenty-one.

Marten, Q.C., and *T. M. Whitehouse* for Mrs. Maconochie.

Ince, Q.C., and *Method* for the residuary legatee.

George Williamson for the trustee.

Cur. adv. vult.

June 9, 1888. **COTTON, L.J.** -The question we have to decide is, whether the trustee of the will of Mr. John Moore ought to pay the sum of £2 10s.

per week to Mrs. Maconochie, a sister of the testator. [His LORDSHIP read the gift in the will, and continued:] When the will was made Mrs. Maconochie was living with her husband, and continued to do so until after the testator's death. The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife. Mrs. Maconochie contends that the gift is to operate as a direction that £2 10s. per week shall be paid to her from the death of the testator, though she is living with her husband, thus entirely altering the amount of the gift made to her by the testator. She contends that the gift is a gift of personalty, subject to an illegal condition precedent, and that, according to the doctrine of the civil law which has been adopted by our land as to personal legacies, the illegal condition may be rejected, leaving the gift absolute.

The rule is thus stated in JARMAN ON WILLS (4th Edn.), vol. 2, p. 12 [see (8th Edn., 1951), vol. 2, at p. 1457] :

"But with respect to legacies out of personal estate, the civil law which in this respect has been adopted by courts of equity differs in some respects from the common law in its treatment of conditions precedent, the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent. But when the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void."

According to English law, if a condition subsequent which is to defeat an estate is against the policy of the law, the gift is absolute; but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is *malum in se* and what is only *malum prohibitum*; but in the view I take of this case we need not consider within which of these two classes the restriction in the present case falls. Are the words relating to living separate a condition? In my opinion, they are not a condition, but a part of the limitation, and although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them. If you give effect to Mrs. Maconochie's contention, you give her what the testator never intended to give her, an annuity during the whole of her life, if the son is so long under age. It is wrong to give to an expression a forced construction in order to prevent a particular result that follows from the natural construction. The construction does not depend on the civil law, and the civil law is binding only so far as it has been adopted by our courts. I, therefore, do not enter into the question whether the civil law regards this as a condition or a limitation, for if it regards it as a limitation, and yet applies the same rule to it as to a condition, no authority has been cited to show that the civil law has been followed here to that extent.

Many authorities have been cited, but it has not been laid down in any of them that a gift in this form is to be treated as a gift upon condition. In *Tennant v. Braie* (1), upon the fair construction of the words, the gift was a gift upon condition, not a limited gift. A sum was to be paid once for all if a woman was divorced. There was nothing imposing a limit on the duration of the gift. In *Brown v. Peck* (2) the report is not clear, either as regards the facts or the principle laid down. The testator, after noticing that his niece had married without the consent of her mother, directed that if she lived with her husband his executors should pay her £2 per month and no more, but if she lived from him and with her

mother then they should allow her £5 per month. LORD HENLEY treated this as a condition, for he says (1 Eden, at p. 142):

"The condition annexed being both impossible at the time of imposing it, and contra bonos mores, the legacy was simple and pure."

What was meant by "impossible," it is hard to say, but that is not material. All that is of importance is that it was treated as a condition, and the words could reasonably be so construed.

Wren v. Bradley (3) occasions more difficulty. There was first a gift of an annuity to the testator's daughter, subject to conditions which were contra bonos mores. Then there was a gift of the income of one-third of an accumulated fund to the same daughter "during such time as she shall continue to live apart from her said husband Abraham Wren," and then came a condition in the form of a subsequent condition, that if she should at any time cohabit with her husband, then during such time as she should cohabit with him the income should be paid to other persons. It was proved that at the date of the will she was living apart from her husband. KNIGHT BRUCE, V.-C., appears to have been impressed by that, and to have looked at the gift of the income as an immediate gift of it to the wife, subject to a proviso that if she returned to cohabitation the trust for payment to her should cease. I think this was the real ground of his decision, though he does not clearly state his reasons. I think his view must have been that, she being at the time separated from her husband, the gift was a simple gift to her with a subsequent condition defeating it if she returned to cohabitation.

If that construction of the will be adopted as correct, there is no difficulty about the decision, for as to the annuity the rule of the civil law clearly applied. None of the cases, in my judgment, warrants our applying it here, and, in my opinion, KAY, J., came to a correct conclusion. The gift here is not a gift of an annuity subject to a condition, but a limited gift, the commencement and duration of which are fixed in a way which the law does not allow.

BOWEN, L.J. I am of the same opinion. At the date of the will the testator's sister was living with her husband. The testator directs his trustees to pay to her during such time as she may live apart from her husband before the testator's son attains twenty-one, £2 10s. per week for her maintenance while so living apart from her husband. There can be no question that the object of this gift was to promote separation—an object which is against the policy of the law—and KAY, J., has decided that the gift is bad.

The argument for Mrs. Maconochie was twofold. First, she contended that the condition was subsequent and might be rejected, leaving the gift absolute; secondly, that if it was a condition precedent, this being a gift out of pure personalty, the doctrine of the civil law applied, and the gift was absolute, for which *Harvey v. Lady Aston* (4) and *Reynish v. Martin* (5) were referred to, where LORD HARDWICKE, L.C., states the rule of the civil law and the extent to which our courts have adopted it. There is a great distinction in our law between conditions precedent and subsequent. LORD HARDWICKE, L.C., in *Reynish v. Martin* (5) says (3 Atk. at p. 332):

"The civil law considering the condition whether precedent or subsequent as unlawful and absolutely void, the legacy stands pure and simple. But in our law where the condition is precedent the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy. But it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and, therefore, if this had been merely a personal legacy I should have been of opinion that as the marriage without consent would not have precluded Mary of her right to this legacy in the ecclesiastical court, no more

would it have done so here, and to this purpose several cases were cited which are taken notice of in the case of *Harvey v. Lady Aston* (4), and which I shall not repeat, but refer to that case for them."

Accepting that as law with respect to legacies of personal estate on a condition, the question remains whether this is a legacy on a condition. If not, then, unless it can be shown that the rule of the civil law extends to limitations as well as to conditions, and that our law has adopted it to that extent, the rule cannot apply. Is there here a condition? In one sense the gift does contain a condition; but it contains something more than either a condition precedent or a condition subsequent, and must be held to create a limitation. If the subject of gift here had been real estate this would have been a limitation, not a condition—just as a gift to a woman *dum sola vixerit* is a conditional limitation, not a condition. But why should that be held to be a condition in the case of personalty which is not so in the case of realty? Here the sister's living apart from her husband is the measure of the gift to her, and if that be taken away the quantum of the gift is altered. This was the ground taken by KAY, J. No authority has been cited to show that limitations are treated by the civil law in the same way as conditions; but if they were, it would not follow that they should be so treated in our courts. This is a gift which begins when the sister begins to live apart from her husband, continues while she lives apart from him, and comes to an end when she ceases to live apart from him.

As regards the cases cited, *Tennant v. Braie* (1) is a clear case of a gift upon condition, though it is so meagrely reported that I should hesitate before acting upon it. *Brown v. Peck* (2) appears to have been compromised after an expression of opinion by the court. *Wren v. Bradley* (3) is a peculiar case. There were two gifts, the first of which was clearly a gift on condition; the second gift is more difficult. I think that KNIGHT BRUCE, V.-C., considered the context of the will to throw light on the second gift, and to lead to the conclusion that it was a gift to a woman who was at the time living separate from her husband, with a condition defeating it if she returned to cohabitation.

The cases, therefore, do not support the view that the doctrine of the civil law is to be extended to limitations, and, in my opinion, the judge below came to a right conclusion. One regrets taking away a dead man's bounty from the object of it under the very circumstances in which he intended her to have it, but we must not depart from the law.

FRY, L.J.—I am of the same opinion.

Solicitors: *Brownlow & Howe*, for *T. M. J. & G. Whitehouse*, Wolverhampton; *Emmet, Son & Stubbs*, for *A. W. Borradaile*, Dudley; *Williamson, Hill & Co.*, for *Trafford & Cook*, Northwich.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

LONDON FOUNDERS ASSOCIATION LTD. AND PALMER v. CLARKE

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), March 1, 3, 5, 1888]

[Reported 20 Q.B.D. 576; 57 L.J.Q.B. 291; 59 L.T. 93;
36 W.R. 489; 4 T.L.R. 377]

Company—Shares—Sale—Sale on London Stock Exchange—Refusal by directors to register purchaser—Vendor's obligation under contract—Implication of condition that purchaser acceptable to directors.

Where shares in a limited company have been sold on the London Stock Exchange and subject to its rules, the vendor has fulfilled his contract when he has executed the transfer and handed over the share certificates with the interest and rights which they convey. There is no implied condition that the purchaser or his nominee shall be accepted by the directors for entry in the register of shareholders.

Notes. Considered: *Benjamin v. Barnett* (1903), 19 T.L.R. 564; *Hooper v. Herts*, [1904-7] All E.R. Rep. 849. Applied: *Hichens Harrison Woolston & Co. v. Jackson & Sons*, [1943] 1 All E.R. 128. Referred to: *Re Warden and Hotchkiss, Ltd.*, [1945] 1 All E.R. 507.

As to transfer and transmission of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 34, 249; and for cases see 9 DIGEST (Repl.) 365, 366.

Cases referred to:

- (1) *Stray v. Russell* (1859), 1 E. & E. 888; 28 L.J.Q.B. 279; 5 Jur.N.S. 1295; 7 W.R. 64; affirmed, 1 E. & E. 916; 29 L.J.Q.B. 115; 1 L.T. 443; 6 Jur.N.S. 168; 8 W.R. 240; 120 E.R. 1154, Ex. Ch.; 9 Digest (Repl.) 365, 2335.
- (2) *Wilkinson v. Lloyd* (1845), 7 Q.B. 27; 115 E.R. 398; sub nom. *Leeman v. v. Lloyd*, *Wilkinson v. Lloyd*, 14 L.J.Q.B. 165; 9 Jur. 328; sub nom. *Wilkinson v. Lloyd*, *Leman v. Lloyd*, 4 L.T.O.S. 432; 9 Digest (Repl.) 365, 2334.

Also referred to in argument:

- Birmingham v. Sheridan*, *Re Waterloo Co. (No. 4)* (1864), 33 Beav. 660; 3 New Rep. 699; 33 L.J.Ch. 571; 10 Jur.N.S. 415; 12 W.R. 658; 55 E.R. 525; sub nom. *Birmingham v. Sheridan*, 10 L.T. 256; 43 Digest 640, 771.
- Evans v. Wood* (1867), L.R. 5 Eq. 9; 37 L.J.Ch. 159; 17 L.T. 190; 15 W.R. 476; 16 W.R. 67; 9 Digest (Repl.) 411, 2653.
- Colonial Bank v. Whinney* (1886), post; 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 5 Digest (Repl.) 843, 7104.
- Re London, Hamburg and Continental Exchange Bank*, *Emmerson's Case* (1866), 1 Ch. App. 433; 36 L.J.Ch. 177; 14 L.T. 746; 12 Jur.N.S. 592; 14 W.R. 905, L.JJ.; 9 Digest (Repl.) 410, 2648.
- Hodgkinson v. Kelly* (1868), L.R. 6 Eq. 496; 37 L.J.Ch. 837; 16 W.R. 1078; 9 Digest (Repl.) 340, 2170.
- Paine v. Hutchinson* (1866), L.R. 3 Eq. 257; 36 L.J.Ch. 169; affirmed (1868), 3 Ch. App. 388; 37 L.J.Ch. 485; 18 L.T. 380; 16 W.R. 553, L.JJ.; 9 Digest (Repl.) 370, 2370.
- Remfry v. Butler* (1858), E.B. & E. 887; 31 L.T.O.S. 356; 5 Jur.N.S. 1297, n.; 6 W.R. 682; 120 E.R. 740, Ex. Ch.; 9 Digest (Repl.) 366, 2340.

Taylor v. Stray (1857), 2 C.B.N.S. 175; 26 L.J.C.P. 185; 29 L.T.O.S. 95; 3 Jur.N.S. 540; 5 W.R. 528; 140 E.R. 380; on appeal, 2 C.B.N.S.P. 197; 26 L.J.C.P. 287; 3 Jur.N.S. 964; 5 W.R. 761; 140 E.R. 380, Ex. Ch.; 42 Digest 803, 118.

Skinner v. City of London Marine Insurance Corpn. (1885), 14 Q.B.D. 882; 54 L.J.Q.B. 487; 53 L.T. 191; 33 W.R. 628; 1 T.L.R. 426, C.A.; 9 Digest (Repl) 362, 2318.

Masted v. Paine (1871), L.R. 6 Exch. 132; 24 L.T. 149; 19 W.R. 527; sub nom. *Maxsted v. Paine*, 40 L.J.Ex. 57, Ex. Ch.; 9 Digest (Repl.) 362, 2319.

Appeal by the plaintiff, Palmer, from a decision of STEPHEN, J., at the trial of an action without a jury, to recover £142 10s., the price of thirty shares in the National Conservative Industrial Dwellings Association, Ltd., in which the Founders Association was non suited and judgment was given for the defendant against the plaintiff.

In September, 1885, the defendant, Clarke, through his brokers upon the London Stock Exchange, sold to the London Founders Association thirty shares in the National Conservative Industrial Dwellings Association, according to the rules and regulations of the Stock Exchange. In accordance with those regulations, the Founders Association nominated the plaintiff, Palmer, as the transferee of the shares, and the transfer was accordingly executed by the defendant in the name of the plaintiff. The transfer and share certificates were then handed over by the defendant to the plaintiff, who at the same time paid the defendant the purchase money. The directors of the National Conservative Industrial Dwellings Association subsequently declined to accept the plaintiff's name as the transferee of the shares, and to register him as a member of the company. By the articles of association the directors had power either to register, or decline to register, as a member any person claiming by transfer of a share or shares.

H. F. Dickens and *W. E. Gordon* for the plaintiff.

Horne-Payne, *Q.C.*, and *A. G. McIntyre* for the defendant, were not called on to argue.

LORD ESHER, M.R.—In this case a contract was made on the Stock Exchange with regard to shares in a limited company. By its articles of association the company had the option of declining to register any person as a shareholder of the company. The contract in question was made through brokers on the Stock Exchange, but I shall treat the case as if the dispute was one between the parties who instructed the brokers. The plaintiff was the purchaser of the shares, the defendant was the seller of them. The contract having been made, a transfer of the shares was executed and handed over to the purchaser, and thereupon, according to the usage of the Stock Exchange, the price was paid by him. Afterwards the transfer was taken to the company, who, in the exercise of the power given in the articles of association, declined to accept the name of the transferee, whether rightly or wrongly is immaterial. Then the plaintiff brings an action to recover the price of the shares, and endeavours to maintain the proposition that, although it must be admitted that the contract was for payment of the price of the shares when the transfer was handed over to the purchaser, and that that handing over is an act which was to be done, and was done before the transfer was taken to the company to register, it is nevertheless an implied term of the contract that, if the company for any reason refuse to register the transfer, the contract must be considered at an end and the price is recoverable, upon the ground that the condition subsequent not having happened the whole consideration has failed.

That proposition raises two questions: First, whether there was such a condition subsequent; secondly, whether the consideration has failed. I shall not express any opinion upon the second question, whether the consideration would

have failed, if there had been such a condition subsequent, because I think it would be now absolutely wrong to throw any doubt whatever as to what the answer to the first question is, viz., that in a contract such as this made on the Stock Exchange, there is no such implied condition subsequent as is suggested. The contention is that the vendor of shares on the Stock Exchange does contract absolutely that the purchaser or his nominee shall be accepted by the company. In 1859, that very point came before the Court of Queen's Bench in *Stray v. Russell* (1), and the judgment of the court was given upon it, and that judgment, until reversed, is binding upon everyone. *Wilkinson v. Lloyd* (2) was cited and relied upon by counsel for the plaintiff in that case, and thereupon LORD CAMPBELL, C.J., said (1 E. & E. at p. 897) :

"You have to show that the vendor here was equally bound as was the vendor in that case to obtain the directors' consent."

The very point, therefore, had to be decided by the Court of Queen's Bench in that case. The court pointed out the distinction between the circumstances of the case before them and the circumstances in *Wilkinson v. Lloyd* (2), and held that the plaintiff had failed to show that the vendor was bound to obtain the directors' consent as he was in *Wilkinson v. Lloyd* (2).

What do they say in their judgments? LORD CAMPBELL, C.J., says (1 E. & E. at p. 900) :

"Here the purchase of shares in a joint-stock banking company was made at the request of the plaintiff by a broker on the Stock Exchange in London, and must be considered as made with reference to all the established usages of the Stock Exchange. According to these usages the price of the shares is payable on the one broker handing over to the other the transfers and certificates. What does the vendor contract to sell and deliver? Genuine transfers and certificates, with the interest and rights which they convey. There might be a condition subsequent imposing on the vendor the onus of procuring the consent of the directors to the transfer, but I find no evidence of such a condition."

That gives a direct negative to what counsel for the plaintiffs has been arguing in this case. CROMPTON, J., says (*ibid.* at p. 912) :

"I am not satisfied that the contract was such as the plaintiff must make it out to be in order to treat the supposed breach of it by the defendant as amounting to a case of total failure of consideration, or that the plaintiff lost the whole consideration and got nothing for his money by reason of the defendant's breach of the contract, or that the money was paid in ignorance of the facts. In the first place, I am not satisfied that, according to the contract, the defendant engaged that the banking company should accept the plaintiff as a member of the copartnership. By the contract, as explained by the usage of the Stock Exchange, the name was to be given on a certain day, so that the vendor might get the transfer made out to the vendee or to his nominee, and he was then to hand over the transfers and certificates of shares, and to receive his money, and there is nothing that satisfies me that anything more was to be done by the vendor. . . . The fact of the payment being to be made on the handing over of the certificates and transfers, and the practice stated as to no prior consent being ever asked for, and as to no assent being ever refused, make it very probable that the vendee in such case bargains only for the delivery of the shares and transfers, and takes the chance of getting himself or his nominee or sub-vendee accepted and registered."

Then he states *Wilkinson v. Lloyd* (2). In that case, he says (1 E. & E. at p. 914) :

"the court assumed that the consent to the assignment was a part of the vendor's title, as in the case of the sale of a lease; but whatever may have been the case of the purchase of the partnership shares in the mines (real property to

some extent) in that case, on a sale between the parties, not according to any course of business on the Stock Exchange, I can make no such assumption in the present case, where the sale was according to the regulations of the Stock Exchange, which made the price payable on handing over the shares and transfers, and according to which it is at least probable that the vendee was to take upon himself the duty of getting the transfers completed and the shares registered, and where from the nature of the transaction it seems to be very unlikely that the vendor should undertake for the acceptance of any particular name or person, when he may have been entirely ignorant at the time of the contract of the name and responsibility of the intended transferee."

There the court was asked to say that something was to be implied in the contract which was not in it; and they acted on the rule that you cannot bring anything into a contract by implication unless it is absolutely certain that both parties contracted on that basis. It was for that reason that they put their judgment in the form in which they did. They said that it was not likely that the vendor would undertake for the acceptance of any particular name or person of whom he might be entirely ignorant. Unless you can say that it is certain that both parties intended it, you cannot imply such an undertaking. That case is a decision as to the construction of a contract of daily mercantile habit, so that, even if we could say that we did not agree with it, we would not, forty years afterwards, set it aside, when all subsequent contracts must have been made with reference to it. It is idle to say that the decision was not known on the Stock Exchange. Therefore, even if we thought it wrong we should not overrule it.

But I myself think that the view taken by the Court of Queen's Bench was confirmed by the Exchequer Chamber. WILLIAMS, J., in delivering the judgment, said (1 E. & E. at p. 917):

"We all think that, construing the contract in this case by the usage of the Stock Exchange, subject to which it was made, there was no undertaking by the vendor of the shares to obtain absolutely the consent of the directors to the transfer."

That seems to me to be accepting the very ground of the doctrine upon which the judgment in the Queen's Bench proceeded, and to negative what was argued in that case, and has been argued before us in this, on behalf of the plaintiff. I have no doubt that the seller must do nothing to prevent the buyer being accepted by the company. I do not say whether in such a case an action like this would be the right form of proceeding. There is not a trace here of anything of the kind. I do not think anything turns on the provision in the articles of association of the company as to the power of the directors to refuse to register. If there was no such provision, an action by the purchaser might lie against the company for refusing to register, but as between vendor and purchaser it would be immaterial. The purchaser takes the risk, not the vendor. The vendor has fulfilled his responsibility when he has handed to the purchaser the transfer and certificates in proper form, and has done nothing to prevent the registration of the purchaser.

I may say this, that if we had differed from the reasons of the decision in *Stray v. Russell* (1), considering this question merely as a matter of business, I should still have come to the same conclusion. I think that it would be a most unbusiness-like proceeding for a man to receive money with a condition subsequent that he would hand it back on something happening over which he had no control. I do not think that that is an agreement which would be entered into by business men. And, therefore, this is the strongest case possible against making the implication that there was such a term in the contract. But I say again that we should not now overrule *Stray v. Russell* (1), even if we disagreed with it. For these reasons I think the appeal must be dismissed.

FRY, L.J.—I agree that this appeal should be dismissed. The question is: What was the real nature of the contract entered into in this case? The contract was for the sale and purchase of certain shares, subject to the rules of the Stock Exchange. The shares in question were delivered to the purchaser prior to the transfer being registered. By the articles of association the directors of the company had power to refuse to register the transfer, and they did so refuse. Counsel for the plaintiff contended that the true nature of such a contract is that the purchaser agreeing to pay the purchase money, the vendor agrees that the purchaser shall become the registered owner of the shares. On the other hand, it may be said that the true nature of the contract is that the vendor agrees that, on payment of the purchase money, he will deliver to the purchaser a genuine transfer and certificates, "with the interest and rights which they convey," as was said by LORD CAMPBELL, C.J., in *Stray v. Russell* (1) (1 E. & E. at p. 900), and without any condition subsequent, on the happening of which the purchase money is to be returned. There appears to be every reason for supposing, from the practice of the Stock Exchange, that the latter, not the former, is the true construction of the contract. The practice is, that on a certain day the name of the proposed transferee shall be given, and that upon delivery of the executed transfer payment shall be made of the price. The execution of the transfer and the payment of the price are both prior to the refusal of registration. That is strong to show that all which the vendor undertook to do was to be done prior to the exercise of the power of the directors as to accepting or refusing the name of the purchaser. In other words, the fact that the purchase money passes prior to the event happening, is very strong to show that the purchaser does not contract with reference to that event. I, therefore, come to the conclusion that the argument of counsel for the plaintiff fails.

But we have in addition a decision of the Court of Queen's Bench, thirty-nine years ago, upon the same question, which we should be very unwilling to disturb. Counsel for the plaintiff has pressed upon us certain analogies, which show, as he contends, that *Stray v. Russell* (1) was wrongly decided. He has suggested the case of a landlord who has refused his consent to the assignment of a lease. But in that case the consent of the landlord must be obtained before the assignment can be made. The landlord's consent is signified before any money is paid by the assignee to the assignor. The condition in that case is a condition precedent to the assignment, and happens before payment of the price. In the present case the condition is not a condition precedent, and does not happen till after the payment of the price. So, in *Wilkinson v. Lloyd* (2), there were clauses in the deed of settlement of the company whose shares were in question, providing that the board of directors should certify their approbation of any person to whom it might be proposed to assign any share, and that then, and not till then, the person desirous of assigning such share should be at liberty to assign the same; and the Court of Queen's Bench held that the approval of the directors was a condition precedent to the assignor's power to assign.

It appears to me, on these grounds, that the contention of the plaintiff with regard to the nature of the contract fails, and, therefore, it is immaterial to consider the question whether, if there had been such a breach of contract as alleged, the consideration could be considered to have totally failed.

LOPES, L.J.—This case raises the question as to the liability of a vendor in respect of shares in a company bought and sold on the Stock Exchange, where the directors of the company, having the right to refuse or accept the purchaser's name, refuse it. It is the undoubted duty of the transferor of shares on the Stock Exchange to execute the transfer, and he can be compelled to pay all calls that are outstanding at the time of the transfer; but it is said that there is a further duty on his part. It is said that there is an obligation on his part to obtain the consent of the directors to the registration of the transfer, and that if he cannot obtain the insertion of the transferee's name on the register of the company, the

whole transaction is defeated. I can see no trace of such a condition subsequent. *Stray v. Russell* (1) is a clear authority that the vendor of the shares is not under any liability to procure the consent of the directors to the transfer or the registration of the transferee. For these reasons I think that the appeal fails.

Appeal dismissed.

Solicitors : *Robinson, Poole & Robinson ; Morley & Sherriff.*

[*Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.*]

STONEHAM v. OCEAN, RAILWAY AND GENERAL ACCIDENT ASSURANCE CO.

[QUEEN'S BENCH DIVISION (Mathew and Cave, JJ.), June 16. 1887]

[Reported 19 Q.B.D. 237; 57 L.T. 236; 51 J.P. 422;
35 W.R. 716; 3 T.L.R. 695]

Insurance—Accident insurance—Accident “within the United Kingdom”—Death by accident in Jersey—Condition—Condition precedent—Notice of accident—Notice to be given within stipulated time.

A policy of insurance provided that, if the assured sustained bodily injury caused by any external accident happening within the United Kingdom or on the continent of Europe and if the assured should die from the effects of such accident, the insurers would pay his legal representatives the sum stipulated. The policy was subject to certain conditions endorsed on and incorporated in it, one such condition being that “in case of fatal accident, notice thereof must be given to the [insurers] . . . within seven days.” The assured died in Jersey from an accident sustained there, and it was impossible to give notice within seven days.

Held: (i) Jersey was within the United Kingdom within the meaning of the policy; (ii) the giving of notice within seven days was not a condition precedent to the right of recovery; and, therefore, the insurers were liable on the policy.

Notes. Distinguished : *Navigators and General Insurance Co., Ltd. v. Ringrose*, [1962] 1 All E.R. 97. Referred to : *Welch v. Royal Exchange Assurance*, [1938] 1 All E.R. 451.

As to claims under policies of insurance and failure to perform the duties imposed on the assured, see 22 HALSBURY'S LAWS (3rd Edn.) 252; and for cases see 29 DIGEST (Repl.) 443 et seq.

Cases referred to in argument :

Cawley v. National Employers' Accident and General Assurance Association, Ltd. (1885), 1 T.L.R. 255; Cab. & El. 597; 29 Digest (Repl.) 440, 3240.

Cassel v. Lancashire and Yorkshire Accident Insurance Co., Ltd. (1885), 1 T.L.R. 495; 29 Digest (Repl.) 443, 3253.

Gamble v. Accident Assurance Co., Ltd. (1869), I.R. 4 C.L. 204; 29 Digest (Repl.) 443, *1284.

Action upon an accident insurance policy by the personal representative of the assured, whose death had taken place in Jersey and had been caused by an external accident sustained there.

The policy stated that if the assured should, during the period in which the policy was in force, sustain any bodily injury caused by any external accident happening to the assured within the United Kingdom, or on the continent of Europe, or while proceeding from one European port to another in a decked vessel, and if the assured should die solely from the effects of such accident within ninety days after the happening thereof, the company would pay to the legal representatives or the assigns of the assured the sum of £1,000 at the expiration of three calendar months after satisfactory proof of the death of the assured had been given to the company. The policy was subject to certain conditions endorsed upon it, which were to be considered as incorporated. Among such conditions were the following :

"This policy shall be void if the assured shall travel beyond the limits of Europe, or shall embark in any vessel with the intention of going beyond such limits. In case of fatal accident, notice thereof must be given to the company at the head office in London within seven days."

Notice of the death of the assured was not given to the company within seven days, and it would have been impossible to have given such notice within such time, by reason of the suddenness of the death of the assured, and by reason of the accident not having come to the knowledge of any person who could identify him until after the expiration of seven days. The defendants refused to pay, and pleaded (*inter alia*) that notice had not been given to the company of the death of the assured within seven days of the occurrence thereof, and that it was not alleged that the death or injury sustained by the assured had happened within the United Kingdom or on the continent of Europe, or while proceeding from one European port to another in a decked vessel. The case came before the court upon an order to set down for hearing before the trial of the action the points of law raised by the pleadings, namely, that Jersey was not within the United Kingdom within the meaning of the policy, and that notice to the company within seven days after a fatal accident was a condition precedent to the right of recovery upon the policy.

Bosanquet, Q.C., and *Spokes* for the plaintiff.

Arthur Cohen, Q.C., and *Wood-Hill* for the defendant company.

MATHEW, J.—I am of opinion that our judgment must be for the plaintiff in this case. The pleadings appear to be old-fashioned and irregular, but I think the parties knew well what sort of questions they wished to submit to the court. One of the questions intended to be submitted to us is whether Jersey, in popular language, can be said to be within the United Kingdom. If it is, it is within the policy, and one of the places to which it is intended to apply. I have no hesitation in saying that it is within the United Kingdom, and therefore within the policy. I am unable to give any other answer. No reasons were given in argument on either side, but in my opinion it cannot reasonably be suggested that the policy is not intended to cover an accident occurring in Jersey.

The other point raised is one of greater importance, and it is whether the condition endorsed upon the policy, to the effect that in case of fatal accident notice thereof must be given to the defendant company at the head office in London within seven days, is a condition precedent to the right of recovering the sum in respect of which the insurance was effected. Was the condition inserted with that intention, and was it so understood? That is a question of pure construction, and necessitates the language of the policy being examined. No cases exactly identical with the present one have been cited by the counsel on either side. In some of the cases it was agreed between the parties that such a term was to be considered a condition precedent. If that was agreed, of course it was treated as such, but if no such agreement was made, the court must see if it was intended, looking at all the terms of the policy. In this

case the obligation contained in the policy is that, if the assured shall die solely from the effects of an external accident within ninety days after the happening thereof, the company shall pay to the legal representatives or assigns of the assured the sum of £1,000 at the expiration of three calendar months after satisfactory proof of the death of the assured shall have been given to the company. Then follows a clause to the effect that the policy shall be subject to the conditions endorsed upon the back, which are to be considered as incorporated. It does not say that they are to be considered conditions precedent, but as "incorporated herein." The duty upon us is to say what the whole of these conditions mean.

Some of them are referred to as terms of the policy, but not as conditions precedent. For instance, there is a clause which says that :

"For the purpose of identifying the assured, in all cases of change of residence or occupation, or change of name, whether by marriage or otherwise, due notice thereof shall be given by the assured at the company's offices in London."

Is that a condition precedent? I do not think it is intended to be, and it is not so stated to be. The next clause says that :

"If the assured shall, during the period covered by this policy, engage in any other occupation or employment involving a greater risk than is contemplated in the class of risks under which this policy is effected, he shall forthwith give notice thereof to the company, and pay such extra premiums as may be required in respect of such increased risk, and in default of his so doing, this policy shall become absolutely void, and the premium paid for the same shall be forfeited to the company."

The language there shows plainly that the company knew how to describe a term which was to be a condition precedent. Another term of the policy says that :

"Any question arising under, or in relation to, this policy, shall, if required by the company or the assured, or his representatives or assigns, be referred to the decision of two referees or an umpire to be appointed by the referees."

If the assured refused so to refer, would the policy be void, or, if the company refused, could they get rid of their liability? That, in my opinion, is a stipulation which must be regarded as a mere term, and not as a condition precedent.

Then we come to the clause which says, that :

"in case of fatal accident, notice thereof must be given to the company at the head office in London within the time of seven days."

That is intended to apply, counsel for the defendant company argues, either to an accident which is fatal instantaneously, or to an accident which is followed at an interval by death. Counsel had to admit that such a construction, in many cases, would render it an honour policy, that is, one which the company could pay or not as it thought fit. Notice within seven days is not stated to be a condition of liability, nor is it stated that in default of such notice the policy shall become void. We must then consider whether the assured so understood it. If it was the intention of the company that it should be a condition precedent, it ought to have been couched in clearer language. The absence of such notice might cause the company to incur extra expense, and in such a case the assured would have to make that good. I am satisfied that such a construction as is contended for by the defendant company would be absurd. The term is not a condition precedent to the enforcement of the policy, and, therefore, our judgment must be for the plaintiff.

CAVE, J.—I am of the same opinion. On the first point I am clearly of opinion that Jersey is in the United Kingdom within the meaning of the policy. Light is thrown upon this point by the terms of the policy. One of the conditions says that:

"this policy shall be void if the assured shall travel beyond the limits of Europe, or shall embark in any vessel with the intention of going beyond such limits;"

that is, it shall be in force in Europe. It is quite obvious that the policy is to be void only if the assured goes beyond Europe. Jersey is in Europe, and, in my judgment, it is in the United Kingdom as far as this policy is concerned.

Then, as to the other question. There are a number of conditions of assurance endorsed upon the policy, and one says that:

"in case of fatal accident, notice thereof must be given to the company within seven days from the occurrence thereof."

That is said to be a condition precedent, rendering the policy with which we are now dealing void. These conditions are of different kinds. Some contain provisions which, if not complied with, render the policy void or not payable; others contain no such condition at all. The obvious and only rational conclusion is that they mean what they say. Where the provision is said to be a condition precedent, it is so; where it is not said to be so, it is not. An honour policy, in my judgment, is next door to a fraud, and I should recommend the public to have nothing to do with them. Nothing is more monstrous, in my judgment, than such a policy. I am of opinion that there is nothing in this case to lead to the conclusion that these conditions are conditions precedent, except where they are expressed so to be. There is no such expression in the condition which we are now considering. Judgment must, therefore, be for the plaintiff on these preliminary questions.

Judgment for plaintiff.

Solicitors: *Carter & Bell; Dawes & Sons.*

[*Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.*]

Re LORD SUDELEY'S SETTLED ESTATES

[CHANCERY DIVISION (Kay, J.), December 12, 1887]

[Reported 37 Ch.D. 123; 57 L.J.Ch. 182; 58 L.T. 7;
36 W.R. 162; 4 T.L.R. 139]

Settled Land—Improvement—Application of capital money—Drainage—Loan—Repayment—Instalments representing capital and interest—Application of capital for payment of such portion of the instalments as represented capital.

On the application of the tenant for life in possession of settled estates under a will the Inclosure Commissioners, by an order dated May 15, 1879, charged the estates with payment to the improvement company of an annual rentcharge of £176 13s. payable half-yearly for a term of twenty-five years, being a proportionate repayment of a capital sum of £2,704, borrowed for

drainage improvements on the estates, with interest at $4\frac{1}{4}$ per cent. On a summons by the tenant for life asking that it might be declared that money in the hands of the trustees (being capital money or money applicable as capital money arising under the Settled Land Act, 1882) might properly be applied in payment of the instalments, and that the trustees be directed to pay the instalments,

Held: as no injury would result to the remainderman and as the improvements came within the Settled Land Act, 1882, the trustees were justified in applying capital money in their hands in paying such portion of the instalments as represented capital, but it was the duty of the tenant for life to keep down the interest.

Notes. Section 25 of the Settled Land Act, 1882, has been replaced with amendments by s. 83 of the Settled Land Act, 1925, and s. 21 of the Settled Land Act, 1882, and the Settled Land Acts (Amendment) Act, 1887, have been replaced with amendments by s. 73 of the Settled Land Act, 1925: see 23 HALSBURY'S STATUTES (2nd Edn.) 161, 186.

Distinguished: *Re Lord Egmont's Settled Estates* (1890), post. Explained: *Re Sandbach (deceased)*, [1951] 1 All E.R. 971. Referred to: *Re Verney's Settled Estates*, [1898] 1 Ch. 508.

As to redemption of improvement charges, see 23 HALSBURY'S LAWS (3rd Edn.) 130; and for cases see 30 DIGEST (Repl.) 331 et seq.

Case referred to in argument:

Re Knatchbull's Settled Estate (1885), 29 Ch.D. 588; 54 L.J.Ch. 1168; 53 L.T. 284; 33 W.R. 569; 1 T.L.R. 398, C.A.; 30 Digest (Repl.) 316, 65.

Adjourned Summons by Lord Sudeley, tenant for life of settled estates, including the Toddington Estate in the county of Gloucester, under the will of the late Lord Sudeley, the testator, asking for a declaration that money in the hands of the trustees (being capital money or money applicable as capital money arising under the Settled Land Act, 1882) might properly be applied in payment of instalments payable under the head of proportionate repayments of the loan in the table annexed to the improvement loan charge, No. 2374, dated May 15, 1879, and that the trustees might be directed to pay the instalments, commencing with the instalment of £44 2s. 10d. payable on Mar. 25, 1888.

By an order, No. 2374, dated May 15, 1879, made on the application of the tenant for life concerning a loan of £2,704 for land drainage improvement of the Toddington Estate, the Inclosure Commissioners, in pursuance of the Lands Improvements Company's Acts, charged the estates with an annual rentcharge of £176 13s. payable half-yearly on Mar. 25 and Sept. 25, for a term of twenty-five years computed from Mar. 25, 1879, and being a proportionate repayment, according to the table annexed, of the capital sum of £2,704 with interest at $4\frac{1}{4}$ per cent. per annum, the first half-yearly payment to be made on Sept. 25, 1879. The table gave the proportionate repayment in each of the twenty-five years, the total payment in each year being £176 13s., or £88 6s. 6d. half yearly, the proportionate repayments of the capital increasing each year, while the proportionate repayments of the interest decreased as the capital was paid off. Thus: September 25, 1879, repayment as to the loan £30 17s. 8d., interest £57 9s. 2d.; March 25, 1904, repayment as to the loan £86 9s. 9d.; interest £1 16s. 9d.

The remainderman was an infant and was not served with the summons but the trustees were served.

Haldane for the tenant for life.

Shebbeare for the trustees.

KAY, J.—I think it may be done, assuming that the improvements which have been made come within the improvements authorised by the Settled Land

Act, 1882, s. 21 and s. 25. That being so, the words of the Settled Land Acts (Amendment) Act, 1887, justify the trustees in applying capital money in their hands, or which may come into their hands in paying such portion of the yearly instalments as represent in each case the capital, but I do not think it right that they should from time to time pay the interest of the unpaid portion. It is the duty of the tenant for life to keep down the interest, and I do not think that the Act of 1887 relieved him of it. It is going rather far to relieve the tenant for life from paying capital money for drainage improvements. Everyone who has any knowledge of agricultural affairs in England knows that drainage improvement is one which wears out, and every now and then has to be done over again. But drainage is included in the improvements authorised by the terms of the Settled Land Act, 1882, it is one of the special improvements allowed by the Act of 1887 to be paid out of capital. I think, therefore, that the remainderman will not be injured by payment of the instalments of capital any more than the Acts intended him to be injured, if any injury does result.

Order accordingly.

Solicitors: *Young, Jackson & Beard.*

[*Reported by FRANCIS E. ADY, ESQ., Barrister-at-Law.*]

WALKER AND OTHERS *v.* MIDLAND RAIL CO.

[HOUSE OF LORDS (The Earl of Selborne, Lord Bramwell, Lord Watson, Lord FitzGerald and Lord Ashbourne), March 4, 5, 26, 1886]

[Reported 55 L.T. 489; 51 J.P. 116; 2 T.L.R. 450]

Inn—Safety of guests—Innkeeper's duty of care—Limitation to places in the inn to which guests may be reasonably supposed to be likely to go.

Per the EARL OF SELBORNE: The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of night or day, and irrespective of whether a guest has a right, or some reasonable cause for being there. The duty must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so.

A guest at an inn left his bedroom in the middle of the night to go to a water-closet. There were properly lighted and easily accessible closets in the same corridor, but he went into a dark "service room," the door of which was shut, but not locked, fell down the unguarded well of a lift at the end of the room and was killed. The "service room" was not lighted or used at night, and the visitors had no business there at any time. An action was brought by the personal representatives of the deceased, under the Fatal Accidents Act, 1846.

Held (LORD FITZGERALD and LORD ASHBOURNE dissenting): there was no evidence of negligence on the part of the innkeeper to go to a jury.

Notes. Considered: *Maclenan v. Segar*, [1917] 3 K.B. 325; *Mersey Docks and Harbour Board v. Proctor*, [1923] All E.R. Rep. 134; *Lee v. Luper*, [1936] 3 All E.R. 817. Distinguished: *Campbell v. Shelbourne Hotel, Ltd.*, [1939] 2 All E.R.

351. Referred to: *Dickson v. Scott* (1914), 7 B.W.C.C. 1007; *Henaghan v. Rederiet Forangirene*, [1936] 2 All E.R. 1426.

As to innkeeper's liability for guests' safety, see 21 HALSBURY'S LAWS (3rd Edn.) 450; and for cases see 29 DIGEST (Repl.) 10-12. As to occupier's duty of care, see 28 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and for cases, see 36 DIGEST (Repl.) 45 et seq. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Appeal from a decision of the Court of Appeal (FRY, L.J., dissenting), affirming a decision of the Queen's Bench Division, in an action brought under the Fatal Accidents Act, 1846 (Lord Campbell's Act), by the appellants, as the personal representatives of a Mr. Smith, who was killed by a fall at the Midland Hotel, St. Pancras, in May, 1883, under circumstances which appear fully in the opinion of the EARL OF SELBORNE.

The action was tried before GROVE, J., and a special jury, when a verdict was found for the appellants for £3500 damages; but this verdict was set aside by the Queen's Bench Division, and judgment was entered for the respondents, on the ground that there was no evidence of negligence on their part, and this judgment was affirmed in the Court of Appeal, as above mentioned.

Willis, Q.C., and *Birrell* for the appellants.

Sir Richard Webster, Q.C., and *Noble* for the respondents.

Their Lordships took time for consideration.

Mar. 26, 1886. The following opinions were read.

THE EARL OF SELBORNE.—The husband of the appellant lost his life by falling down the well of a lift at the respondents' hotel at their St. Pancras station. The well in question was for a luggage lift, at the further end of a "service" room, used for the temporary deposit of luggage and other purposes incidental to the general service of the hotel, of which the door opened into a corridor on the third floor, containing sleeping apartments for guests; one of which apartments, nearly opposite to the service room, was occupied by the appellant and her husband, who had been for more than a day staying at that hotel. The door of the service room was shut but not locked, I think it appears by the evidence that it had no key; the well, which was seventeen feet from the door, had been left unfenced. There were iron doors at the entrance to it, by closing which it might have been fenced; these were left open. I infer that this service room was not used by the servants of the hotel at night. I find no evidence that it was ever so used after the gas was turned down, and I cannot, in this inquiry, attribute any importance to the statement of the witness Naef, that he has "known the servants of visitors sometimes, but very seldom, go to the service room to get water at night." He does not say that he ever knew this done after midnight, when the light in that room was extinguished; and the place for water there was close to, and just within the door. He says he never knew any visitor go to that room at all.

This accident happened three hours or more after midnight. The deceased had been out late with a friend, and had only just returned to the hotel. According to the evidence of his friend, the refreshments which he had taken had produced an effect, not enough to make him incapable of taking reasonable care of himself, but enough, as I cannot but infer, to make the absence of such care on his part less improbable than it might have been under other circumstances. He went to his own room; and having occasion to go to a water-closet, asked his wife, twice over, where the place was. Without waiting for her answer, he went out into the corridor, where the gas lights were turned down, as was usual at that hour, so that there was some but not a clear or distinct light. No candles were used in the hotel; all the artificial light was from gas. There were proper water-closets, properly lighted within, with doors partly glazed, and having the

letters "W.C." legible upon them, in an open recess of the same corridor, which the appellant's husband might have seen if he had gone only a few paces beyond the service room upon the same side. Those closets might have been seen by him as often as he ascended to or descended from the corridor, while staying at the hotel, as on every such occasion he passed to or from his room, in front of the recess where they were. It must be taken, however, that he had not actually observed them.

What he did was to open the door of the service room, the first door he came to on crossing the corridor towards the left. It was distinguished from the doors of the sleeping apartments by having glass in the upper part, on which the word "Service" was written, but not so as to be clearly legible by the light then in the corridor. There was no light within. Just within the door, to the left, there was a sink, in which there was some drip of water, the sound of which was perceptible outside. On opening the door it was apparent that the room was absolutely dark, and it must have been at once perceived that the drip of water came from the place where the sink was, which the deceased left behind him as he advanced into the room. He nevertheless, instead of continuing his search along the corridor for a water-closet properly lighted, which he would have found within a very short distance if he had done so, went into this dark room. It contained one or more tables, on the same side as the sink, and some luggage was lying on the floor; but with those things he does not seem to have come in contact. He made his way through the darkness to the further end, and there met the danger which cost him his life. The door of the room seems to have been found closed when search was afterwards made for him; this, at least, is the effect of the appellant's evidence, though the night watchman, Naef, says that the door was then open.

This is a summary of the whole evidence, omitting nothing which can be regarded as favourable to the appellant's case. The Fatal Accidents Act, 1846, under which the action was brought, made it necessary for the appellant to prove that her husband's death was caused by such a "wrongful act, neglect, or default" of the respondents as would have entitled him to maintain an action and recover damages for any injury, not mortal, which he might have sustained. This is not a question of any "act" done by the respondents; it is one of alleged neglect or default. Wrongful neglect or default there could not be, unless a duty, which was not performed, was previously owing by the respondents towards the appellant's husband, or towards persons in the same situation, in respect of the place where the accident happened. *Prima facie*, there was no such duty, for the service room was a place in which no guest of the hotel had any right or legitimate occasion to be, and into which no such guest was expressly or impliedly invited to go. I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether a guest may have a right, or some reasonable cause, to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so. Unless there was evidence fit for the consideration of a jury that any guest in the position of the deceased would, in the darkness of night, have reasonable ground for believing this service room to be a water-closet, and for acting as he did, there is nothing else in the case which, as it seems to me, could make the respondents' omission to provide against dangers within that service room wrongful towards the appellant's husband or generally towards their guests; for there was no other ground on which the presence of any guest there could reasonably be explained or excused.

Were, then, those circumstances connected with this room, which alone can be supposed to have suggested to the mind of the deceased that it might be

A a water-closet, enough to furnish reasonable ground for a belief, on which a guest in the situation of the deceased might reasonably act in the way he did, that this service room was a water-closet? This seems to me to be the question, putting it most favourably for the appellant. Those circumstances were the glass in the door and the audible drip of water within. I do not add the absence of light; for to me it would not seem reasonable to expect that water-closets B intended for use at night in such an hotel would be left unlighted. But the glass in the door no more denoted a water-closet, there being no light within, than it did any other kind of room, passage, or place, which might receive borrowed light from the corridor, such, for instance, as a service room, a housemaid's closet, or the entrance to a passage or back staircase. And the drip of water would be left behind by anyone advancing, as the appellant's C husband did, into the room, and could not be supposed by any such person to denote the situation of the object of his search. At the most, these circumstances might explain his first act, in opening the door to see what, if anything, might be discernible within; but when he had done this, and found the room quite dark, I cannot regard either of them alone, or both together, as furnishing reasonable D ground for his going forward in the dark to the place where he fell, instead of proceeding a little further along the corridor, where proper water-closets, with proper lights, might have been found.

Would the respondents have been wrongdoers towards him, all other circumstances being the same, if he had come to a steep staircase instead of the unguarded well of a lift, and had fallen down it? I think not; and, if not, I E do not think they can be liable because it was the well of a lift with iron doors, which had been, purposely or inadvertently, left unclosed. The magnitude of a particular danger, to anyone who may happen to come in the way of it unawares, may doubtless enhance the responsibility of the person to whom it is imputable, for the neglect of any duty which he owes to persons whom he leaves exposed to it; but I do not see how it can create such a F duty, when the person who suffers would not, in the proper and ordinary course of things, or without his own unauthorised and unreasonable act, have been within the reach of the danger at all.

I will not detain your Lordships by considering some other things which might have happened, as, e.g., if the appellant's husband had sustained serious hurt by stumbling over the luggage which was on the floor of the service room, or G if there had been in the room brittle or perishable articles of value belonging to the respondents, which he might have broken or injured while groping about in the darkness. I doubt whether a judgment in the appellant's favour in the actual case could be justified, unless upon principles which would equally have entitled the appellant's husband to damages in the first of those cases, and have exonerated him from liability in the other. In considering whether there was any H evidence of neglect of duty by the respondents, it would not, in my opinion, be right to leave out of sight the fact that they did not so conduct their hotel as to drive their guests to grope about in dark places, or to explore unknown rooms in order to find water-closets. These conveniences were provided on that corridor, in positions easily accessible, and easily discoverable by any guests in the circumstances of the appellant's husband, who might endeavour, with I reasonable care and patience, to observe or to find them; and they were kept properly lighted at night.

Much as I regret the terrible result to the appellant's husband, I cannot hold the respondents responsible for it. The majority of the learned judges in the Court of Appeal, and all the judges of the Queen's Bench Division, before whom the case came, thought that there was no evidence of any wrongful neglect or default towards the appellant's husband on the respondents' part. I am unable to differ from them. If the evidence, illustrated by the plans which were before us, would not have been enough to go to a jury without the view, I am

unable to see how a view of the corridor lighted so as to reproduce as far as A possible, its condition at the time of the accident could make any material difference. I, therefore, move your Lordships to dismiss this appeal.

[His LORDSHIP concluded by considering the question of costs.]

LORD WATSON and LORD BRAMWELL concurred.

LORD FITZGERALD and LORD ASHBOURNE dissented from the opinion of the EARL OF SELBORNE, holding that, on the facts of the case, there was evidence to go to the jury that the respondents had been guilty of a culpable breach of duty, and that the verdict ought not to be disturbed.

Appeal dismissed.

Solicitors; *Keeping & Gloag; Beale, Marigold & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

SOCIÉTÉ GÉNÉRALE DE PARIS v. DREYFUS BROTHERS

[COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), December 16, 17, 1887]

[Reported 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573;
36 W.R. 609; 4 T.L.R. 177]

Practice—Service out of jurisdiction—Discretion of court—Ascertainment whether plaintiff has possible cause of action—Outcome of action depending on foreign law—Decision of foreign court adverse to plaintiff—R.S.C., Ord. 11, r. 1.

On an application under R.S.C., Ord. 11, r. 1, for leave to serve a writ out of the jurisdiction the court cannot go into the merits of the action in the sense of deciding it, but the court, in exercising the discretion conferred by the rule, must look at the plaintiff's case and see if he has a probable cause of action. If (as in the present case) the plaintiff has no probable cause of action, if the outcome of the action depends entirely on foreign law, and if the proper foreign tribunal has decided that he has no cause of action, there will be no ground for exercising the discretion of the court in the plaintiff's favour, and the application, therefore, should be dismissed.

Notes. As to foreign judgments and their enforcement and effect, and service out of the jurisdiction, see 7 HALSBURY'S LAWS (3rd Edn.) 140 et seq., and *ibid.*, vol. 30, pp. 323-328. For cases see 11 DIGEST (Repl.) 519-527, 531, DIGEST (Practice) 336 et seq.

Case referred to:

(1) *Call v. Oppenheim* (1885), 1 T.L.R. 622, C.A.; 11 Digest (Repl.) 524, 1368.

Appeal from a decision of PEARSON, J., reported 29 Ch.D. 239, giving the plaintiffs leave to serve the defendants with a writ out of the jurisdiction under R.S.C., Ord. 11, r. 1 (f).

The plaintiffs were a French company domiciled in Paris, and the defendants were Dreyfus (a domiciled Frenchman resident in Paris, sued as Dreyfus Brothers), the Peruvian Guano Co., Ltd. (an English company), and B. Premsel (a domiciled Frenchman resident in Paris, the owner of the business of Leiden, Premsel & Co., a French firm). On July 5, 1869, Dreyfus Brothers entered into

A an agreement with the Peruvian government for the purchase of guano; and on July 6, Dreyfus Brothers, Leiden, Premsel & Co., and the plaintiffs entered into a contract, executed at Paris, for the purpose of carrying out the above agreement "en participation" between them. Disputes afterwards arose, an action of *Dreyfus v. Peruvian Guano Co.* was commenced, and the proceeds of certain cargoes of guano received by Dreyfus Brothers, amounting to about £200,000, was paid into court to the credit of that action. The plaintiffs in the present action claimed (i) a declaration that the £200,000, belonged to them and to the other parties interested under the contract of July 6, 1869; (ii) a receiver; (iii) an injunction restraining Dreyfus Brothers from receiving or dealing with the money. They obtained leave, under R.S.C., Ord. 11, r. 1. (f), to serve Dreyfus Brothers with the writ out of the jurisdiction, and Dreyfus Brothers then moved to discharge the order giving leave. On the evidence before him PEARSON, J., came to the conclusion that the French courts had not decided an important question, viz., whether, having regard to the terms of the contract between the parties of July 6, 1869, the plaintiffs and B. Premsel had a right to any part of the proceeds of the guano, or only a personal right to an account against Dreyfus Brothers, and to stand as creditors against them for what should be found due on taking the account, and therefore it was a case in which leave to serve the writ out of the jurisdiction ought to be given. From this decision the defendants appealed, but the hearing of the appeal stood over to await the result of proceedings in France. After the date of this order by PEARSON, J., further proceedings were taken in France. The Société Générale and Premsel brought an action before the Tribunal of Commerce of the Department of the Seine claiming a right to receive as against Dreyfus Brothers all sums arising out of the guano contract of July 5, 1869, and, in particular, the sum of 5,300,000 francs, being the sum deposited in court in England, and asked for a receiver to receive that money. Judgment in that action, which was referred to as the receiver action, was given by the Tribunal of Commerce on Nov. 21, 1885, in favour of the defendants, Dreyfus Brothers, and declared that the demands of the Société Générale were unfounded; that Dreyfus Brothers alone had the right, as well with respect to third persons as to the participants, of receiving all sums arising from the execution of the guano contract, and expressly the 5,300,000 francs arising from the cargoes realised in England, the prices of which were deposited in the court of London; that by the terms of the contract of participation the Société Générale had no right to require the payment into its hands of the sums arising from the guano contract, or to object to their being paid to Dreyfus Brothers; and that in its relation with Dreyfus Brothers the Société Générale had no right of property in these sums, but only a contingent right of debt against their co-participants. On April 22, 1886, this judgment was affirmed by the Court of Appeal of Paris, and on July 12, 1887, by the Cour de Cassation.

Sir Horace Davey, Q.C., and Ingle Joyce for Dreyfus Brothers.
Rigby, Q.C., and Cozens-Hardy, Q.C., for the plaintiffs.

COTTON, L.J.—This is a motion by way of appeal from a decision of PEARSON, J., to discharge an order made by him for the service of a writ out of the jurisdiction, namely, in France. It is a somewhat singular case, because both plaintiffs and defendants are French people domiciled in France, and there are courts in that country, but the plaintiffs come here saying that it is a case within Ord. 11, r. 1, for it is an action in which it is sought to get an injunction with reference to a large sum of money which is in court in this country. That is so, and it is really, therefore, within para. f of Ord. 11, r. 1.

But was it right of the court, in the discretion given to it, to authorise the issue of the writ and notice of it to be served in France? When the case was before PEARSON, J., on the evidence by affidavit, he declined to discharge

the order, as I understand, on a view of what were the rights of the parties under a particular clause in the contract of participation which had been entered into between the plaintiffs and defendants. He thought that the evidence was doubtful on what must be a question of fact, namely, the rights of the parties under this contract, which was a French contract, made between domiciled Frenchmen. The plaintiff société is a French society. But now we have a great deal more. At the time the order was made by PEARSON J., there was an action brought by Dreyfus in France in order to have his rights established under the contract as against the other contracting parties, but since the order was made by PEARSON, J., refusing to discharge the order for the issue of the writ and the order for service there have been other proceedings taken by the société against Dreyfus, in order to have it established in the French courts that the société had a right to receive this sum, either under the general law applicable to such cases, or under the particular terms of the contract on which PEARSON, J., rested his decision. That has been through all the courts there, and the Court of Appeal in Paris and the Cour de Cassation have decided against the claims which were raised by the société. That shows that the société were wrong in trying to establish their claim to this fund in England on the grounds which we relied on by them. In the writ which was authorised to be served they put their claim in this way: These funds are assets of a partnership, we have a right to receive them as against Dreyfus, or, at any rate, the court ought to grant a receiver and injunction. That was expressly decided against the société in the proceedings taken by them, and so it was ultimately conceded by their counsel. That being so, we must take it that, on that point as to the right to a receiver and the right to receive the fund personally, the société were wrong in their contention as plaintiffs here.

Then it was said that there was another point, which, although not raised before the tribunals in France, would, on the evidence before us, entitle the société to a receiver, or make it probable that the société was entitled to that relief. That was the evidence of M. Barboux, who is their witness. It is pointed out, and it has not been displaced, that the very fact on which M. Barboux says that the further right to get a receiver would depend, namely, that the participation or partnership was in liquidation, was actually before the Court of Appeal when the proceedings were before it, and when it made the order of April 22, 1886, affirming the decision of the court of first instance which decided that the société had no right personally to receive and no right to get a receiver of this fund. That being so, the whole case of the defendants has been proved. That is to say, it has been established by the best evidence possible that the matter of fact on which the right of the plaintiffs in England depends does not exist.

In those circumstances what ought we to do? If we were satisfied that the tribunals in Paris had no power to protect this fund if they thought right to do so, I should hesitate about discharging the order for the issue of this writ and for service abroad. But M. Barboux's affidavit, on which reliance was placed by the plaintiffs, shows, in my opinion, quite the contrary. He explains why a receiver would not be granted when the société was not in liquidation, because it would interfere with the rights and powers and duties of the manager, who in this case was Mr. Dreyfus, the manager of Dreyfus Brothers. But if the société were in liquidation, which to my mind, can have no other meaning than when it is only carrying on its business so far as necessary for the purpose of winding-up its affairs, paying its debts, and distributing its proceeds, that would not apply. If that is so and they will, in consequence of that liquidation existing, be entitled in France to get a receiver, they can do it; but in my opinion, if it comes before us as a question of fact, I should say that the highest tribunal has decided what the French law is, and, therefore, gives us positive evidence that they are not entitled there, or consequently here, to get any receiver of this fund.

A That being so, what ought we to do? In my opinion, although we determine this matter on evidence now brought before us which was not before the court below showing conclusively what the French law as a matter of fact for us to decide is, we ought not to allow this action to go on. The defendants have not appeared, that is to say, they have only appeared conditionally in order to obtain the discharge of the order which has been made by PEARSON, J., for liberty to issue the writ and for service of notice abroad. I think, therefore, the proper thing to be done is to discharge PEARSON, J.'s, order and the writ. That will put an end to this action.

It is said that we are wrong in considering the questions into which I have entered. That argument was principally based on *Call v. Oppenheim* (1) in the Court of Appeal, but there are enormous differences between that case and this.

C There there was an English contract, because there was a bill of exchange accepted in France, but accepted payable in England, and there were grave questions as to what was the effect and validity of the judgment which had been given in France with reference to the matter. That is very different from that which appears before us now, where we have this judgment of the highest tribunal in France which really decides the matter. As a rule, in such a case as the present

D one ought not to enter into the questions which are to be decided at the trial of the action. But r. 4 of Ord. 11 requires that every application for leave to serve such writ shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action. The fact that such an affidavit is to be made shows that the court ought to consider whether there is a probable cause of action in respect of which the writ is sought

E to be served abroad. Here that depends not on a question of English law, but on a question of fact. That fact has been established by the best possible evidence by the courts which can decide what is French law deciding what the fact is, and the fact is shown to be that there is no cause of action.

Therefore, in my opinion, having regard to that rule, not only are we justified, but we ought in a case like this to inquire into any matter which is brought

F before us by the parties served, showing that the supposition upon which the judge made the order for the issue of the writ was erroneous and does not exist. In my opinion, therefore, the appellants are entitled to the order for which they ask. Then as to costs. I had some doubt about that, as we were hearing the matter here on evidence not before PEARSON, J. But it is shown now that the affidavits which were before PEARSON, J., on behalf of Dreyfus

G correctly stated the fact that was disputed by the other side. They ought never to have stated to the court that a fact existed which the tribunals in Paris, the Court of Appeal, and the Cour de Cassation have shown to us never did exist. This also is to be considered, that the matter stood over, after the appeal was presented and before it came before us, in order that the plaintiffs, the société, might bring the matter before the French tribunals to decide this

H matter between the parties in order to get their decision to show what was right and what was wrong in the allegations of fact which they raised before PEARSON, J. I think, therefore, we cannot do otherwise than, in discharging the order made by PEARSON, J., give to Messrs. Dreyfus the costs here and below.

LINDLEY, L.J.—I am of the same opinion, and I cannot help thinking, if the facts now before us had been before PEARSON, J., leave to serve this writ abroad would never have been granted.

The controversy is of this nature. The Société Générale de Paris and Messrs. Dreyfus and some other gentlemen entered into a French contract, all being French subjects, for the participation of profits in a certain adventure, and their rights upon that contract depend upon French law, and French law only. There is no English law in the matter. It so happens that there is standing to the credit of a cause in the High Court a very considerable sum which has been

ordered to be paid out to Messrs. Dreyfus; and the Société Générale, by their writ in this action, ask for a declaration that they are entitled to have that fund. They ask for a receiver, and for an injunction to restrain Dreyfus from receiving it. Under these circumstances they apply for leave to serve the writ in that action against Dreyfus. We have now the matter established clearly enough to enable us to see our way with perfect precision. It is established beyond all possibility of controversy that by French law the Société Générale are not entitled to receive that money; that they are not entitled to prevent Messrs. Dreyfus from receiving the money; and that Messrs. Dreyfus are the proper people to get it. It is also not in controversy at all that when Messrs. Dreyfus have got it, it must be brought into account and accounted for by them as part of the moneys which are subject to the contract to which I have referred. But they are the people to get it, even according to the affidavit which we have last had before us, relied upon by the plaintiffs. It seems to me to be quite plain that the proper mode of proceeding, even in France, is to let Messrs. Dreyfus get in that outstanding asset. Whether when they have got it matters are sufficiently in liquidation to enable the Société Générale to have it deposited is a question for the French courts, not for us; but it is impossible for Messrs. Dreyfus even to comply with any order of that kind unless they get the fund from us. It is an outstanding asset which the French courts say Messrs. Dreyfus are to get in, and no one has a right to say they shall not get it in. That appears to be the simple answer to the case.

We are referred to R.S.C., Ord. 11, and it is contended that, inasmuch as an injunction is asked, and as an affidavit has been made in the terms required by that order, we have no right to refuse leave to serve this writ, and it has been contended, upon the authority of *Call v. Oppenheim* (1), that if we do we shall be running counter to a decision of this court. I differ entirely from everyone of these allegations. In the first place, Ord. 11 enumerates certain circumstances under which, and under which alone, the court can give leave to serve writs out of the jurisdiction. It does not say that when these circumstances occur the court is bound to give leave. On the contrary, the language is that service out of the jurisdiction "may be allowed by the court or a judge" in certain specified events. This shows that the court has a discretion, and is bound to exercise its discretion. This becomes still plainer by turning to r. 2, which states certain matters which the court is bound to have regard to when it is asked for leave to serve a writ in Ireland or Scotland. It is not that you are entitled to have leave simply because you bring your case within one or the other of the rules of Ord. 11. You cannot get the leave unless you do, but it does not follow that if you do you are to have the leave. The court has a discretion, and that discretion must be exercised judicially and upon proper grounds.

It is said that in such a matter as this you cannot go into the merits. That is quite true. You cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-by, but at the same time a judge cannot perform the duty imposed upon him by this order unless he so far looks into the matter as to see whether the plaintiff has a probable cause of action or not. I do not think the court ought to look into the defence as distinguished from the plaintiff's case. The court must look at the plaintiff's case and see whether he has a probable cause of action. If he has no probable cause of action, if the outcome of the action depends entirely upon foreign law, and if the proper foreign tribunal has decided against him that he has no cause of action, there is no ground for exercising the discretion of the court, and the court ought to refuse the leave to serve the writ. That is not contrary to *Call v. Oppenheim* (1) as I understand it, but quite the reverse. *Call v. Oppenheim* (1) does not contain a word which goes to show that, if the court sees the plaintiff has

A no case, and if it has already been decided by a competent court that he has no such right as he alleges, this court should go through the farce of giving leave to serve a writ out of the jurisdiction when there is nothing to be gained by it.

Therefore, it appears to me, now we have the materials before us in the shape in which we have them, that this is a case in which leave to serve the writ abroad ought not to be given, and the appeal must be allowed. As regards the costs, no doubt there is a little difficulty in consequence of fresh facts having come forward, but the broad result is that Messrs. Dreyfus were right throughout. This was a very speculative action. When one foreigner sues another in the courts of this country on a foreign contract he is making a very hazardous experiment in asking for leave to serve the defendant, a foreigner, out of the jurisdiction. If he is wrong, if his opponent is right from the first, I cannot see on what principle the defendant ought not to be indemnified, and should not have costs. It appears to me, therefore, that the appeal ought to be allowed, with costs here and below.

D **LOPES, L.J.**—Allowing or disallowing service out of the jurisdiction is a matter of discretion. If a prima facie case is made on the affidavits that there is a cause of action within the rules of Ord. 11, the court in its discretion permits the service. If, on the other hand, no such case is made out, or if it is shown by the party on whom service is sought to be effected that there is a clear and complete defence, the court, in its discretion, does not grant, but refuses such service. Applying that to the present case, it appears to me that, if this action proceeded and the judgments in the French courts were pleaded, they would furnish a complete answer to the case which the plaintiffs now set up on the ground of *res judicata*. Therefore, to permit the service to continue would be vexatious and oppressive towards the defendants. I think, therefore, the service should not be allowed. But it is said that this decision is not in accordance with the decision of *Call v. Oppenheim* (1). In my opinion, the decision is in no way inconsistent with that case. It is said that on an application like the present the court is not entitled to go into the merits of the case. That is perfectly true. The court does not go into the merits in the sense of deciding the case but it is clear that the court must to a certain extent go into the facts in order to determine whether or not there is a cause of action, or whether or not there is a complete answer to that cause of action which can be furnished by the defendants. The appeal, in my opinion, therefore, succeeds.

Appeal allowed.

Solicitors : *Michael Abrahams, Son & Co.; G. M. Clements.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

WILSON, SONS & CO. v. XANTHO (CARGO OWNERS). THE XANTHO

[HOUSE OF LORDS (Lord Bramwell, Lord Herschell and Lord Macnaghten),
March 17, July 14, 1887]

[Reported 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353;
3 T.L.R. 766; 6 Asp. M.L.C. 207]

*Shipping—Carriage of goods—Exception relieving shipowner from liability—
“Dangers and accidents of the sea”—Carrying ship sunk in collision—
Absence of negligence.*

*Insurance—Marine insurance—Perils of the sea—Loss or damage covered—Need
to prove some casualty.*

A bill of lading relating to the carriage of cargo from Cronstadt to Hull contained an exceptions clause relieving the shipowners from liability for loss of or damage to the goods due to “the act of God, Queen’s enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the sea, rivers, and steam navigation of whatever nature and kind soever.” The ship was lost through a collision with another vessel. In an action by consignees, to whom the property in the goods had passed, against the shipowners for damages for the loss of the cargo,

Held: the proximate cause of the loss fell within the words “dangers and accidents of the sea” in the exceptions clause, and, therefore, in the absence of any negligence on the part of the shipowners the action failed.

Woodley v. Michell (1) (1883), 11 Q.B.D. 47, overruled.

Per LORD HERSCHELL: The term “perils of the sea” (and certainly the words “dangers and accidents of the sea” cannot have a narrower interpretation) does not cover every accident or casualty which may happen to the subject-matter of a policy of marine insurance on the sea. It must be a peril “of” the sea. It is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.

Per LORD BRAMWELL: Are the words “perils of the sea” to have different meanings in a policy of marine insurance and in a contract for the carriage of goods by sea? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew of the carrying vessel, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other?

Per LORD MACNAGHTEN: Whatever the expression “perils of the sea” means in a policy of insurance, it means neither more nor less in a contract of carriage.

Notes. Explained: *The Glendarloch*, [1891-4] All E.R. Rep. 484. Applied: *Sassoon & Co. v. Western Assurance Co.*, [1911-13] All E.R. Rep. 438. Explained: *Stott (Baltic) Steamers v. Marten*, [1914] 3 K.B. 1262. Considered: *Grant, Smith & Co. and McDonnell, Ltd. v. Seattle Construction and Dry Dock Co.*, [1918-19] All E.R. Rep. 378; *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R. Rep. 66; *The “Stranna,”* [1937] 2 All E.R. 383; *The Lapwing*, [1940] P. 112; *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co., Ltd.*, [1940] 4 All E.R. 169. Referred to: *Hamilton, Fraser & Co. v. Pandorf*, post, p. 220;

- A** *Johnson v. Wainwright* (1894), 38 Sol. Jo. 362; *Trinder, Anderson & Co. v. Thames and Mersey Insurance Co., Trinder, Anderson & Co. v. North Queensland Insurance Co., Trinder, Anderson & Co. v. Weston, Crocker & Co.*, [1898] 2 Q.B. 114; *Blackburn v. Liverpool, Brazil and River Plate Steam Navigation Co.*, [1900-3] All E.R. Rep. 67; *Dunn v. Bucknall, Dunn v. Donald Currie & Co.*, [1900-3] All E.R. Rep. 131; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *The Torbryan*, [1903] P. 35; *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, [1908] 1 K.B. 796; *Trin Joint-District Board of Management v. Kelly*, [1914] A.C. 667; *Travers v. Cooper* (1914), 20 Com. Cas. 44; *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918-19] All E.R. Rep. 443; *British and Foreign Steamship Co., Ltd. v. R.*, [1918-19] All E.R. Rep. 676; *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R. Rep. 480;
- C** *Forestal Land Timber and Railways Co. v. Rickards, Middows, Ltd. v. Robertson, Howard Bros. & Co. v. Kahn*, [1940] 4 All E.R. 96; *N. E. Neter & Co. v. Licenses and General Insurance Co.*, [1944] 1 All E.R. 341.

As to exceptions relieving a shipowner from liability for damage to or loss of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 288-303; and for cases see 41 DIGEST 407 et seq.

- D** Cases referred to :
- (1) *Woodley v. Michell* (1883), 11 Q.B.D. 47; 52 L.J.Q.B. 325; 48 L.T. 599; 31 W.R. 651; 5 Asp. M.L.C. 71, C.A.; 41 Digest 415, 2584.
- (2) *Cullen v. Butler* (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest (Repl.) 260, 1974.
- E** (3) *Grill v. General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; Har. & Ruth. 654; 35 L.J.C.P. 321; 14 L.T. 711; 12 Jur.N.S. 727; 14 W.R. 893; 2 Mar. L.C. 362; on appeal (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar. L.C. 77, Ex. Ch.; 41 Digest 771, 6260.
- (4) *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260;
- F** 31 W.R. 445; 5 Asp. M.L.C. 65, C.A.; 41 Digest 422, 2648.

Also referred to in argument :

- Phillips v. Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, 2664.
- Czech v. General Steam Navigation Co.* (1867), L.R. 3 C.P. 14; 37 L.J.C.P. 3; 17 L.T. 246; 16 W.R. 130; 3 Mar. L.C. 5; 41 Digest 425, 2667.
- G** *Lloyd v. General Iron Screw Collier Co.* (1864), 3 H. & C. 284; 4 New Rep. 298; 33 L.J.Ex. 269; 10 L.T. 586; 10 Jur.N.S. 661; 12 W.R. 882; 2 Mar. L.C. 32; 41 Digest 421, 2646.
- Garston Sailing Ship Co., Ltd. v. Hickie, Borman & Co.* (1886), 18 Q.B.D. 17; 56 L.J.Q.B. 38; 55 L.T. 879; 35 W.R. 33; 3 T.L.R. 23; 6 Asp. M.L.C. 71, C.A.; 41 Digest 651, 4833.
- H** *Pickering v. Barkley* (1648), Sty. 132; 82 E.R. 587; 41 Digest 415, 2590.
- Smith v. Scott* (1811), 4 Taunt. 126; 128 E.R. 276; 29 Digest (Repl.) 235, 1772.
- The Norway (Owners) v. Ashburner, The Norway* (1865), 3 Moo. P.C.C.N.S. 245; Brown. & Lush. 404; 13 L.T. 50; 11 Jur.N.S. 892; 13 W.R. 1085; 2 Mar. L.C. 254; 16 E.R. 92, P.C.; 41 Digest 305, 1673.
- I** *Ohrloff v. Briscall, The Hélène* (1866), L.R. 1 P.C. 231; 4 Moo. P.C.C.N.S. 70; Brown. & Lush. 429; 35 L.J.P.C. 63; 14 L.T. 873; 12 Jur.N.S. 675; 15 W.R. 202; 2 Mar. L.C. 390; 16 E.R. 242, P.C.; 41 Digest 467, 2989.
- Hale v. Washington Insurance Co.*, 2 Story Rep. 176.
- Taylor v. Liverpool and Great Western Steam Co.* (1874), L.R. 9 Q.B. 546; 43 L.J.Q.B. 205; 30 L.T. 714; 22 W.R. 752; 2 Asp. M.L.C. 275; 41 Digest 420, 2638.
- Buller v. Fisher* (1799), 3 Esp. 67; Peake, Add. Cas. 183; 170 E.R. 540, N.P.; 41 Digest 415, 2583.

Merchants Trading Co. v. Universal Marine Co. (1870), cited in L.R. 9 Q.B. at p. 596; 2 Asp. M.L.C. 481, n., C.A.; 29 Digest (Repl.) 233, 1744.

Appeal by the defendants in the action from a decision of the Court of Appeal (LORD ESHER, M.R., BOWEN and FRY, L.JJ.), reported 11 P.D. 170, affirming a decision of the President of the Probate, Divorce and Admiralty Division (SIR JAMES HANNEN) in favour of the plaintiffs.

The action was brought by the respondents, holders of a bill of lading for cargo shipped on board the steamship *Xantho*, against the appellants, the owners of that vessel, for non-delivery of the cargo. At the trial it was admitted by the ship-owners that a collision occurred between the *Xantho* and another vessel, by which the former was sunk, and that the cargo had been received, and had not been delivered. The bill of lading contained a clause excepting the shipowner from liability for loss of or damage to the cargo caused by, inter alia, "dangers and accidents of the sea." The shipowners contended that the burden of proof which was on them to show that the loss was due to a cause within the meaning of the exception had been discharged. SIR JAMES HANNEN, P., gave judgment for the cargo owners on the authority of *Woodley v. Michell* (1), and his judgment was affirmed by the Court of Appeal. The shipowners appealed.

Sir Richard Webster, Q.C., Sir Walter Phillimore and Aspinall for the appellants.
Sir Charles Russell, Q.C., and Hollams for the respondents.

Their Lordships took time for consideration.

July 14, 1887. The following opinions were read.

LORD HERSCHELL.—In order to render clear the exact point which has to be determined in this case it will be necessary to state with some minuteness the pleadings and the course which the case took at the trial. The owners of cargo by the steamship *Xantho*, who were the plaintiffs in the action, by their statement of claim alleged that they had suffered damage by breach of the contract contained in the bills of lading of goods shipped at Cronstadt on board the defendants' vessel *Xantho* for carriage to Hull, that the bills of lading were endorsed to the plaintiffs, to whom the property in the goods passed by such endorsement, and that the goods were not delivered. The statement of claim further alleged, alternatively, that the plaintiffs had suffered damage from the loss of their goods while on board the defendants' vessel by a collision with the steamship *Valuta*, caused by the negligent navigation of the defendants' servants. The statement of defence denied the contract and the breach, and also that the bills of lading were endorsed to the plaintiffs, and that the property in the goods thereby passed to them. In answer to the alternative claim, it admitted that the *Xantho* came into collision with the *Valuta*, but denied that the collision was caused by the negligent navigation of the *Xantho*, alleging that it was solely caused by the negligent navigation of the *Valuta*. The defence further alleged that the loss of the cargo was occasioned by perils which were excepted by the bill of lading.

The action came on for trial before the President of the Probate and Admiralty Division. The learned counsel for the plaintiffs put in as his only evidence the bills of lading and admissions that the property in the goods and the right to sue on the bills of lading had passed to the plaintiffs, and that the goods had not been delivered. The bills of lading, which were in the usual form, contained an exception in these terms :

"The act of God, Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the sea, rivers, and steam navigation of whatever nature and kind soever excepted."

In opening his case the plaintiffs' counsel stated that the *Xantho* was lost by reason of a collision which took place between that vessel and the *Valuta*

- A in a fog, and submitted that, whether the collision arose from the negligence of those navigating the *Xantho* or of those navigating the *Valuta*, or from the negligence of both combined, the loss of the goods did not fall within the exception contained in the bill of lading, and that the plaintiffs were in either case entitled to recover. He relied in support of this contention upon *Woodley v. Michell* (1). The learned counsel for the defendants admitted that if *Woodley v. Michell* (1) were good law he could not resist this view; that even if he proved that no negligence was to be imputed to the *Xantho*, and that the disaster was solely due to the negligence of the *Valuta*, as he could not prove that it arose from an inevitable accident, the result must be a decision for the plaintiffs. He considered, therefore, that the only course open to the defendants was to test the law laid down in *Woodley v. Michell* (1) by appeal to your Lordships' House. The learned President thereupon gave judgment for the plaintiffs. I think the defendants' counsel was perfectly correct in the course which he took. If he had proved to demonstration that his vessel was free from blame and that the other vessel's negligence alone caused the disaster, he would have established no defence so long as *Woodley v. Michell* (1) stood. He, accordingly, wisely abstained from the idle task of attempting to prove facts which the Court of Appeal had held to be wholly immaterial.

- D It appears to me that the only question which arises for your Lordships' determination in this case is whether the decision in *Woodley v. Michell* (1) can be sustained. In that case an action was brought on a bill of lading. The goods were lost owing to a collision between the defendants' and another vessel. The jury found that there was no negligence on the part of the master or crew of the carrying vessel. The Court of Appeal held that the defendants were not protected by the exception of "perils of the sea" contained in the bill of lading, and gave judgment for the plaintiffs. BRETT, L.J., said (11 Q.B.D. at p. 52):

- E "What I think it necessary in this case to say (and I repeat it without any doubt), is that although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading."

- F COTTON, L.J., thus expresses himself (*ibid.* at p. 53):

- G "There is no decision that is binding upon us that a collision occasioned by the negligence of one of the ships is a peril of the sea. Looking, then, upon it with reference to decided cases, and according to the ordinary interpretation of words, I cannot see how, if there was no peril from sea or wind, and an accident is caused by the negligent act of one of the two ships which comes into collision, that can be said to be a peril of the sea."

- H The question what comes within the term "perils of the sea" (and certainly the words "dangers and accidents of the sea" cannot have a narrower interpretation) has been more frequently the subject of decision in the case of marine policies than bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter. I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one

of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to *Cullen v. Butler* (2), where, a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

But it is said that the words "perils of the sea" occurring in a bill of lading or other contract of carriage must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, while in the former you may go behind the *causa proxima* and look at what was the real or efficient cause. It is on this view that the Court of Appeal acted in *Woodley v. Michell* (1). I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy on the ground that there had been a loss by such perils. I think, however, that this difference arises, not from the words "perils of the sea" having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments.

The true view appears to me to be presented by WILLES, J., in his judgment in *Grill v. General Iron Screw Collier Co.* (3). The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of "perils of the sea." It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, WILLES, J., said (L.R. 1 C.P. at pp. 611, 612) :

"I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."

A So far as I am aware, until *Woodley v. Michell* (1) was decided, there was no authority for saying that a loss the proximate cause of which was a peril of the sea, and which did not result from the act or default of the carrier, was not within the exception. In *Chartered Mercantile Bank of India v. Netherlands Indian Steam Navigation Co.* (4) BRETT, L.J., suggested the view that a loss by a collision due to the negligence, not of the carrying, but of the other vessel, was not a loss by perils of the sea. He said (10 Q.B.D. at p. 530):

C "If the collision is caused without any fault on the part of the carrying ship, but is caused by reason of the negligence of those who are conducting the other ship, it cannot be called an accident of the sea. An accident is that which happens without the fault of anybody, and consequently a collision which is the fault of somebody is not an accident of the sea."

D This was a dictum certainly not necessary for the decision of that case. But in *Woodley v. Michell* (1) it was repeated and adopted as the ground of judgment. With the greatest respect for that learned judge, the weight of whose opinion on any question of maritime law I fully recognise, I am unable to perceive why a loss occasioned by an inroad of the sea owing to a casualty over which the shipowner and his servants had no control should not be held to be within the exception. If the distinction pointed out by WILLES, J., between the rules governing the construction of policies of marine insurance and bills of lading be the true one, it is certainly not applicable to such a case. I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or a peril of the sea; and I think it would give rise to distinctions resting on no sound basis if it were to be held that the exception of perils of the seas in a bill of lading were always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency. Take the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, while a similar loss arising from a vessel coming into contact with a rock not marked upon the chart admittedly would be? And what substantial distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights?

G For these reasons I have arrived at the conclusion that *Woodley v. Michell* (1) cannot be supported. It was contended by the learned counsel for the appellants that if your Lordships should take this view, the judgment ought to be entered for them. I cannot concur in this. With the authority of *Woodley v. Michell* (1) in their favour, when once it was admitted that the accident was not inevitable, it was as fruitless for the respondents to give evidence of the negligence of the appellants as it was for the appellants to seek to cast the blame on the other vessel. Much argument was addressed to your Lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus, and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view. I certainly must not be understood as deciding that the mere proof of loss by collision under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause would exonerate the defendants. I move your Lordships that the judgment appealed from be reversed, and that there be a new trial of the action. I think the respondents must pay the costs in

the Court of Appeal and in this House, and that the costs of the two trials already had should abide the event. I move your Lordships accordingly. A

LORD BRAMWELL.—My noble and learned friend has been kind enough to read his opinion first, in consequence of its containing a fuller statement of the facts than what I am about to read to your Lordships. The plaintiffs' statement of claim is for the non-delivery of goods according to a bill of lading, with an alternative claim for loss of the goods therein mentioned owing to the negligence of the defendants. It was admitted at the trial by the defendants that the goods had not been delivered according to the bill of lading. It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of inevitable accident—i.e., of winds, waves, or other natural causes. The plaintiffs contended, on the authority of *Woodley v. Michell* (1), that, that being so, they were entitled to judgment, whether the collision was attributable to the negligence of the defendants, with or without negligence on the part of the other ship, or wholly to the negligence of that other. The President so ruled, considering himself bound by *Woodley v. Michell* (1). B C

That case decided that a damage, including foundering occasioned by collision, was not a loss by perils of the sea within those words of exception in a bill of lading, unless occasioned by action of sea or wind, or inevitable accident, and, therefore, that a collision occasioned, whether by the negligence of the one ship or the other, or both, was not a loss by such perils. The defendants appealed, but the ruling was upheld, the court giving reasons for their opinion, and also relying on *Woodley v. Michell* (1). With great respect, I cannot agree. I think that case wrongly decided, and differ from the reasons given in support of the judgment in that and in this case. Was it by a peril of the sea that the defendants' ship foundered? The facts are that the sea-water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other? The argument is that wind and waves did not cause the loss, but negligence in someone. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. D E F G H

I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say: "I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea." The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started and the vessel went to the bottom in consequence that it should be held: "The loss is not by perils of the seas, but by bad carpentering." Let there be no doubt. I do not say that in I

A such case the freighter might not complain that his goods were carried in an unseaworthy ship: all I say is, that the loss would be by perils of the seas. It is only necessary for this House to say that if the foundering was occasioned by a collision, with no blame on the defendants, they ought to have succeeded. For this is what they offered to prove, and were told that it was useless to do so. Counsel for the respondents argued that they ought to have insisted on their right to prove their case. I am clearly of a different opinion. I think when the judge says: "I shall decide against you, though you prove what you say," the party must acquiesce for the time, and seek his remedy by appeal. I think that the judge might properly refuse to hear the evidence, for he might truly say that, in his opinion, this evidence is irrelevant to any issue on the record; no one giving it would be liable to the penalty of perjury. The practice in my experience has always been in conformity with what I am now saying.

C The judgment, then, must be set aside. Counsel contended that it should be entered for the defendants. That also is impossible. It could not have been done before the Judicature Act, and that Act does not authorise it. It would be most unjust to the plaintiffs. They, relying on the law as it had been laid down, proved what was a sufficient case, and did not give what would have been irrelevant evidence if the law had been rightly laid down. I say nothing about burthen of proof. All I say is, that if the collision was in no way the fault of the defendants' crew, they are entitled to judgment.

E LORD MACNAGHTEN.—In this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods entrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument underlying the contract; implied and involved in it there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that, even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.

G Turning now to the facts of the case, we find that it was admitted at the trial that the vessel with the goods on board foundered at sea in consequence of a collision. The exception in the bill of lading includes "dangers and accidents of the sea." Is shipwreck by collision a danger or accident of the sea? I should say undoubtedly it is. Then comes the question: How was the collision brought about? Of that we know nothing, except that it was not due to inevitable accident. So much was admitted. It follows from that admission that one or both of the vessels that came into collision must have been to blame. In that state of things, I should have thought that the issue between the parties was reduced to this question: Was the carrying vessel in fault? If it was not, the shipowner is protected. If it was, though the loss occurred through one of the excepted perils, the shipowner cannot rely on the exception. Unfortunately that simple issue was obscured, and the trial of the action was rendered abortive by reason of the decision in *Woodley v. Mitchell* (1). In the face of that decision it would have been idle for the parties to have gone into the facts at the trial. It would have been a work of supererogation on the part of the plaintiffs to have proved that the carrying vessel was in fault. The defendants would have been no nearer winning if they had established by the clearest evidence that up to the moment of collision they had performed every duty cast upon them.

I Under these circumstances the parties have been compelled to come to your Lordships' House, appealing in form against the judgment of the Court of

Appeal in the present case, but in reality against the decision in *Woodley v. Michell* (1). Your Lordships are, therefore, called upon to determine whether the rule laid down in *Woodley v. Michell* (1) can be supported on principle or authority. Authority in its favour there is none. The industry of counsel could not produce any passage from any recognised treatise or from any reported judgment countenancing the doctrine, except one observation in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (4), which was not necessary for the decision. It seems to me to be equally difficult to support the rule in *Woodley v. Michell* (1) on principle. If the accident is brought about by the negligence of the owner of the carrying vessel or his servants, it would be contrary to common sense and against all sound principle to allow one who was the author of the mischief to avail himself of his own wrong. But, if the carrying shipowner is free from all blame, why should he suffer for the errors or misconduct of those over whom he has no control? As far as he and his vessel are concerned, what difference can it make in that case whether the collision is caused by a sunken rock, or by an iceberg, or by another vessel, or whether that other vessel is or is not in fault? It seems to me, if I may say so with all deference, that the error of the Court of Appeal in the present case is to be found in this: They start with the assumption that the same words have different meanings when used in policies of insurance, and when used in bills of lading. For that assumption there is not, I venture to think, any foundation. Different considerations, no doubt, apply to the two contracts, one a contract of indemnity and the other a contract of carriage, and the same event may have a different result in the one case from what it would have in the other; but in mercantile contracts so closely connected the same words must have the same meaning. Whatever the expression "perils of the sea" means in a policy of insurance, it means neither more nor less in a bill of lading. The result, in my opinion, is that the appeal must be allowed, and the litigant parties must begin over again.

Appeal allowed.

Solicitors: *Lowless & Co.; Hollams, Son & Coward.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

HAMILTON, FRASER & CO. v. PANDORF & CO.

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Brainwell, Lord FitzGerald, Lord Herschell and Lord Macnaghten), May 12, 13, July 14, 1887]

[Reported 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp. M.L.C. 212]

Shipping—Carriage of goods—Exception relieving shipowner from liability—"Dangers and accidents of the seas"—Damage to cargo by sea water—Water in hold owing to hole in pipe gnawed by rats.

A cargo of rice was shipped under bills of lading which excepted "all dangers and accidents of the seas . . . of whatever nature and kind." During the voyage the cargo was damaged by sea water entering through a pipe which had been gnawed by rats. It was admitted that the ship was seaworthy, and that there was no negligence.

Held: the damage was within the exception, and the shipowner was not liable for the damage to the rice.

- A** Per LORD HALSBURY, L.C.: What the parties, I think, contemplated was that if any accident should do damage by letting the sea into the vessel, that should be one of the things contemplated by the contract. . . . I cannot think that what happened was less a peril or accident because the hole through which the sea came was made by vermin from within the vessel and not by a sword-fish from without—the sea water did get in.
- B** **Notes.** Explained: *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455. Considered: *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co. v. North Queensland Insurance Co.*, *Trinder, Anderson & Co. v. Weston, Crocker & Co.*, [1898] 2 Q.B. 114. Applied: *Hensey v. White*, [1900] 1 Q.B. 481; *Blackburn v. Liverpool, Brazil and River Plate Steam Navigation Co.*, [1900-3] All E.R. Rep. 67. Considered: *Fenton v. Thorley*, [1903] A.C. 443; *Leyland Shipping Co.-v. Norwich Union Fire Insurance Society*, [1918-19] All E.R. Rep. 443; *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R. Rep. 66; *The Stranna*, [1937] 2 All E.R. 383; *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169. Referred to: *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; *The Bedouin*, [1894] P. 1; *Walker v. Lilleshall Coal Co.* (1899), 69 L.J.Q.B. 192; *The Forbryan*, [1903] P. 35; *Steel v. Cammell, Laird & Co., Ltd.*, [1905] 2 K.B. 232; *The Northumbria* (1906), 95 L.T. 618; *Ingram and Royle v. Services Maritimes du Tréport*, [1913] 1 K.B. 538; *Stott Baltic Steamers v. Martin*, [1914] 3 K.B. 1262; *Morrison & Co., Ltd. v. Shaw, Savill and Albion Co.*, [1916] 1 K.B. 747; *Becker, Gray & Co. v. London Assurance Corp.*, [1916-17] All E.R. Rep. 146; *British and Foreign Steamship Co. v. R.*, [1918-19] All E.R. Rep. 676; *Denholm v. Shipping Controller* (1920), 124 L.T. 378; *N. E. Neter & Co., Ltd. v. Licenses and General Insurance Co.*, [1944] 1 All E.R. 341; *Ocean Steamship Co. v. Liverpool and London War Risks Insurance, Ltd.*, [1946] 1 All E.R. 123.
- C**
- D**
- E**

As to exceptions relieving a shipowner from liability for damage to or loss of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 288-303, and for cases see 41 DIGEST 407 et seq.

F Cases referred to:

- (1) *Laveroni v. Drury* (1852), 8 Exch. 166; 22 L.J.Ex. 2; 16 Jur. 1024; 1 W.R. 55; 155 E.R. 1304; sub nom. *Leveroni v. Drury*, 20 L.T.O.S. 178; 41 Digest 415, 2586.
- (2) *Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho*, ante, p. 212; 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp. M.L.C. 207, H.L.; 41 Digest 414, 2573.
- (3) *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp. M.L.C. 516, H.L.; 41 Digest 428, 2693.
- (4) *Cullen v. Butler* (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest (Repl.) 260, 1974.
- (5) *Garrigues v. Core*, 1 Binney, Penn., 592.

G Also referred to in argument:

- Dale v. Hall* (1750), 1 Wils. 281; 95 E.R. 619; 8 Digest (Repl.) 18, 96.
Pickering v. Barkley (1648), Sty. 132; 82 E.R. 587; 41 Digest 415, 2590.
Rohl v. Parr (1796), 1 Esp. 445, N.P.; 29 Digest (Repl.) 285, 2157.
Hunter v. Potts (1815), 4 Camp. 203, N.P.; 29 Digest (Repl.) 235, 1766.

I *Hazard's Administrator v. New England Marine Insurance Co.*, 8 Peters, U.S. 557.

The Schooner Reeside, 2 Sumner, U.S. 567.

Kay v. Wheeler (1867), L.R. 2 C.P. 302; 36 L.J.C.P. 180; 16 L.T. 66; 15 W.R. 495; 2 Mar.L.C. 466, Ex. Ch.; 41 Digest 415, 2587.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260; 31 W.R. 445; 5 Asp. M.L.C. 65, C.A.; 41 Digest 422, 2648.

- Garston Sailing Ship Co., Ltd. v. Hickie, Borman & Co.* (1886), 18 Q.B.D. 17; 56 L.J.Q.B. 38; 55 L.T. 879; 35 W.R. 33; 3 T.L.R. 23; 6 Asp. M.L.C. 71, C.A.; 41 Digest 651, 4833. **A**
- Dixon v. Sadler* (1839), 5 M. & W. 405; 9 L.J.Ex. 48; 151 E.R. 172; affirmed sub nom. *Sadler v. Dixon* (1841), 8 M. & W. 895; 11 L.J.Ex. 435, Ex. Ch.; 29 Digest (Repl.) 221, 1638.
- Busk v. Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73; 106 E.R. 294; 29 Digest (Repl.) 239, 1797. **B**
- Laurie v. Douglas* (1846), 15 M. & W. 746; 4 L.T. 588; 41 Digest 421, 2642.
- Grill v. General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; 35 L.J.C.P. 321; 14 L.T. 711; 14 W.R. 893; affirmed (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar. L.C. 77, Ex. Ch.; 41 Digest 422, 2647. **C**
- Davidson v. Barnard* (1868), L.R. 4 C.P. 117; 38 L.J.C.P. 73; 19 L.T. 782; 17 W.R. 121; 3 Mar. L.C. 207; 29 Digest (Repl.) 224, 1663.
- Merchants Trading Co. v. Universal Marine Co.* (1870), cited in L.R. 9 Q.B. at p. 596; 2 Asp. M.L.C. 431, n., C.A.; 29 Digest (Repl.) 228, 1699.
- Dudgeon v. Pembroke* (1874), L.R. 9 Q.B. 581; 43 L.J.Q.B. 220; 31 L.T. 31; 22 W.R. 914; 2 Asp. M.L.C. 323; affirmed (1877), 2 App. Cas. 284; 46 L.J.Q.B. 409; 36 L.T. 382; 25 W.R. 499; 3 Asp. M.L.C. 393, H.L.; 29 Digest (Repl.) 233, 1742. **D**
- Magnus v. Buttemer* (1852), 11 C.B. 876; 21 L.J.C.P. 119; 18 L.T.O.S. 276; 16 Jur. 480; 138 E.R. 720; 29 Digest (Repl.) 232, 1739.
- The Chasca* (1875), L.R. 4 A. & E. 446; 44 L.J.Adm. 17; 32 L.T. 838; 2 Asp. M.L.C. 600; 41 Digest 417, 2603. **E**
- Taylor v. Curtis* (1816), 6 Taunt. 608; 2 Marsh. 309; 128 E.R. 1172; 41 Digest 596, 4206.
- Fletcher v. Inglis* (1819), 2 B. & Ald. 315; 106 E.R. 382; 29 Digest (Repl.) 232, 1738.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., BOWEN and FRY, L.JJ.), reported 17 Q.B.D. 670, reversing a decision of LOPES, L.J., upon further consideration of an action tried before him at the Liverpool Summer Assizes, 1885. **F**

The appellants were the owners of the steamship *Inchrhona*, and the respondents were merchants in London and the rice ports. In the action the respondents sought to recover from the appellants the sum of £1000 by way of damages for breach of contract contained in bills of lading dated Mar. 26, 1884, relating to a cargo of rice shipped by the respondents at Akyab, on board the *Inchrhona*, and delivered in a damaged condition, the damage having been occasioned by sea-water which had got into the hold through a hole made by rats in a leaden discharge pipe connected with a bathroom in the ship. No negligence on the part of the shipowners was proved. The appellants relied on the exceptions in the bills of lading as freeing them from liability for the damage so occasioned. The perils excepted in the bills of lading were **G**

"the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever." **H**

LOPES, L.J., gave judgment for the shipowners, but his decision was reversed by the Court of Appeal and the shipowners appealed to the House of Lords. **I**

Bigham, Q.C., and *Gorell Barnes* for the appellants.

Sir Charles Russell, Q.C., and *Walton* for the respondents.

Their Lordships took time for consideration.

July 14, 1887. The following opinions were read.

A LORD HALSBURY, L.C.—In this case the admissions made at the trial reduce the question to this—whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea-water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts, as I have stated them, constituted a danger or accident of the seas. With all respect to **BOWEN** and **Fry, L.J.**, they have not accepted the hypothesis of fact which the admissions at the trial render essential. It is admitted that the ship was seaworthy, and that there was no negligence, and these admissions are absolutely inconsistent with the reasoning of the lords justices, which suggests important difficulties in deciding those questions of fact to which I have referred, but seems beside the question if these facts are proved or admitted, as I think it is clear they were. The other question with which **LORD ESHER, M.R.**, dealt is one which must be determined upon the ordinary rules of construction, whatever is the document the meaning of which is under debate; and it must be admitted that words may receive a limited meaning by reason of the other words with which they are associated, or by reason of the subject-matter with which they deal, or by reason of the mode in which they are commonly used.

It is clear that the parties do not mean by such an instrument as we are construing to except all accidents of any kind or description whatsoever which may happen during the voyage to which both parties are looking forward. Some effect must be given to the words “perils of the sea.” A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni v. Drury* (1). In the report of that case in 22 L.J. Ex. 2, **POLLOCK, C.B.**, and **ALDERSON, B.**, distinctly point out, after the judgment of the court had been given, that the decision at which the court had arrived did not touch the question whether the sea being let in by a hole made by a rat was an accident or danger of the sea.

One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water getting into the vessel from the sea upon which the vessel was to sail in accomplishing her voyage—it would not necessarily be by a storm; the parties have not so limited the language of their conduct—it might be by striking on a rock, or by excessive heat, so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in; but what the parties, I think, contemplated was that if any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that should be one of the things contemplated by the contract. A subtle analysis of all the events which lead up to and in that sense cause a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal right of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed—each of these may be represented as the cause of the water entering; but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises. In the class of contract where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract, which makes the negligence of the shipowner, or of those for whom he is responsible, a material element.

It is necessary to give effect to the words “dangers and accidents of the seas.”

Cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question whether it was a sea peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, "peril" or "accident"; you could not speak of the danger of a ship's decay; you would know that it must decay; and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas. One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without—the sea-water did get in. I am, therefore, of opinion that the decision of the Court of Appeal should be reversed, and I move your Lordships accordingly.

LORD WATSON.—The respondents sue for damages in respect of damage sustained, during transit, by a cargo of rice, which was carried in the appellants' steamship *Inchrhona* from Akyab to Bremen. The appellants plead, in defence, that the injury was occasioned by a danger or accident of the sea, within the meaning of the exception in the charterparty and bills of lading, which are in the usual terms. In point of fact, the rice was damaged by sea-water, which found its way into the hold of the *Inchrhona* through a hole gnawed by a rat in a leaden pipe connected with the bathroom of the vessel.

If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted, and there would have been no consequent damage. Your Lordships have disapproved [*in Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (2)] of the novel doctrine that in a contract of sea carriage a meaning must be attached to the expression "dangers and accidents of the seas," different from that which it bears in a contract insuring cargo against sea risks, and that, in the case of a charterparty or bill of lading, the court ought to look to what has been termed the remote, as distinguished from the proximate, cause of damage, whereas, in the case of a policy, the proximate cause can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them: when a shipowner, who is bound, by the implied terms of his contract to carry with ordinary care, claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible. As LORD BLACKBURN said in *Steel v. State Line Steamship Co.* (3) (3 App. Cas. at p. 88):

"Although the things perished by a peril of the sea, still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception."

A I am of opinion that in the present case the appellants must prevail, because it has not been shown that the peril which was the immediate and efficient cause of damage owed its existence to their negligence. In the course of the trial before LOPES, L.J., it does appear to have been, at one time, suggested that the appellants' servants failed to exercise due diligence in extirpating the rats, and also that the bathroom pipe ought not to have been of lead, but of
B some other material which a rat could not or would not gnaw. Neither of these points was submitted to the jury, who negatived the only charge of negligence which was ultimately insisted on by the respondents. I, accordingly, concur in the judgment which has been moved.

LORD BRAMWELL.—I am of opinion that this decision must be reversed.
C This is another case in which this House has had to consider whether a peril of the sea or other peril within the general words was shown. I think the definition given by LOPES, L.J., very good: "It is a sea damage occurring at sea, and nobody's fault." What is the "peril?" It is that the ship or goods will be lost or damaged; but it must be "of the sea." "Fire" would not be a peril of the sea; so loss or damage from it would not be insured against by the general
D words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that the rats made the hole through which the water got in; and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the under-
E writer for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case.

Then I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading and charterparties as in policies of insurance. I repeat my illustration; if underwriters paid this loss as through a peril of the sea, how
F would they, in the name of the assured, claim from the shipowner, because it was not a peril of the sea. I do not go through the cases; I say there is none opposed to this opinion. The doubt or hesitation expressed in *Cullen v. Butler* (4) where the ship was sunk by being fired into is certainly a doubt the other way, but only a doubt. An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-
G condition. But that is met by the argument that, if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence. No question of negligence exists in this case. The damage was caused by the sea in the course of navigation with no default in anyone. I am, therefore, of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading, that LOPES, L.J.,
H was right, and that the judgment must be reversed.

LORD FITZGERALD. The damage to a portion of the cargo of rice carried by the defendants' ship was not occasioned either remotely or immediately by any negligence of the defendants, as alleged in the statement of claim, but they may nevertheless be liable, and the real question is whether the
I defendants have established that it arose from a peril of the sea coming within the exception contained in the charterparty and in the bill of lading. I agree with LORD WATSON that the exception, "peril of the sea," has the same meaning whether it occurs in a marine policy or in a charterparty, or bill of lading, and is to be so interpreted, but that when the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of ascertaining whether the remote cause may not have been the negligence of the carrier, and indeed the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity. Thus, for instance, if a ship

is cast on the rocks by force of the winds or sea, that is a loss by a peril of the sea within the exception; but in an action against the carrier it would be open to consider whether the ship, being placed in that position, did not originate in negligent navigation. A

At the close of the argument I was slightly inclined to the opinion that the loss in question might be more accurately described as arising from a peril of the ship than caused by a peril of the sea; but on consideration of the very careful and elaborate judgments in the Court of Appeal, and the authorities referred to, and looking at the reason of the thing, I have come to a conclusion in accord with that announced by my noble and learned friends, adopting the reasons and the decision of LOPES, L.J. The accident was fortuitous, unforeseen, and actually unknown until the ship had reached her destination and commenced unloading. I do not, however, mean to suggest that to constitute a peril of the sea the accident or calamity should have been of an unforeseen character. The remote cause was in a certain sense the action of the rats on the lead pipe, but the immediate cause of the damage was the irruption of sea-water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage. There having been no negligence on the part of the appellants, I am of opinion that they have brought the case within the exception, and are protected. B C D

LORD HERSCHELL.—I have so recently expressed, in *Wilson, Sons & Co. v. Xantho* (Cargo Owners), *The Xantho* (2), my views upon the interpretation to be put upon the words “dangers and accidents of the seas” occurring in a bill of lading, that I need trouble your Lordships with but few observations in this case. I take the facts to be that the damage occurred by the sea entering through a leak caused by rats, without any neglect or default on the part of the shipowner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. In saying so, I am differing from the ground upon which two of the learned judges in the Court of Appeal (BOWEN and FRY, L.JJ.) based their judgment. But when those learned judges say that E F

“it was consistent with the findings that the mischief done to the pipe and the incursion of sea-water which followed would never have happened but for either a defect in the condition of the ship or some want of prudence in the shipowner,” G

I think they overlook the course which the case took at the trial. It was suggested during the trial, by the learned counsel for the plaintiffs, that due care had not been taken to exclude or exterminate the rats, and that, if the pipe had been made of some other material, the accident would not have happened. But I think these points were distinctly and unequivocally abandoned by him. H If intended to be insisted upon, they raised questions upon which the opinion of the jury ought to have been taken, and, with the assent of the plaintiffs’ counsel, the only questions put were upon a totally different point.

The Master of the Rolls rested his judgment altogether upon another ground. He considered that the rats were the real cause of the damage, and that it was, therefore, not due to a danger or accident of the seas. I quite concur I with the view expressed in *Laveroni v. Drury* (1), that injury done to a vessel or its cargo by rats, is not damage by perils of the sea. But in that very case POLLOCK, C.B., said (22 L.J. Ex. at p. 4):

“If indeed the rats had made a hole in the ship through which water came and damaged the cargo, that might very likely be a case of sea damage.”

The Master of the Rolls says that the distinction is a very fine one between damage done by rats, which, it may be, so eat into the timbers of the ship

A as to render it unfit to proceed to sea, and the loss of the vessel owing to the incursion of water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that POLLOCK, C.B., shared this view. It has been held in the United States in *Garrigues v. Coxe* (5) that a leak occasioned by the eating of rats, without negligence on the part of the shipowner, was a risk covered in a marine policy by the words "perils of the seas."

B Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and, therefore, to be anticipated. And, inas-

C much as it was not the result of any act or default on the part of the shipowner or his crew, I think, for the reasons I have given in my opinion in *The Xantho* (2), that it is within the exception in the bill of lading. I, accordingly, concur in the motion which has been made.

LORD MACNAGHTEN.—The goods which were carried under the bill of

D lading were damaged during the voyage by the incursion of sea-water. The water came in through a hole gnawed by rats in a pipe connecting the bathroom with the sea. At the trial various charges and suggestions were made of negligence on the part of the shipowner; but they were all either withdrawn or negatived by the jury. Under these circumstances it seems to me, that the accident which caused the damage was one of the excepted perils or accidents,

E and there was no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care. I agree, therefore, with the judgment of LOPES, L.J. I do not think the case could be summed-up better than it was by him in the words which have already been

F quoted: "Sea damage occurring at sea and nobody's fault." I concur in the motion which has been made.

Appeal allowed.

Solicitors: *W. A. Crump & Son; Hollams, Son & Coward.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

Re DOUGLAS, OBERT AND OTHERS v. BARROW

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), May 2, 3, 1887]

[Reported 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786;
35 W.R. 740; 3 T.L.R. 589]

Charity—Benefit to community—Protection and benefit of animals—Home for lost dogs—Uncertainty—Gift of ultimate residue as appointed by named person—Previous specific gifts to charities—Inclusion in specific gifts of objects not legally charitable.

By her will, made in 1882, the testatrix bequeathed to trustees the residue of her personal estate upon trust out of such part of her personal estate as the law permitted to be appropriated by will to charitable purposes to pay pecuniary legacies to the treasurers "of the respective charities, institutions, or societies hereinafter mentioned," to be applicable for the general purposes of "such respective charities, institutions, and societies." There followed a list of societies and institutions including "the Society for the Protection of Animals Liable to Vivisection," and "the Home for Lost Dogs." The will continued, "and upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those hereinbefore mentioned), and in such shares and proportions as S. shall by writing nominate." After the death of the testatrix, S. in writing nominated 153 charities, societies, and institutions (not including the Society for the Protection of Animals Liable to Vivisection, or the Home for Lost Dogs) to receive the residue in unequal shares.

Held: on construction of the will the words "charities, institutions and societies" meant "charities, charitable institutions, and charitable societies," and the mere inclusion in the bodies specified of one or two institutions which might not be charitable did not introduce such an element of uncertainty as to make the latter part of the will void.

Morice v. Bishop of Durham (1) (1805), 10 Ves. 522, distinguished.

Per LINDLEY, L.J.: The Home for Lost Dogs is a charitable institution.

Notes. Distinguished: *Hunter v. A.-G.*, [1895-9] All E.R. Rep. 558. Considered: *Re Freeman, Shilton v. Freeman* (1908), 98 L.T. 429; *Adamson v. Melbourne and Metropolitan Board of Works*, [1929] A.C. 142; *Re Grove-Grady, Plowden v. Lawrence*, [1929] All E.R. Rep. 158; *National Anti-Vivisection Society v. I.R.Comrs.*, [1947] 2 All E.R. 217. Referred to: *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; *Re Piercy, Whitwham v. Piercy* (1898), 67 L.J.Ch. 297; *Re Willis, Shaw v. Willis*, [1921] 1 Ch. 44; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; *Re Moss, Hobrough v. Harvey*, [1949] 1 All E.R. 495; *Baddeley v. I.R.Comrs.*, [1953] 2 All E.R. 233.

As to what are charitable purposes and the requisites of a valid charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq., 267 et seq. For cases see 8 DIGEST (Repl.) 312 et seq., 387 et seq.

Cases referred to:

- (1) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 336.
- (2) *London University v. Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.JJ.; 8 Digest (Repl.) 348, 285.
- (3) *Doyley v. Doyley, A.-G. v. Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194: 32 E.R. 35; 8 Digest (Repl.) 404, 952.

A Also referred to in argument :

Kendall v. Granger (1842), 5 Beav. 300; 11 L.J.Ch. 405; 6 Jur. 919; 49 E.R. 593; 8 Digest (Repl.) 394, 867.

Re Jarman's Estate, Leavers v. Clayton (1878), 8 Ch.D. 584; 47 L.J.Ch. 675; 39 L.T. 89; 42 J.P. 662; 26 W.R. 907; 8 Digest (Repl.) 395, 872.

B *Re Sutton, Stone v. A.-G.* (1885), 28 Ch.D. 464; 54 L.J.Ch. 613; 33 W.R. 519; 8 Digest (Repl.) 399, 905.

Wilkinson v. Lindgren (1870), 5 Ch. App. 570; 39 L.J.Ch. 722; 23 L.T. 375; 18 W.R. 961, L.C.; 8 Digest (Repl.) 395, 880.

Lewis v. Fermor (1887), 18 Q.B.D. 532; 56 L.J.M.C. 45; 56 L.T. 236; 51 J.P. 371; 35 W.R. 378; 3 T.L.R. 449; 16 Cox, C.C. 176; 2 Digest (Repl.) 401, 701.

C *Thornton v. Howe* (1862), 31 Beav. 14; 31 L.J.Ch. 767; 6 L.T. 525; 26 J.P. 774; 8 Jur.N.S. 663; 10 W.R. 642; 54 E.R. 1042; 8 Digest (Repl.) 335, 161.

Carne v. Long (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, 1278.

Re Dutton, Ex parte Peake (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, 1281.

D *A.-G. v. Haberdashers' Co.* (1834), 1 My. & K. 420; 39 E.R. 741, L.C.; 8 Digest (Repl.) 357, 357.

Marsh v. Means (1857), 30 L.T.O.S. 89; 21 J.P. 725; 3 Jur.N.S. 790; 5 W.R. 815; 8 Digest (Repl.) 421, 1117.

E *Cocks v. Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 338, 198.

Thrupp v. Collett (1858), 26 Beav. 125; 32 L.T.O.S. 365; 5 Jur.N.S. 111; 53 E.R. 844; 8 Digest (Repl.) 360, 380.

Habershon v. Vardon (1851), 4 De G. & Sm. 467; 20 L.J.Ch. 549; 17 L.T.O.S. 196; 15 Jur. 961; 64 E.R. 916; 8 Digest (Repl.) 360, 379.

F *Browne v. Yeall* (1791), cited in 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, 821.

A.-G. v. Stepney (1804), 10 Ves. 22; 32 E.R. 751, L.C.; 8 Digest (Repl.) 422, 1127.

Appeal by the defendant from a decision of Kay, J., in an action for the determination of questions arising on the construction of a will.

G By her will, dated Nov. 22, 1882, the testatrix appointed the plaintiffs executors and trustees. She devised her real estate to the defendant Francis Barrow, made specific and pecuniary bequests, and bequeathed the residue of her personal estate, including leasehold property, to the plaintiffs, upon trust to convert the same and out of the proceeds to pay her debts, the funeral and testamentary expenses, and the pecuniary legacies, duty, and other payments thereinbefore mentioned, certain other legacies, and an annuity. The will provided :

H "And upon further trust, out of such part of my said personal estate as the law permits to be appropriated by will to charitable purposes, to pay the following legacies to the treasurers or other proper officers respectively of the respective charities, institutions, or societies hereinafter mentioned (whose respective receipts shall be effectual discharges for the same), and to be applicable for the general purposes of such respective charities, institutions, and societies, viz.: To the Royal Society for the Prevention of Cruelty to Animals, the sum of £200; to the Society for the Protection of Animals liable to Vivisection, £100; to the Metropolitan and City Police Orphanage, Twickenham, £100; to the Police Fund for Officers of Police who have lost their health, and have been obliged to retire from the service, and known as the Metropolitan Police Superannuation Fund, £200; to the Royal Orthopædic Hospital, Oxford Street, Middlesex, £100; to the Central London

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Ophthalmic Hospital, Gray's Inn Road, £200; to the London Orphan Asylum, Watford, formerly at Clapton, £100; to the Protestant Blind Pension Society of Southwark Bridge Road, £200; to the School for the Indigent Blind, situate in St. George's Fields, Southwark, £100; to the Ragged School Union, Exeter Hall, London, £100; to the Refuge for Homeless Boys, Great Queen Street, London, £300, to be applied as to £100 part thereof to the purposes of the *Arethusa* Training Ship, and as to £100 other part thereof to the purposes of the *Chichester* Training Ship in connection with the said Refuge, or to or for the purposes of such other training ship or ships, if any, as may at the time of the payment of the said legacy have taken the place of the said ships *Arethusa* and *Chichester* respectively; to the Royal Sea Bathing Infirmary at Margate, Kent, £200; to the West London Hospital, Hammer-smith Road, £200; to the Hospital for Consumption at Brompton, £200; to the Home for Lost Dogs, £100. And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those hereinbefore mentioned as may be preferred), and in such shares and proportions as the said Earl of Shaftesbury shall by writing nominate. . . ."

It appeared that a society was formed in 1875, under the title of "The Society for Protection of Animals liable to Vivisection," but that in August, 1878, the society changed its name to "The Victoria Street Society for Protection of Animals from Vivisection," and an affidavit stated that since the last-named date the object of the society had been the total abolition of the practice of vivisection.

The testatrix died on April 28, 1885, and her will was proved on June 16, 1885. She had considerable personal estate consisting of both pure and impure personalty. On July 23, 1885, Anthony, Earl of Shaftesbury, the person designated by the will, made his nomination in writing. He named 153 charities, societies, and institutions, to receive the residue of the testatrix's pure personalty, and divided such residue into 50,000 shares, and set opposite the name of each of the charities, societies, and institutions nominated the number of shares which in his opinion it ought to receive, giving some more than others. The trustees and executors brought this action against the defendant, the testatrix's sole next of kin, for the purpose of having the question determined whether the gift in favour of such charities, societies, and institutions as Lord Shaftesbury should nominate was valid, or void for uncertainty. On Aug. 4, 1886, on the further consideration of the action, Kay, J., decided that the words "charities, societies, and institutions," whatever they might mean if they stood alone, must, in the context of the will, mean charities, charitable societies, and charitable institutions. He made a declaration accordingly, and directed the pure personalty to be distributed on the footing of Lord Shaftesbury's appointment. His Lordship also held that the Home for Lost Dogs was a charity, inasmuch as it was an institution for the benefit of animals useful to man. The defendant appealed.

Sir Henry James, Q.C., Graham Hastings, Q.C., and Maidlow for the defendant.

The Attorney-General (Sir Richard Webster, Q.C.), Sir Horace Davey, Q.C., and Ingle Joyce, in support of the decision appealed from.

E. Ford and Chubb for other parties.

COTTON, L.J.—This appeal raises the question whether the residue of that portion of the testatrix's estate which may be properly applied for charitable purposes goes to the defendant as the next of kin of the testatrix, or is to be applied according to the discretion given by the testatrix to Lord Shaftesbury, who survived her and exercised that discretion. It is contended on behalf of the defendant that, in accordance with a well-established doctrine, there is no trust relating to this residue which can be executed by the court. As I understand,

A it is contended that, as Lord Shaftesbury is not restricted to the application of this money to charitable purposes—that is to say, what this court considers charity—and as the purposes are so indefinite, the whole thing fails.

B The defendant relies on the principle laid down in *Morice v. Bishop of Durham* (1), that where a gift is made without any definite object being pointed out, and there is merely a description of the character of the object to which the gift is to be applied, if that character is not charitable, then the court will not effectuate the gift in favour of the indefinite purposes pointed out, but will consider that the legatee, who clearly does not take for his own benefit, but as trustee, stands in the same position as if the gift had been made to him as a trustee and no trust had been declared—that is to say, as if he held it as a trustee for the next of kin. That is what is laid down in *Morice v. Bishop of Durham* (1), in C which case purposes not charitable were included among the objects in favour of which the legatee was to apply the legacies in question.

D Looking at the will in the present case I am of opinion that KAY, J., was right in holding that the indefinite objects pointed out by the testatrix as those to which the fund was to be applied at the discretion of Lord Shaftesbury, were charitable. The words used, which occur in the introduction of the gift on which Lord Shaftesbury was to exercise his discretion, are :

“for such purpose among such charities, societies, and institutions (including or excluding those hereinbefore mentioned as may be preferred) and in such shares and proportions as the said Earl of Shaftesbury shall by writing nominate.”

E This follows a gift to a number of definite objects—“definite” in the sense that the particular institutions are pointed out which are to be the objects of the testatrix’s bounty as respects the particular legacies which she has given.

F Was KAY, J., right in holding that the power to apply to the “charities, societies, and institutions,” taking those words alone, was an appropriation to charity? I think he was. One must look closely at the will throughout in order to determine what the words I have referred to mean. The testatrix divided her personal estate into two portions, and directed that that portion which by law could not be applied to charitable bequests should be applied in payment of certain legacies as in the will mentioned. She goes on :

G “And upon further trust, out of such part of my said personal estate as the law permits to be appropriated by will to charitable purposes, to pay the following legacies to the treasurers or other proper officers respectively of the respective charities, institutions, or societies hereinafter mentioned.”

H She then enumerates a number of societies and institutions. There is a question whether one, at least, of those societies or institutions [the Society for the Protection of Animals liable to Vivisection] is a charitable society, and for the purpose of determining this case, I assume that it was not a charitable society or institution at the time of the testatrix’s death. But, in my opinion, having regard to the institutions which the testatrix points out, and the objects indicated by their titles, and the object of this particular one at the time when it properly I held the title in question (“the Society for the Protection of Animals liable to Vivisection”), the testatrix referred to these societies as being in her mind charitable societies and as in her mind performing those duties and functions which would be considered as charitable by the Chancery Division.

When we come to the end of those particular gifts we find the words :

“And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purpose among such charities, societies, and institutions and in

such shares and proportions as the said Earl of Shaftesbury shall by writing nominate."

The purpose mentioned must mean the charitable purposes which she had indicated. In my opinion, if one deals with the matter in that way, leaving out the words "including or excluding those [institutions &c.] hereinbefore mentioned as may be preferred," it is clear that, although the testatrix used those three words, "charities, societies, and institutions," she had in her mind that which is expressed, and probably would be sufficiently expressed, by the first word used, "charities." Having contemplated the gifts to the particular institutions which she named, all of which, to my mind, she considered—and as regards the objects indicated by that description properly considered—as charities, what she means is not to allow Lord Shaftesbury to give to charities or, as an alternative, to a society or institution not charitable, but to point out new charities of such a nature as are administered or dealt with by societies or institutions, that is, something that is not a mere transitory charity, but has the nature of permanence in it—in other words, something in the nature of those objects which she has already pointed out. To my mind, those supporting *KAY, J.*'s decision have succeeded on the first point, which was a necessary point to be established by them on this will, having regard, not only to the particular words used in this portion of the will, but to the context, and general purport and object as indicated by the other portions of the will. There are, it is true, the words, "including or excluding those hereinbefore mentioned as may be preferred." The will gives to Lord Shaftesbury the duty and power of distributing the remainder of what I call, to use a common phrase, "pure personalty," among charities, including or excluding those before mentioned as may be preferred. I have assumed that the institution which has been so much discussed [the Vivisection Society] is not one which this court would support as a charity, but, in my opinion, that will not make this gift bad. It is said that Lord Shaftesbury is enabled to include in the division of the estate purposes not charitable. I am of opinion that he is not authorised so to do by the words "charities, societies, and institutions." That means charity administered by a society or institution, or administered by a body which could not strictly be called a society or institution. Then here are certain specified things which he may include in the distribution if he thinks fit.

Does that bring this case within the principle of *Morice v. Bishop of Durham* (1)? In my opinion, it does not. All that that case decided was that where no definite object is pointed out as the object of the trust, the court says that that trust cannot be executed unless the court can itself determine how the money is to be applied, and that the court can only so determine where charity is the object. But if definite objects are pointed out, and a discretion is given to trustees to distribute property among those definite objects, then, in my opinion, *Morice v. Bishop of Durham* (1) in no way decides that such a gift fails. Take a gift to A., B., and C., or any number of individuals, or institutions, in such proportions as a trustee or some other person shall name and appoint. If the person so designated does not exercise the discretion and power given, then the court will define the trust. It will do so, where the objects are definite, by deciding, unless there is something to show that the contrary was the intention, that the fund to be administered, the subject of the trust, shall be divided equally among all the objects of the testatrix's bounty. The trustee, to whom a discretion is given, might have given it unequally—he might have excluded some if he had thought fit; but where the court, not having the discretion which is given to the trustee, has to administer the trust, in the absence of anything special in the instrument, it administers the trust by dividing the fund equally among the named and definite objects. In my opinion, the mere fact that there is, in addition to those named and definite objects,

A a general indefinite object which is charitable, will not make the gift bad. It would be good if it was limited to a charitable gift, although for purposes utterly indefinite, and the addition to that of definite purposes, though they are not all charities, will not, in my opinion, make the ultimate gift bad.

B I do not think it necessary to decide, and it is better not to decide, whether, if this institution [the Vivisection Society], which I assume not to be a charity, had come to ask for a division or a share of the fund, and none had been given to it, it could have been said that that was right, or whether it could be said it was wrong to give a share to it because it was not a charity. It may be that the meaning of the will is to give the money to be applied for charitable purposes, including such of the before-mentioned specified objects as are charities, and that any which was not a charity would not be properly treated by Lord Shaftesbury as coming within those objects. But it is not necessary to decide that point. All I decide is that the mere addition to the general charitable purposes of certain definite objects does not make the gift bad because one of those objects is itself not a charity. In my opinion, the decision was right, and the appeal fails.

D LINDLEY, L.J.—I am of the same opinion. KAY, J., has declared that having regard to the context of the will, the words "charities, societies, and institutions" mean charities and charitable societies and charitable institutions. The defendant, who is the sole next of kin of the testatrix, asks the court to reverse that decision and to declare that, according to the true construction of the will of the testatrix, the words "charities, societies, and institutions," in the power given to the Earl of Shaftesbury, are not restricted to charities, charitable societies, and charitable institutions, and that consequently the disposition of the pure personal estate is void.

E The questions which arise have been stated by COTTON, L.J., and when we come to look at the frame of the will, and to observe the care taken by this testatrix to divide the personal estate into that which can be given to charitable purposes and that which cannot, and when we look to the expression "charitable legacies" and "charitable purposes," and to the marshalling clause, it appears to me that the court is almost forced to the conclusion that what she means by "charities, societies, and institutions" is charitable societies and charitable institutions as well as what she calls charities. I do not see how there can be any real doubt about that. Then she has specified a great number of institutions, and among them she has specified or referred to "the Society for the Protection of Animals liable to Vivisection" and "the Home for Lost Dogs." We have had some discussion whether these can be regarded as charitable institutions. As described by her, I take it that there is no reasonable doubt that the bequest to the society which she mentions by the name "Society for the Protection of Animals liable to Vivisection" was a good charitable legacy. Whether there is now any such society, or whether the society with altered objects can be regarded as an object of a charitable bequest, is another matter altogether; but that she described this society, left her money to it, and contemplated it as a charitable society is, I think, manifest from the language which she has used. As regards "the Home for Lost Dogs," on the authority of *University of London v. Yarrow* (2), I think it cannot be contended that that is not a charitable legacy or that in its nature the institution is not what is called a charitable institution.

I Assuming that one or more of the institutions named are not charities, we have to consider what the effect of that is upon the gift of the ultimate residue. It has been contended, on the one side, that there is such uncertainty in that as to bring the case within *Morice v. Bishop of Durham* (1), and, on the other hand, it has been contended that if the testatrix in the earlier part of the will meant charitable societies and institutions, the mere addition of one or two institutions which are named but may not be charitable, does not introduce such

an element of uncertainty as to make the latter part of her will void. It appears to me that that contention is right, and that the passage to which we were referred in JARMAN ON WILLS (4th Edn.), vol. 1, p. 217 and *A.-G. v. Doyley* (3), which is there referred to, enable those supporting KAY, J.'s, decision to succeed. When one looks at it closely, one sees that there is no such uncertainty in this case, construed as we construe it, as there was in *Morice v. Bishop of Durham* (1); nor do I think that any of the other objections which have been urged prove fatal to the title of these societies. I do not say—it is unnecessary to say—whether the Anti-Vivisection Society in its present shape is as good an object for a charitable bequest as it was. I say nothing at all about it one way or the other, but, assuming it was not, that will not vitiate this bequest. It appears to me, therefore, that the appeal ought to be dismissed.

BOWEN, L.J.—I entirely agree, resting my judgment on the grounds which have been mentioned, and reserving, if necessary, for further consideration in a future case, the question whether the Society for the Protection of Animals liable to Vivisection in its present form is a charitable society within the meaning which this court puts on the term. I express no opinion one way or the other. I think we are right in not deciding that point finally, because the materials put before us as to the purposes of that society and its history are in a scattered and imperfect form.

Appeal dismissed.

Solicitors: *Sismey & Sismey*, for *Essell, Knight & Arnold*, Rochester; *Hare & Co.*; *Foster & Spicer*; *J. B. Churchill*.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

WOODWARD AND OTHERS v. GOULSTONE AND OTHERS

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Blackburn and Lord FitzGerald), June 24, 25, 29, July 16, 1886]

[Reported 11 App. Cas. 469; 56 L.J.P. 1; 55 L.T. 790; 51 J.P. 307; 35 W.R. 337]

Will—Evidence—Lost will—Proof of contents by parol evidence—Need for evidence to be of extreme cogency—Court to be satisfied beyond all reasonable doubt—Post-testamentary declarations by testator—Proof of fact of legacies—Proof of disposition of residue—Jurisdiction to grant probate of residue.

The establishing of the contents of a lost will merely by parol evidence of the contents is extremely dangerous, and, therefore, to support a will which has been propounded, when its contents is sought to be proved by parol evidence only, that evidence ought to be of extreme cogency and such as to satisfy the court beyond all reasonable doubt that there really is before the court substantially the testamentary intention of the testator.

Semble: When it is sought to establish by parol evidence the contents of a lost will and there is proved the bare fact that the will contained legacies, but there is no evidence with regard to their amount, and there is, however, some evidence as to the disposition of the residue, the court will hesitate to grant probate of the residue and give the whole to the residuary legatee.

Quære whether post-testamentary declarations of the testator are admissible to prove the contents of a lost will.

A Notes. Considered: *Atkinson v. Morris*, [1897] P. 40; *In the Estate of Macgillivray*, [1946] 2 All E.R. 301. Explained: *In the Estate of Wippermann*, *Wissler v. Wippermann*, [1953] 1 All E.R. 764. Referred to: *Young v. Holloway*, [1895] P. 87; *Barkwell v. Barkwell*, [1927] All E.R. Rep. 138.

As to probate of contents of lost will, see 16 HALSBURY'S LAWS (3rd Edn.) 175, 176; and for cases see 23 DIGEST (Repl.) 104-109.

B Cases referred to:

(1) *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 369, 372; 24 W.R. 479, 860, C.A.; 23 Digest (Repl.) 105, 1061.

(2) *Quick v. Quick and Quick* (1864), 3 Sw. & Tr. 442; 4 New Rep. 347; 33 L.J.P.M. & A. 146; 10 L.T. 619; 28 J.P. 455; 10 Jur.N.S. 682; 12 W.R. 1119; 164 E.R. 1347; 23 Digest (Repl.) 106, 1067.

C (3) *Doe d. Shallcross v. Palmer* (1851), 16 Q.B. 747; 20 L.J.Q.B. 367; 17 L.T.O.S. 252; 15 J.P. 689; 15 Jur. 836; 117 E.R. 1067; 44 Digest 313, 1462.

Appeal by the defendants in the action from a decision of the Court of Appeal (COTTON, LINDLEY, and FRY, L.JJ.), reported 1 T.L.R. 590, reversing an order of BUTT, J.

D The action was brought by the respondents in the Probate Division as next of kin of one John Hill Morgan, deceased, claiming administration of his estate, with a will, dated in 1868, annexed. The appellants set up a lost will, said to be dated in 1877 or 1878, under which they alleged that they were interested as legatees. It appeared that the testator was possessed of both real and personal property of considerable value, and the evidence adduced by the appellants was

E that, in the year 1877, he went to a Mr. Peters, a solicitor in Bristol, with whom he was on terms of intimate friendship, and asked him to make his will. He produced a list of names of persons to whom he wished to leave money, with various sums set against some of the names, and then said that he intended to make Peters his executor and residuary legatee, upon which Peters declined to draw his will for him. Afterwards he was said to have gone to a Mr. Perrin,

F also at that time a solicitor in Bristol, and to have instructed him to prepare a will, which he afterwards executed. He afterwards told Peters that he had made his will as he had intended, and mentioned in conversation with other persons that he had left them money by his will. He was also said to have had a conversation with Peters shortly before his death, in which he referred to the fact that Peters was his residuary legatee. The testator died suddenly, in

G consequence of an accident, in June, 1883. Some time before his death, namely, in November, 1881, Perrin, the solicitor who was said to have made his will, absconded from Bristol under discreditable circumstances, and was made bankrupt. The trustee under the bankruptcy took possession of his papers, but no will of the testator was found among them. The only will found among the testator's

H papers was the will of 1868. In answer to advertisements put forward by Peters, three persons who had formerly been clerks in the employment of Perrin came forward and stated that a will had been made for the testator by Perrin, and had been duly executed by the testator, and had remained in Perrin's possession, but neither of them professed to have any remembrance of the contents of the will. BUTT, J., pronounced in favour of the lost will, but his decision was

I reversed in the Court of Appeal, and the defendants appealed to the House of Lords.

Inderwick, Q.C., Bowen Rowlands, Q.C., and Pritchard for the appellants.

Fischer, Q.C. (Searle with him) and Sir J. Deane, Q.C. (Barnard with him), for the next of kin.

Yate Lee and Foulkes for the heirs-at-law.

Their Lordships took time for consideration.

July 16, 1886. **LORD HERSCHELL, L.C.**, read the following opinion:—The plaintiffs in this action claim letters of administration as the next of kin of

John Hill Morgan. In answer to this claim the defendants, who are the appellants before your Lordships' House, propounded an alleged will of the testator, executed towards the latter end of 1877 or the beginning of 1878, and BUTT, J., granted probate of this will. The Court of Appeal reversed his decision on the ground that the defendants had not established the contents of the will which they propounded, and I think they were right in the conclusion at which they arrived.

Both courts were satisfied that a will was in fact duly executed by Morgan. [His LORDSHIP reviewed the evidence, including that of persons who stated that the testator had told them that he had made certain provision for other persons, and continued:] Nothing can be more dangerous, I think, than to accept as evidence, to carry with it weight, of the contents of a will, the evidence of persons of statements made to them of bounties which they are to receive after the death of the person who made those statements. Of course I do not say that in no case can a will be established by parol evidence. I do not dissent from the view expressed in *Sugden v. Lord St. Leonards* (1), where a will which had been propounded was supported by parol evidence; but I cannot help thinking that, as regards the will which was propounded in the present case, some of the legacies contained in it, and the most important legacies, are practically supported by no evidence at all. I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. The legislature has endeavoured to protect the interests and rights of testators by requiring that the expression of their testamentary intentions shall be authenticated in such a manner as to leave no doubt, if possible, that the court has before it that which really expresses the will and intention of the testator. It is not enough that it is in his own handwriting; it must, even if in his own handwriting, be authenticated by witnesses who must be present and see the testator sign, and must sign in each other's presence. But if upon mere loose statements of the recollection of witnesses as to what has been said to them at some time or other, you were to grant probate of, and to establish as the will of the testator, something which no one had ever seen or purported to be able to depose to from recollection, it seems to me that you would be doing that which would be in the highest degree dangerous, and the more so when these statements are statements of witnesses (and one knows how fallible human memory is even when there is no interest to bias it) who have the strongest possible interest in remembering what they remember, and in forgetting what they forget.

I think, therefore, that, in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there really is before one substantially the testamentary intention of the testator. It is said that, at all events, the residuary clause of the present will is well established, and that upon the authority of *Sugden v. Lord St. Leonards* (1) probate of it should be granted, even if the court be not satisfied that it has before it the rest of the testamentary intentions of the testator. In *Sugden v. Lord St. Leonards* (1) the facts were very different from the facts here. The evidence, it is true, was the evidence of a person much interested in establishing the will, but it was the evidence, to begin with, of a person who had seen the will and was giving a recollection of its contents. In the next place, that evidence was corroborated in the strongest possible way, and in the most material particulars, by written documents about which there could be no question. Moreover, the court were satisfied that, although there might be some few legacies which were omitted in the recital of the legacies by Miss Sugden, yet there could not be many, but must be few, and they could not be of any material consequence. The court were satisfied that they had the substantial testamentary dispositions brought to their minds.

It is quite true that SIR GEORGE JESSEL, M.R., used certain language upon which much reliance has been placed by the appellants. It is said that he laid

A down the proposition that, though you have no evidence, except as to the residuary clause, beyond the fact that there are legacies of which you know nothing, you are bound to grant probate of that residuary clause, even though you grant probate of nothing else. The language relied on is this (1 P.D. at pp. 232, 233):

B "The argument as to the personal estate was this: It was said, if it is proved to your satisfaction that legacies are omitted, then, by granting probate of the will which disposes of the residue, you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention, but you are acting contrary to the intention of the testator."

C That was the argument, then, of those who were opposing the probate. SIR GEORGE JESSEL, M.R., said (*ibid.* at p. 233):

"This argument appears to me to be fallacious; it turns on the use made of the word 'intention.' It seems to me that the testator may be said to have in this respect two intentions—he has a primary intention that the legatee, whether general or specific, shall take the legacy—he has a secondary intention that, if by any reason whatever that legacy cannot take effect, then it is to go, not to his next of kin, but to his residuary legatees. It may well be that we are not able to give effect to the primary intention, but we are certainly able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which, we do not know."

If that is intended to lay down a universal proposition that, whenever you have evidence as to the gift of a residue, whatever you may know about the rest of the will and the legacies given by it, and however clear it may be that there were large legacies given by it, if you are not able to prove the amount of those legacies, you are still bound to grant probate of the residue, and give the whole to the residuary legatee, I do not say that I dissent from the view, but I certainly hesitate before giving my assent to it. It may be that, according to the law as administered in the Probate Court, that ought to be done; but certainly, with all deference, I cannot give my assent to the reasons expressed by SIR GEORGE JESSEL, M.R. It does not seem to me that the testator always has this secondary intention, that, if the primary intention of giving the legacies should fail, the residuary legatee should get the benefit. No doubt the law gives the residuary legatee the benefit, though I doubt very much whether the testator ever thinks of it, supposing a legacy to fail. But accepting that view in a case where the will is forthcoming, and a bequest has failed because it is impossible that the object of the testator's bounty can take it, I certainly cannot come to the conclusion that a testator ever contemplates or ever dreams that the residuary legatee is to get the benefit of the whole bequest, supposing that by the loss of the will you are unable to ascertain who the objects of the testator's bounty were, though there undoubtedly were such objects of his bounty whom he intended to benefit in preference to the residuary legatee.

I It may be a rule of law that under such circumstances you must grant probate, and the residuary legatee must have the benefit, but I certainly cannot accept it as being necessarily a carrying out of the intentions of the testator. SIR GEORGE JESSEL, M.R., says that he intends it to go not to the next of kin, but to the residuary legatee. Supposing that a witness comes and says: "I was left residuary legatee under a will. I know that there were a great many legacies, amounting to a large sum of money, say £100,000, and that there was very little left to go to the residuary legatee. I know that those large legacies were left to the testator's next of kin, but I cannot remember all their names, nor how

much was left to any one of them." In such a case undoubtedly it was not the intention of the testator that the residuary legatee should be benefited to the exclusion of the next of kin, and you would be defeating his manifest and certain intentions if you were to give the money to the residuary legatee. Would you in such a case be bound to grant probate of the residue upon such evidence as that? I certainly for my part cannot help expressing a doubt whether you would, and whether you would ever be justified in granting probate of a will which was proved merely by parol evidence of its contents, unless you were satisfied that you had before you evidence substantially of the intentions of the testator, so that the grant of probate of the residue would substantially carry those intentions into effect. In this case, which is certainly a very different one from *Sugden v. Lord St. Leonards* (1), upon which I do not mean to cast the slightest doubt, it is not necessary to decide that point; but inasmuch as it was urged strongly before us, having regard to the language to which I have just called attention, that we were bound to grant probate of this residuary clause unless we were prepared to impute perjury to Peters, I must say for my part that I cannot assent to that reasoning at all.

There was one other point upon which the court below was bound by the authority of *Sugden v. Lord St. Leonards* (1), but it would be open to review in this House, and I wish to reserve my opinion upon it. It will be observed that the only evidence of the contents of the will in this case are the post-testamentary declarations of the testator. If these declarations be inadmissible, then there is absolutely no evidence to support the case of those who are propounding the will. As the court below came to the conclusion that, even admitting them, the will was not established, and as we concur—for I believe all your Lordships concur—in that view, the question does not arise here for determination; but, as far as I am concerned, I desire to guard against its being supposed that I hold that these post-testamentary declarations are admissible. It is a matter which has given rise to considerable difference of judicial opinion. LORD PENZANCE distinctly decided that they were not admissible in *Quick v. Quick and Quick* (2), and I think that a dictum of LORD CAMPBELL in *Doe d. Shallcross v. Palmer* (3) indicates that he took the same view. The majority of the Court of Appeal in *Sugden v. Lord St. Leonards* (1), consisting of SIR ALEXANDER COCKBURN, C.J., SIR GEORGE JESSEL, M.R., JAMES and BAGGALLAY, L.JJ., were of opinion that the evidence was admissible, but MELLISH, L.J., took the contrary view. SIR GEORGE JESSEL, M.R., in giving his reasons for holding this evidence to be admissible, lays down first of all the general rule of law, which he admits would exclude statements of this description, but then he says there are certain exceptions, certain principal exceptions, and certain subordinate exceptions. The principal exceptions which he names are declarations accompanying an act, declarations against interest, and declarations made by a person in the course of business which it was his duty to make. The subordinate exceptions which he names are in matters of public and general interest, and in matters of pedigree. Undoubtedly these are all well-recognised and long-established exceptions to the general rule. But SIR GEORGE JESSEL, M.R., proceeds to say that there is a principle underlying all these exceptions, and that principle he states thus (1 P.D. at p. 241):

"In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground of admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me to be one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases."

A Finding that principle underlying the exceptions to which he has alluded, he then seems to come to the conclusion that, whenever you find those conditions satisfied, you are justified in making a new exception, although it has never hitherto been recognised in the law.

B It appears to me that, if that view be adopted, the extension of those principles to a case like the present would equally afford authority for many additional exceptions hitherto unknown to the law. It is much broader than would merely support the particular extension of the exceptions which SIR GEORGE JESSEL, M.R., was then upholding; and I cannot help feeling that, for the courts to add at will from time to time any new exceptions which appear to be capable of being supported on principles similar to those which have been long established, would be introducing a dangerous uncertainty into the law of evidence. It appears to C me that there is much to be said in support of the view which is forcibly expressed by MELLISH, L.J. He says (1 P.D. at pp. 251, 252):

"It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before and may never happen D again, for you then establish an exception which more or less throws a doubt on the law. It appears to me that it would be better to leave it to the legislature to make the improvement, which, in my opinion, ought to be made, in our present rules with regard to the admissibility of evidence of that description."

No doubt there are many countries, and, indeed, Scotland is one of them, E where the law permits declarations of persons who are dead to be given in evidence in all cases in which they were made under circumstances in which such evidence ought properly to have been admitted if the person had been living, and there is much to be said for that law as compared with our own; but certainly I have always understood that law to differ from our law, and I cannot help feeling that, if we were to adopt in full the reasoning of SIR GEORGE JESSEL, F M.R., it would practically wipe away all such distinction, which is, in my opinion, the function of the legislature and not of the courts. I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeal in *Sugden v. Lord St. Leonards* (1) upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision. That disposes of G all the matters arising upon the appeal, and I move your Lordships that the judgment be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN.—I agree completely in saying that the judgment of the Court of Appeal appealed against, in which they held that upon the evidence before them the contents of the will were not sufficiently established, therein H reversing the decision of BUTT, J., was right. I think that on that evidence there was no evidence of the contents of the will. All it tends to show, and it is evidence to show, that such a will was executed; but there is not one morsel of evidence of its contents. The really important question is: Is there evidence enough of its contents? I am not going further into it than to say that I think the evidence which I have mentioned, the declarations of the deceased, such I as: "I have remembered you in my will," or "treated you handsomely," or anything of that sort, if admissible, are evidence that, in my mind, should have very little weight indeed given to it. I wish to guard myself, as the Lord Chancellor did, against being supposed, except so far as it is necessary for the present case, to be either affirming or disaffirming the decision which was come to in *Sugden v. Lord St. Leonards* (1), or the propositions of law there laid down. I wish to leave them just in the same way as before, as far as I am concerned. Very considerable reasons have been given for doubting some of the propositions and doctrines laid down there, and they may be shaken to some

extent, but the decision of this House will not make that case better or worse as an authority than it was before. It is quite sufficient to say that, if these declarations are admissible as evidence, and are treated as such, they certainly are not sufficient to show what the contents of the will were, and, therefore, the judgment appealed against is right. A

LORD FITZGERALD.—I concur in thinking that the decision of the Court of Appeal ought to be affirmed. I am quite willing to follow the great judges who decided *Sugden v. Lord St. Leonards* (1) in the conclusions at which they finally arrived, but I am not disposed to go one hair's breadth beyond. That case might be truly said to have reached the very verge of the law, and it ought not to be extended. The short view which I take of the present case is that there is no satisfactory evidence of the contents of this will. Assuming that the factum of a will has been established to the satisfaction of the court, I can find no evidence whatever as to the contents of the will which would justify the court in acting upon it. The declarations of the testator have been offered and received in evidence. Still, even the testator, after the supposed execution of this testamentary instrument, never tells us what its contents were. There are some obscure statements, no doubt, such as that he made a will according to his expressed intention, but beyond that there is no evidence whatever of any statement by him of the contents of the will, and if I were acting as a judge in the Probate Court, I should hold that there was no evidence sufficient to warrant me in granting probate of the supposed will. B C D

There is another question whether, even supposing that there was some satisfactory evidence of the residuary bequest, the court ought to grant probate of the residuary bequest alone, for the reasons stated in *Sugden v. Lord St. Leonards* (1). I do not intend to express any very strong opinion upon that, for I do not think that that question is before us. I do not think that there is any satisfactory evidence that there was in this will a residuary bequest in favour of Peters. He never saw it; the testator never tells us of it; and the witnesses in favour of the factum of the will, who are produced under circumstances not free from suspicion, do not tell us one word of the contents of the will or of this residuary bequest. A testator, when dealing with the residue of his property, must be taken to contemplate that the bequests previously given, or some of them, may fail, or that a legatee may die, and, therefore, he may be deemed to have had the intention that the lapsed legacy should fall into the residue; but it is a very different proposition that he intended that, if his will were stolen or lost and there were no evidence of the other bequests contained in it, the residuary legatee should take the whole of his property. Here the personalty is estimated at £25,000, and the realty is said to be worth £10,000. If we accepted that proposition we should infer that the testator intended, under such circumstances as are supposed to exist in the present case, that the residuary legatee was to take the whole of his estate. Whenever that question arises, to be fairly raised and discussed, it will be for the House to decide it; but it is in no way before us. A good deal has been said as to the admissibility in evidence of parol statements of testators alleged to have been made after the factum of the will. Upon that I wish to reserve my opinion. My impression is that, however such statements of the testator were dealt with in *Sugden v. Lord St. Leonards* (1), the true ground upon which such evidence ought to be received, if received at all, was not fully discussed, and it is not necessary to decide it now. Therefore I reserve my opinion upon it. E F G H I

Appeal dismissed.

Solicitors: *Freemans & Dicker*, for *C. A. Peters*, Bristol; *W. V. Williams; Guscotte, Wadham & Daw*, for *W. E. Lawrence*, Bristol; *J. H. Bridgford*, for *J. E. Jones*, Halifax; *W. J. Foster*.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

A

THAMES AND MERSEY MARINE INSURANCE CO.
v. HAMILTON, FRASER & CO.

B

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Bramwell, Lord Herschell and Lord Macnaghten), February 15, 17, July 14, 1887]

[Reported 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp. M.L.C. 200]

C

Insurance—Marine insurance—Risks insured against—General words following specified risks—Construction ejusdem generis—Damage to donkey engine.

D

By a policy of marine insurance a ship including "machinery, shafting, propellers, boilers and connections, including donkey engines," was insured against "adventures and perils . . . of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people . . . barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the afore-said subject-matter of this insurance, or any part thereof." While the ship was at anchor awaiting orders, for the purposes of the voyage it was necessary to pump up the main boilers by means of a donkey-pump and engine. In consequence of a screw-valve, which should have been open, being left closed, water was forced into the air-chamber of the donkey-engine and split it open.

E

Held: the general words in the policy must be interpreted with reference to the specific words which immediately preceded them, and, when they were so construed, the damage to the pump did not fall within them; furthermore, the damage was not due to the pump being in a ship or at sea and so it had no marine character; and, therefore, the damage, whether it occurred through negligence or by accident, was not covered by the policy.

F

West India Telegraph Co. v. Home & Colonial Insurance Co. (1) (1880), 6 Q.B.D. 51, disapproved.

Document—Construction—Common form of words—Construction by courts over many years—Mercantile instrument.

G

Per LORD HERSCHELL: Nothing would be more dangerous than to depart from a construction which the authorities have put on words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.

H

Notes. Considered: *The Bedouin*, [1894] P. 1; *Oceanic Steamship Co. v. Faber* (1906), 95 L.T. 607; *Hutchings v. Royal Exchange Assurance Corpn.*, [1911] 2 K.B. 398. Applied: *Stott (Baltic) Steamers v. Marten*, [1916] 1 A.C. 304. Considered: *Samuel v. Dumas*, [1924] All E.R. Rep. 66. Applied: *The Stranna*, [1938] P. 69. Referred to: *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455; *Lund v. Thames & Mersey Marine Insurance Co.* (1901), 17 T.L.R. 566; *Blackburn v. Liverpool, Brazil and River Plate Steam Navigation Co.*, [1900-3] All E.R. Rep. 67; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *Steamship Knutsford v. E. Tillmanns & Co.*, [1908-10] All E.R. Rep. 549; *Thorman v. Dowgate Steamship Co., Ltd.*, [1908-10] All E.R. Rep. 174; *S.S. Magnhild v. McIntyre*, [1920] 3 K.B. 321; *Wadsworth Lighterage and Coaling Co., Ltd. v. Sea Insurance Co.* (1929), 35 Com. Cas. 1; *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] All E.R. Rep. 666; *Lazard Bros. & Co. v. Brooks* (1932), 37 Com. Cas. 224; *The Stranna*, [1938] 1 All E.R. 458; *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co.*, [1940] 4 All E.R. 169; *N. E. Neter & Co. v. Licenses & General Insurance Co.*, [1944] 1 All E.R. 341; *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768; *Coates v. Diment*, [1951] 1 All E.R. 890.

I

As to the perils insured against in a policy of marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 29 DIGEST (Repl.) 227 et seq.

Cases referred to :

- (1) *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1880), 6 Q.B.D. 51; 50 L.J.Q.B. 41; 43 L.T. 420; 29 W.R. 92; 4 Asp. M.L.C. 341, C.A.; 29 Digest (Repl.) 261, 1983.
- (2) *Devaux v. J'Anson* (1839), 5 Bing. N.C. 519; 2 Arn. 82; 7 Scott, 507; 8 L.J.C.P. 284; 6 L.T. 836; 3 Jur. 678; 132 E.R. 1200; 29 Digest (Repl.) 300, 2275.
- (3) *Pandorf & Co. v. Hamilton, Fraser & Co.* (1885), 16 Q.B.D. 629; 54 L.T. 536; 34 W.R. 488; 2 T.L.R. 228; 5 Asp. M.L.C. 568; reversed (1886), 17 Q.B.D. 670; 55 L.J.Q.B. 546; 55 L.T. 499; 35 W.R. 70; 2 T.L.R. 891; 6 Asp. M.L.C. 44, C.A.; reversed sub nom. *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), ante p. 220; 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp. M.L.C. 212, H.L.; 29 Digest (Repl.) 235, 1767.
- (4) *Cullen v. Butler* (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest (Repl.) 260, 1974.
- (5) *Butler v. Wildman* (1820), 3 B. & Ald. 398; 106 E.R. 708; 29 Digest (Repl.) 260, 1976.
- (6) *Phillips v. Barber* (1821), 5 B. & Ald. 161; 106 E.R. 1151; 29 Digest (Repl.) 261, 1977.
- (7) *Carruthers v. Sydebotham* (1815), 4 M. & S. 77; 105 E.R. 764; 29 Digest (Repl.) 284, 2140.
- (8) *Fletcher v. Inglis* (1819), 2 B. & Ald. 315; 106 E.R. 382; 29 Digest (Repl.) 232, 1738.
- (9) *Davidson v. Burnand* (1868), L.R. 4 C.P. 117; 38 L.J.C.P. 73; 19 L.T. 782; 17 W.R. 121; 3 Mar. L.C. 207; 29 Digest (Repl.) 224, 1663.

Also referred to in argument :

- Bishop v. Pentland* (1827), 7 B. & C. 219; 1 Man. & Ry. K.B. 49; 6 L.J.O.S.K.B. 6; 108 E.R. 705; 29 Digest (Repl.) 239, 1801.
- Merchants' Trading Co. v Universal Marine Co.* (1870), 2 Asp. M.L.C. 431; 29 Digest (Repl.) 228, 1699.

Appeal by the defendants in the action, an insurance company, from a decision of the Court of Appeal (LINDLEY and LOPES, L.JJ., LORD ESHER, M.R., dissenting), in an action brought by the owners of *S.S. Inchmaree* on a policy of marine insurance, reported 17 Q.B.D. 195, affirming a decision of the Queen's Bench Divisional Court (MATHEW and A. L. SMITH, JJ.), in favour of the plaintiffs.

The following statement of the facts, which were set out in a Special Case agreed between the parties, is taken from the opinion of LORD HERSHELL. The policy sued on was a time policy for twelve months, from Aug. 20, 1883, to Aug. 20, 1884; and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials, and all stores, valued at £20,000; and machinery, shafting, propellers, boilers and connections, including donkey-engines and boilers, pumps and all connections, valued at £11,000." The risks against which the insurance was effected are thus described :

"And touching the adventures and perils which the capital, stock, and funds of the said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

A On Mar. 2, 1884, the *Inchmaree* was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being

B pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was that, when the donkey-pump was set to work, the pipes and water chamber in the donkey-pump, and the air chamber therein, became overcharged, and the water was forced up into the air chamber, which, in consequence, split, and the pump was thereby

C damaged. It was admitted for the purposes of the case that the check-valve was either allowed to remain closed or to become salted up by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up and accident were not due to ordinary wear and tear.

D The cost of replacing the pump was about £72 10s. The ship and freight were warranted free from average under 3 per cent. unless the ship were stranded; but, as she did become stranded during the voyage, the loss was not excluded from the warranty. The parties were unable to agree whether there was negligence in allowing the check-valve to remain closed or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material)

E after the decision of the case. The questions stated for the opinion of the court were, whether the defendants were liable under the policy in respect of the loss, (i) if it could have been avoided by proper care, and occurred through negligence; (ii) if it occurred accidentally without negligence. The Queen's Bench Division gave judgment for the plaintiffs, and this decision was affirmed by the majority of the Court of Appeal (LINDLEY and LOPES, L.JJ., the Master of the

F Rolls, dissenting).

Their Lordships took time for consideration.

Sir Richard Webster, Q.C., Sir Charles Russell, Q.C., French, Q.C., and Synnott for the appellants.

G *Cohen, Q.C., Myburgh, Q.C., and Gorell Barnes* for the respondents.

July 14, 1887. The following opinions were read.

LORD HALSBURY, L.C.—In this case a policy of marine insurance for twelve months was effected upon, among other things, a pump on board the

H *Inchmaree* steamer. The adventures and perils to which the capital stock and funds of the defendant company were made liable by the policy of insurance were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of

I “all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof.”

It is certain that a loss or misfortune happened to the pump while the pump was being used for the purpose of filling the boilers of the *Inchmaree*, and the sole question is whether the loss or misfortune which did happen was one of the losses or misfortunes against which the insuring company agree to indemnify

the owners of the *Inchmaree*. If understood in their widest sense, the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is, that words, however general, may be limited with respect to a subject-matter in relation to which they are used. The other is, that general words may be restricted to the same genus as the specific words that precede them. There is, perhaps, a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction, it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used.

The facts here are very simple. A part of the pump burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by a donkey-engine. On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated. In the long line of cases quoted at the Bar there was only one (with which I will attempt to deal presently) which enunciated any different principles of construction from those I have endeavoured to set forth above, although I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided, conspicuously, I think, *Devaux v. J'Anson* (2), where TINDAL, C.J., rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision then arrived at.

The great difficulty I have had in this case is the decision of LORD SELBORNE, L.C., and COCKBURN, C.J., in *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1). I cannot agree with the Master of the Rolls that that case does not, as matter of reasoning, cover the present case. With the utmost respect, I can draw no real distinction between the explosion of the boiler in that case and the bursting of the air chamber of the pump in the present case, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion or air and water forced into the chamber by ordinary mechanical action. But before your Lordships that case is open to review, and I cannot think that it is reconcilable with the principles upon which policies of marine insurance have hitherto been construed. It introduces analogy as the guide by which you are to ascertain the genus to which the different species are to be attributed; so that in the future one must introduce as the true exposition of general words not the genus you find as applicable to the species enumerated, but any analogous genus. Sea perils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships. I cannot think that even were the analogy perfect, which I do not think it is, this is a satisfactory mode of ascertaining what the parties meant by the words they have used; and, as I have said, this is the real function of a court in construing an instrument. It might be reasonable for the parties to provide for such peril, and one knows that "dangers of and incident to steam navigation" are words which have been used to provide for such casualties; but I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus "perils of the sea" limits the meaning. I think the meaning attributed to these words for more than half a century by decision makes it probable that the parties used them in that accepted sense. I, therefore, think the judgment of the Court of Appeal wrong, and I move your Lordships that it be reversed.

A LORD BRAMWELL.—I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good specified a great many perils, and

“all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof.”

B Words could hardly be more extensive, and if the question, I ought to say a question on them, arose for the first time, I might perhaps give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question.

C Definitions are most difficult, but LORD ELLENBOROUGH's in *Cullen v. Butler* (4) (5 M. & S. at p. 465), seems right :

“All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes.”

D I have had given to me the following definition or description of what would be included in the general words :

“Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance.”

E Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of LOPES, L.J., in *Pandorf & Co. v. Hamilton, Fraser & Co.* (3) (16 Q.B.D. at p. 633) very good :

“In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody”

F is a damage from a peril of the sea. I have thought that the following might suffice: “All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such.” I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1). For example, it would include the case of the ship blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by another ship. It would not include the cases put by LORD ESHER, M.R., nor the case I put during the argument of the captain seized with giddiness dropping the chronometer into the hold, nor would it include the present case. The damage to the donkey-engine was not through its being in a ship or at sea. The same thing

H would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves, and winds had nothing to do with it.

As a matter of principle and reasoning, I think the decision wrong. I think the judgment in *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1) wrong on the reasoning I have used. With most sincere respect, though it is true
I that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to LORD ESHER's judgment in that case, I concur in his criticism on it in the present case, and I agree with LOPES, L.J., that the word “fire” in the policy will not sustain that judgment. The lord justice puts the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose

the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship as a ship had anything to do. I do not like cutting down the natural meaning of words: there is always a great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss; so that the judgment of LORD ESHER, M.R., is, I think, right, and that of the other judges wrong, and their decision should be reversed. A B

LORD HERSCHELL.—This action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy. [His LORDSHIP stated the facts, and continued]: It was not contended at the Bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words: C

“all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof.” D

It cannot be denied that, if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that these general words, following a specific enumeration, must be limited to perils ejusdem generis with those specified, or, to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur, viz., a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. Indeed, the learned counsel for the respondents themselves did not contend for so wide an interpretation. The view which they put before the House was that they should be confined to accidents happening to the subject-matter of the insurance in the course of, and incidental to, the navigation. I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question. E F

In a case which came before the Court of King's Bench, as long ago as 1816, LORD ELLENBOROUGH, C.J., in delivering the judgment of the court, in clear and unambiguous terms expressed their view as to the meaning of the words in question. I refer to *Cullen v. Butler* (4). It was an action on a policy of insurance where the ship and goods had been sunk at sea by another ship firing upon her in mistake for an enemy. The court inclined to the opinion that the loss was not one by “perils of the sea,” but held that it was covered by the general words. LORD ELLENBOROUGH said (5 M. & S. at p. 465): G H

“The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special I

- A words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."
- B No case was cited at the Bar from the date when this opinion was expressed (unless it be the recent case of *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1), to which I will presently advert), which has proceeded upon a construction of the policy different from that enunciated by LORD ELLENBOROUGH.
- C I will briefly review the subsequent authorities. The first is *Butler v. Wildman* (5). There the captain of a ship had thrown a large quantity of dollars overboard, to prevent their falling into the hands of an enemy, by whom he was pursued. It was held that, if not a loss by jettison, it was covered by the general words. ABBOTT, C.J., says (3 B. & Ald. at p. 402):
- "If not, strictly speaking by jettison, it is something ejusdem generis, and, therefore, falls within the general words."
- D The other judges concurred in this view, HOLROYD, J., saying that the general words include
- "all losses of the same nature with those described in the enumerated risks."
- E Next in order of time comes *Phillips v. Barber* (6). A vessel placed in a graving dock for repair was, by the violence of wind and weather, thrown over on her side, whereby she struck the ground with great violence and was bilged. ABBOTT, C.J., in a judgment holding that the underwriters were liable, after quoting the general words contained in the policy, said (5 B. & Ald. at p. 164):
- "These general words are, indeed, restrained in construction to perils ejusdem generis with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port, and it seems to me, therefore, to have been produced by a peril ejusdem generis with those specified, and to fall within the general words of the policy."
- F The next case, *Devaux v. J'Anson* (2), was much relied on by the counsel for the respondents. But, though I feel some difficulty in explaining the grounds of that decision, it certainly purported to be based upon the antecedent authorities, and not upon any different view of the law. The ship had, in that case, been put into a dry dock for repairs. These being completed, preparations were made for getting her afloat. She was for this purpose made fast by four cables, while the workmen removed the sand which was under the vessel, and consolidated the shores upon which the ship was resting. The cables strained the vessel, forcing in the ribs. The stanchions of the kelsons having all fallen from the force of the
- G lower masts upon the keel, the garboard strake gave way, and when at last the ship was no longer upon the shores she sank into a muddy sand. At the time of her sustaining the injury the depth of water in the dock was about four feet. She was abandoned as a constructive total loss, and the question arose whether she was lost by perils insured against. TINDAL, C.J., in delivering the judgment of the court, held that she was. He said (5 Bing.N.C. at p. 540):
- H "It is to be observed the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance.' And the cases cited and relied on by the plaintiff—*Carruthers v. Sydebotham* (7), *Fletcher v. Inglis* (8), and *Phillips v. Barber* (6)—are sufficient authority to show that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy."
- I

It is not easy, I confess, to see how the authorities referred to were sufficient to establish the propositions they are supposed to support. In *Carruthers v. Sydebotham* (7) the pilot navigating a vessel had fastened her to the pier of a dock basin in the Mersey by a rope to the shore. She took the ground, and when the tide left her fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water and her cargo was wetted. It was held that this was a stranding entitling the assured to recover for an average loss upon the goods. After a careful perusal of the judgments in this case, I am unable to see its bearing upon the point which had to be determined in *Devaux v. J'Anson* (2). Nor do I see the application of *Fletcher v. Inglis* (8). A vessel insured for twelve months was in a harbour with a hard, uneven bottom; the tide having left the vessel, on its return there was a considerable swell in the harbour and the ship struck the ground hard several times and was found to be considerably damaged. It was held that this was a loss by peril of the sea. Still less am I able to perceive the applicability of *Phillips v. Barber* (6), to which I have referred above. There was nothing in *Devaux v. J'Anson* (2) that I can see corresponding with the wind and weather in port which was held in *Phillips v. Barber* (6) to be ejusdem generis with a storm at sea. It is unnecessary to inquire whether the decision in *Devaux v. J'Anson* (2) was correct. It cannot be regarded as throwing any doubt upon the canon of construction laid down by LORD ELLENBOROUGH, and more than once recognised and acted upon by LORD TENTERDEN. Nor is it possible to evolve any principle from it applicable to other cases. No reasons are given for the judgment, which is based solely on prior authorities, and when these authorities are examined they only determine the one that a ship damaged by a storm when in dry dock is damaged by causes similar to perils of the seas, and the others that vessels damaged by ceasing to be waterborne, and being driven against the ground by the action of the tide, are injured by "perils of the sea."

The last case to which I need refer on this point is *Davidson v. Burnand* (9) where WILLES, J., expressly recognised the rule of construction laid down in *Cullen v. Butler* (4). He said (L.R. 4 C.P. at p. 120):

"The question, therefore, is, not whether the loss here was strictly one occasioned by perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from the perils of the sea."

I think, therefore, that the case now before your Lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by LORD ELLENBOROUGH—that is, whether it is a case "of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." When the facts are borne in mind it seems necessary only to state the question in this way to see that the answer must be in the negative. To which of the specially enumerated perils is it similar? The only one that could be suggested is "perils of the seas." The damage here arose from the air chamber of the donkey-pump giving way under an excessive pressure of water owing to the proper outlet being closed. It is, I think, impossible to say that this is damage occasioned by a cause similar to "perils of the sea" on any interpretation which has ever been applied to that term. It will be observed that LORD ELLENBOROUGH limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance.

A The respondents placed their main reliance upon *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1), and naturally so, because the majority of the Court of Appeal thought the present case undistinguishable from it. LORD SELBORNE, L.C., and COCKBURN, C.J., in that case held that the damage done by the explosion of the boiler of a steamer was covered by the general words of a marine policy. LORD SELBORNE, after referring to the effect given to these words in
 B *Devaux v. J'Anson* (2), said (6 Q.B.D. at p. 57):

"I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine
 C insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boilers, or from defects of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of wind, and defects or mismanagement of a ship's sails or tackle."

I have already given my reasons for doubting whether *Devaux v. J'Anson* (2)
 D involved any principle which could possibly be extended by analogy to a case not precisely similar in its facts. Moreover, it is to be observed that in *Devaux v. J'Anson* (2) the damage done was done to the ship as such. It arose from her being constructed for the purpose of being waterborne, and thus needing some substituted support, if the support of the water was withdrawn; and the damage
 E to the ship was due to her grounding, and the failure to keep her safely supported. It is on this view alone, I think, that the case can be sustained. But the explosion of the boiler on board the *Panama* had no marine character at all. It might have happened in precisely the same way and done the same kind of damage, if the steam engine had been in use for the purpose of moving manufacturing machinery on shore. The real ground of LORD SELBORNE's judgment
 F appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel, and the excessive pressure of steam in the boiler when the motive power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one; but, even if it be so, I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over-pressure of which caused the damage,
 G was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not, as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind.

The present Master of the Rolls [LORD ESHER], although he concurred in the judgment of the majority of the court in the *West India Telegraph Co. v. Home and Colonial Insurance Co.* (1), differed in his reasons. He based his judgment
 H solely on the ground that the explosion was ejusdem generis with fire, and, therefore, the loss was within the general words. In the case now under appeal he intimated that this reasoning was somewhat fanciful, and that he should not be sorry to see it dissented from. I am certainly disposed to prefer the latter view of the learned judge; but it is not necessary to discuss the point, as it is obvious that such a ground of decision can have no bearing upon the case we have to deal
 I with. I may add, however, that since the term "fire" has been added to the specially enumerated risks (which has taken place in comparatively recent times), I think the general words may properly be extended to similar risks which would not have been included before. Upon the whole, I have come to the conclusion that the judgment of the Master of the Rolls in the court below was correct. I believe it not only to have been in accordance with the authorities, but in harmony with the common understanding of those who enter into contracts of marine insurance. Several instances were put in the course of the argument of disasters which are of common occurrence, and would seem to be just as much within the

general words as that which is now in question, but in respect of which it has never been suggested that the underwriters were liable. I, accordingly, concur in the judgment which has been moved. A

LORD MACNAGHTEN.—In March, 1884, the *Inchmaree* was off Diamond Island lying at anchor, and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine and a donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water, being unable to make its way into the boiler, was forced back and split the air chamber and so disabled the pump. That was the beginning and the end of the misfortune. At this time the *Inchmaree* with her machinery, including the donkey-engine, was insured by a time policy. The question is: Was the loss which resulted from this mishap covered by the policy or not? B C

The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases, perils of the seas and other well-known risks, to which the indemnity was to extend. Then follow general words apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance. It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases. For example, if the expression “perils of the seas” is given its widest sense, the general words have little or no effect as applied to that case. If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen v. Butler* (4), and loss by perils of the seas is to be confined to loss ex marinæ tempestatis discrimine, the general words become most important. But still, ever since *Cullen v. Butler* (4), when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases “akin to” or “resembling” or “of the same kind” as those specially mentioned. I see no reason for departing from this settled rule. In marine insurance it is above all things necessary to abide by settled rules, and to avoid anything like novel refinements or a new departure. It was objected by counsel for the respondents that the rule of ejusdem generis does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so—at any rate, where several cases are enumerated leading to a common result, or intended to be met by a common remedy. D E F G H

A familiar instance occurs in the Companies Act, 1862 and the earlier Act of 1848, in the sections which provide for winding-up. There are several sub-sections specifying various cases in which a winding-up order may be made, and then there is a sub-section providing that the court may make an order whenever it thinks it just and equitable. Under both Acts those general words have always been held to be restricted to cases ejusdem generis with those previously mentioned, and not to give the court a general power to make an order whenever it thinks right to do so. Your Lordships were asked to draw the line, and to give an exact and authoritative definition of the meaning of the expression “perils of the seas” explained or enlarged by or in connection with the general words. For my part, I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included and I

A no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad, common-sense view, and not by the light of strained analogies and fanciful resemblances. In the present case, although the Court of Appeal has properly treated the general words as restricted to cases ejusdem generis with those specially enumerated, the majority of the court has held the accident within the policy. I am unable to adopt their conclusion. The accident, in my opinion, was not due to the "perils of the seas," using that expression in the widest sense that I can give to it, nor did it result in sea damage of any kind. I am, therefore, of opinion that the view of the Master of the Rolls is correct, and that the judgment of the Court of Appeal must be reversed.

C *Appeal allowed.*

Solicitors: *Gregory, Rowcliffes & Co.*, for *Hill, Dickinson & Co.*, Liverpool;
T. W. Rossiter, for *Hoyle, Shipley & Hoyle*, Newcastle-on-Tyne.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

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MATTHEWS AND ANOTHER v. MUNSTER

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), November 28, 1887]

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[Reported 20 Q.B.D. 141; 57 L.J.Q.B. 49; 57 L.T. 922;
52 J.P. 260; 36 W.R. 178; 4 T.L.R. 102]

Counsel—Authority—Conduct of action—Settlement—Absence of client—Binding effect of settlement.

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As against the client, the authority of an advocate is unlimited in the conduct of a cause in court, but the authority is not unlimited in the sense that it cannot be overruled, because it is part of the conduct of the cause, and is, therefore, under the supervision of the court who will not allow injustice to be done. The authority can, however, be withdrawn by the client at any minute. In that case the client must take care to let the other side know that the authority has been withdrawn.

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An action for malicious prosecution was settled by counsel in the course of the trial upon the terms that there should be a verdict for the plaintiffs for £350, and that all imputations should be withdrawn. The defendant was not present when the settlement was arrived at, and upon coming to the court later he repudiated it.

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Held: as the defendant was not present when the settlement was made, he could not have put an end to the relationship of advocate and client which existed between himself and his counsel; his counsel, therefore, still had complete authority in the cause; and the defendant was bound by the settlement.

Notes. Distinguished: *Lewis v. Lewis* (1890), 45 Ch.D. 281. Applied: *Neale v. Gordon-Lennox*, [1902] 1 K.B. 838. Referred to: *Rhodes v. Swithinbank* (1889), 5 T.L.R. 253; *Shepherd v. Robinson*, [1919] 1 K.B. 474.

As to authority of counsel, see 3 HALSBURY'S LAWS (3rd Edn.) 49 et seq.; and for cases see 3 DIGEST (Repl.) 377 et seq.

Case referred to :

- (1) *Swinfen v. Lord Chelmsford* (1860), 5 H. & N. 890; 29 L.J.Ex. 382; 2 L.T. 406; 6 Jur.N.S. 1035; 8 W.R. 545; 157 E.R. 1436; 3 Digest (Repl.) 376, 284.

Also referred to in argument :

Prestwich v. Poley (1865), 18 C.B.N.S. 806; 6 New Rep. 175; 12 L.T. 390; 144 E.R. 662; sub nom. *Pristwick v. Poley*, 34 L.J.C.P. 189; 11 Jur.N.S. 583; 13 W.R. 753; 42 Digest 66, 581.

Swinfen v. Swinfen (1858), 2 De G. & J. 381; 27 L.J.Ch. 491; 31 L.T.O.S. 157; 22 J.P. 306; 4 Jur.N.S. 774; 6 W.R. 480; 44 E.R. 1037, L.J.J.; 42 Digest 65, 573.

Appeal from a decision of the Divisional Court refusing to set aside a compromise and order a new trial in an action brought for malicious prosecution.

On the morning of the second day of the trial, when the plaintiffs' case had closed and the defendant, who was coming up from Brighton, had not arrived, counsel upon both sides agreed upon a settlement of the action. The terms of the settlement were, that there should be a verdict for the plaintiffs for £350 and costs, and that there should be a withdrawal of imputations. The case thereupon terminated; but the defendant, upon coming into court an hour afterwards, at once repudiated the compromise. The defendant subsequently moved to set aside the compromise and for a new trial of the action. Upon the hearing of the motion, an affidavit by the defendant was read, in which he said that he had given no instructions for a compromise, and entirely repudiated the terms of it. The Divisional Court refused to set aside the compromise. The defendant appealed.

E. Wilberforce (H. R. Wilson with him) for the defendant.

Kemp, Q.C., and *J. Arthur* for the plaintiffs, were not called on to argue.

LORD ESHER, M.R.—In this case an action was brought for malicious prosecution. At the trial counsel appeared for the defendant, but the defendant himself was not present. In the course of the case the defendant's counsel, actuated only by the desire of doing what was best for his client, submitted to a verdict against him for £350 upon the terms that all imputations should be withdrawn. The defendant now wishes for a new trial on the ground that his counsel did that which he was not authorised to do.

That raises the question what is the relation between counsel and his client. This is sometimes put as being that of principal and agent. I do not myself adopt that phraseology. To my mind, there is a distinct relationship between advocate and client, and that relationship is best so described, namely, as that of advocate and client. The advocate acts not of his own motion, but because he is requested by the client to act for him. I have no doubt that the client may at any moment withdraw that request. As he cannot become the advocate in the case without the request of the client, so he cannot continue to be the advocate when that request is withdrawn. But when once the client has asked a particular counsel to act for him as advocate, he must know that he has thereby intimated to the other side that that is the person who is to act for him. I doubt whether a secret withdrawal of the client's request to the advocate, not made known to the other side (if one could conceive it possible that a counsel would continue to carry on a case after the client's request to him to do so had been withdrawn), would be sufficient. We need not, however, consider that question now.

A request to a counsel to act as advocate does not mean, of course, that he is to act for the client except as advocate. It is a request to him to do those things which an advocate does for his client. The profession of an advocate is merely to advise his client with reference to a case before it comes into court, but, as soon as it comes into court, to act for him altogether in the conduct of it. In court the

- A advocate is acting as the superior in the matter, and has unlimited power as to the conduct of the case. That power is not unlimited in the sense that it cannot be overruled, because it is part of the conduct of the cause, and is therefore under the supervision of the court, who will not allow injustice to be done. If, therefore, the advocate does something which gives a clear advantage to the other side, and does clear injury to his own client, or makes a slip which results in injury to
- B his client, the court can set aside the proceedings and order a new trial. But, as against his client, the authority of the advocate is unlimited in the conduct of a cause in court. That authority can be withdrawn by the client at any minute; but the client must take care to let the other side know that the authority has been withdrawn. If, when the client is present, the advocate is going to do something in court to which the client objects, the client cannot direct the
- C advocate not to do it. If the client tells his counsel to do something other than that which the counsel thinks advisable, it is the duty of the counsel to say to the client, "Withdraw the authority you have given me to act for you and I will at once make that known to the other side, and will return my brief." That is the only way in which the client can get rid of the authority of the counsel. That authority, however, is strictly limited to the conduct of the cause. If a counsel
- D were to do something beyond what was fairly necessary for the conduct of the cause, that would not be binding upon his client. He has no request to do more than that which his duty as an advocate requires.

It, therefore, becomes necessary to consider what acts may fairly be regarded as necessary in the conduct of a cause. I think that the principle has been as well expressed as it can be by POLLOCK, C.B., in *Swinfen v. Lord Chelmsford* (1). He says (5 H. & N. at p. 922):

- E "We are of opinion that, although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, . . . we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."
- F That is the limitation—I will not say of the authority—but of the power of the counsel. Then he gives instances, which I purposely omitted in reading the passage, but which I will read now, of what is incidental to the conduct of the suit—
- G "such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial."

It follows from that that he thinks that there are many things which properly belong to the management and conduct of the trial besides those which he specifies.

- H One of the things that must properly belong to the management and conduct of the trial must be the assenting to a verdict for a particular amount and upon particular terms. In the present case the amount was £350, and the terms were that all imputations should be withdrawn. It is impossible to say that such an arrangement must be an unreasonable one. Counsel may see that if the case goes to the jury a verdict for a very large amount will be given. If the client is in
- I court and says, "I will not agree to those terms," his counsel ought to say, "Then I will not act for you any longer," and ought to leave him to conduct his own case. If the client allows the negotiation to go on, and makes no audible objection, the settlements will be binding upon him, because he has not withdrawn the authority of his counsel and made that withdrawal known to the other side. But I wish to repeat that, although the authority of counsel is unlimited until it is withdrawn, the court retains control over his proceedings. In the present case the client was not present in court at the time the settlement was come to,

and, therefore, could not have put, and did not put, an end to the relationship of advocate and client which existed between himself and his counsel; but he comes now and says, "I do not like what my counsel has done for me, and I ask the court to set it aside." There is no symptom of any injustice having been done. The counsel exercised his judgment to the best of his ability in the matter, and I have no doubt did what was really best for his client. The judgment of the Divisional Court must be affirmed. A
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BOWEN, L.J. This was an action for malicious prosecution, in which the defendant employed counsel. The defendant was not himself present at the opening of the court on the second day of the trial. During the time of his absence he left to his counsel the necessary duty of doing his best in any emergency that arose. The plaintiffs' case closed, the defendant being still absent, and the defendant's counsel agreed to a verdict for the plaintiff for £350, and to withdraw all imputations. After that had been done the defendant arrived, and wished the settlement to be set aside. He has applied to the Divisional Court to set it aside, and that court has refused to do so; and from that refusal this appeal is brought. C

The authority of a counsel is regulated by professional etiquette and honour, and empowers him to bind the ultimate client within certain limits that are perfectly well understood, and that were stated by POLLOCK, C.B., in *Swinfen v. Lord Chelmsford* (1) (5 H. & N. at p. 922): D

"We are of opinion that, although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, we think he has not, by virtue of his retainer in the suit, any power whatever over matters that are collateral to it. He has complete authority over the suit; he is clothed with that authority by virtue of his retainer." E

The Master of the Rolls has discussed the question which has been discussed by many other distinguished judges, whether a counsel is to be called the agent of his client; and he, like many other judges, has protested against that description of the relationship. I am inclined to agree in that protest. At all events, if a counsel is called an agent, it must be remembered that he is only an agent in a very peculiar and special sense. Can a counsel then compromise a suit if his client is in court, and objects to the compromise? I think that a counsel under those circumstances ought not to do so. It does not follow that he is to submit to the suit going on, if he thinks that that is the wrong course to take. It is always in his power under those circumstances to return his brief. But in the present case the client was not in court at the time of the settlement. Not being there, it must be taken that he left it to his counsel to exercise his discretion in any emergency that arose. Whether the authority of counsel is to be regarded as being derived from the client or from the nature of his profession, it is clear that it includes the acting for the client in his absence when an emergency arises. But I think that it can never include the acting unreasonably. The duty of the counsel and his authority are commensurate. In this particular case it is clear that what was done was not unreasonable, and was within the authority of counsel as defined by POLLOCK, C.B., in the judgment which I have referred to. F
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FRY, L.J.—In my opinion this is a clear and simple case. An action was brought for malicious prosecution, and at the trial, in the absence of the defendant, the defendant's counsel agreed to a compromise. In the compromise itself there is nothing that is outside the case, nothing which is unjust, or which shocks the conscience of the court, and nothing in the nature of a slip. I do not desire

A to do more than to say this, that I think that we should come to a most disastrous conclusion, not as regards the interests of the Bar, but for the interests of the public, if we were to set this compromise aside. A counsel would not be able to accept terms of arrangement, however advantageous to his client, because the client was out of court. In my opinion, the power of counsel to agree to a compromise is a most valuable power, which we should do nothing B to lessen.

Appeal dismissed.

Solicitors: *A. B. Rickards; W. Brewer.*

[*Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.*]

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BRINKLEY v. ATTORNEY-GENERAL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), February 7, 8, 1890]

[Reported 15 P.D. 76; 59 L.J.P. 51; 62 L.T. 911;
6 T.L.R. 191]

E

Conflict of Laws—Marriage—Validity—Solemnisation abroad—Monogamous marriage—Marriage celebrated in Japan in accordance with Japanese law.

F

Marriage, to be recognised by the law of England, must be the union between one man and one woman to the exclusion of all others. Where, therefore, a British subject, temporarily resident in Japan, married a Japanese girl in accordance with the law of that country which recognised monogamy as the basis of the matrimonial contract, the marriage was **held** to be valid in England also.

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Notes. The Legitimacy Declaration Act, 1858, has been repealed. For declarations of legitimacy see now the Matrimonial Causes Act, 1950, s. 17 (29 HALSBURY'S STATUTES (2nd Edn.) 403 et seq.).

Considered: *Nachimson v. Nachimson*, [1930] All E.R. Rep. 114. Referred to: *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634.

As to essentials of marriage as recognised by English law, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

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Cases referred to:

(1) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 12 Jur.N.S. 414; 14 W.R. 517; 11 Digest (Repl.) 455, 906.

(2) *Re Bethell, Bethell v. Hildyard* (1888), post; 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674; 36 W.R. 503; 4 T.L.R. 319; 11 Digest (Repl.) 455, 907.

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Also referred to in argument:

Connolly v. Woolrich, 11 Low. Can. Jur. 197; 11 Digest (Repl.) 350, *135.

Johnson v. Johnson's Administrator, 30 Missouri State Reports, 72.

Ardaseer Cursetjee v. Perozeboye, 10 Moo. P.C.C. 419.

Petition presented under the Legitimacy Declaration Act, 1858, for a declaration that a marriage in Japan, valid by the *lex loci contractus*, should also be recognised as a good marriage in this country.

The petitioner, Francis Brinkley, a retired officer of the Royal Artillery, while temporarily resident at Naka Rokee, Tokio, in the empire of Japan, was married, on Mar. 25, 1886, at Tokio, to Yasu Tanaka, a native of that country. The petitioner was at that time a British subject, with an Irish domicile. After the marriage he lived and cohabited with his wife in Japan, and continued to do so at the date of the hearing of this petition. There was one son issue of the marriage. In accordance with the statute the Attorney-General had been cited and had filed an answer traversing the petition. In the course of the preliminary proceedings, a summons was taken out on behalf of the petitioner, and it was thereupon ordered, with the consent of the Attorney-General, that the petitioner might be permitted, at the hearing, to prove the facts of his case by affidavits and certificates. The affidavit of the petitioner, filed and read at the hearing in accordance with the above-mentioned order, was as follows :

"I was born on or about Nov. 9, 1841, at Parsonstown, County Meath, in Ireland, of parents then and there domiciled, and I have since served Her Majesty as a captain in the Royal Artillery. I am now temporarily resident at Naka Tokubendio, Tokio, in Japan, but I have no intention of permanently residing there. On Mar. 25, 1886, I was married in Japan to Yasu Tanaka, a subject of the Mikado of Japan. The certificates of my said marriage are now produced and shown to me, marked A. and B., and the translations thereof, which I believe to be correct, are now produced and shown to me, marked C. and D. I say that I am the petitioner in this suit, and I and the said Yasu Tanaka are respectively the same persons as 'Francis Brinkley, a British subject,' and 'Yasu Tanaka, of No. 20 of the 6th Ward of Jidamachi Kogimachi District, city of Tokio,' named in the said certificate marked A., and the translation thereof marked C., now produced and shown to me. I am advised and believe that my said marriage is valid according to the laws in force in Japan, and that I am thereby precluded from intermarrying with any other woman during the subsistence of the said marriage. I have since the said marriage cohabited with my said wife, and there is issue of my said marriage one son, born on Mar. 25, 1887. There is no collusion or connivance between myself and any person other than my said wife."

The certificates referred to in the above affidavit were put in and read. They were in the following terms :

"I certify that Yasu Tanaka, of No. 20 of the 6th Ward Jidamachi, Kogimachi District, city of Tokio, was duly married according to the laws of this empire, to Francis Brinkley, a British subject, on the 25th day in the 3rd of Mauh, of the 19th year of Meiji (Mar. 25, 1886). (Signed) GINBAYASHI TSUNAO, Chief Secretary, Tokio City Local Government; for Takasaki Garoku, Governor of Tokio City.

I certify that the above certificate by Ginbayashi Tsunao, Chief Secretary of the Tokio City Government, representing Takasaki Garoku, Governor of Tokio City, is correct and legal. (Signed) AOKI SHINYO, Vice-Minister of State for Foreign Affairs; 10th day of 6th month of 19th year of Meiji (June 10, 1886)."

An affidavit as to the Japanese law and the validity of the petitioner's marriage was also produced and read. It was in these terms :

"I, Kasuo Hatoyama, chief professor of law in the Imperial University of Japan, solemnly declare and say as follows : I am the chief professor of law in the Imperial University of Japan, and am thoroughly acquainted with the law of marriage of the empire. I have read the affidavit of Francis Brinkley, sworn herein on the 2nd day of November, 1888, and am of opinion that the facts therein deposed to show a valid marriage between the above-named

A petitioner, Francis Brinkley, and Yasu Tanaka, therein named, according to the law of Japan, and that the said petitioner, Francis Brinkley, is thereby precluded from intermarrying with any other woman during the subsistence of the said marriage."

B Mr. John Frederick Lowder, a member of the English Bar who had practised for thirty years before the Japanese and Consular courts, was called and stated that a civil marriage in the Japanese empire is contracted before the governor of the city in which the parties reside. Such governor is the registrar, and the registration constitutes the marriage. The parties go before him, or before a duly constituted deputy acting in his stead, and cause their names to be registered as man and wife, and that is the whole ceremony. The certificates produced are the very best certificates that could be procured in Japan of the fact of the marriage having taken place. The witness recognised the names at the foot of the certificates, and the persons who had signed them were known by the witness to hold the respective offices, descriptions of which were thereunto appended.

C Bayford Q.C. (Melsheimer with him) for the petitioner.

D Gwynne James for the Attorney-General.

SIR JAMES HANNEN, P.—This case is clear from the difficulties which arose in the Mormon case (*Hyde v. Hyde and Woodmansee* (1)) and in the South African case (*Re Bethell, Bethell v. Hildyard* (2)), because in each of those cases an attempt was made to establish as valid a marriage which admitted the possibility of a subsequent marriage with a person, other than the first spouse, during the lifetime of the latter. The principle adopted in those cases is, that a marriage which is not a union between one man and one woman, to the exclusion of all others, although it may pass by the name of a marriage, is not the status which the law of England contemplates when dealing with the subject of marriage.

F In this case it has been proved in a most satisfactory manner, by the depositions of a Japanese professor of law, that by the laws of the empire of Japan marriage does imply and involve this fundamental principle as a basis of the marriage contract, viz., that one man unites himself to one woman, and one woman to one man, to the exclusion of all others. Therefore, although throughout the judgments which have been delivered upon this subject, the words "Christian marriage," "marriage in Christendom," or some equivalent phrase, have been used for the sake of conveniently expressing the idea; yet the idea itself which it was desired to express was this, that the only marriages recognised in Christian countries and throughout Christendom "are marriages of the exclusively monogamous kind which I have mentioned." In the present case, it has been conclusively proved that in Japan marriages are of that character. It is well known that Japan has long since taken its place among the civilised countries of the globe, and the customs, laws and ceremonies prevailing in the empire of Japan are not to be dealt with, or looked upon in the same way as those of the Baralong or other tribes of South Africa. I come, therefore, clearly to the conclusion, that the cases referred to do not apply in the present instance, and, as was candidly conceded by the learned counsel representing the Attorney-General, that a valid marriage can take place in Japan according to the law of Japan between a domiciled British subject and a Japanese woman, and that such marriage may be valid in this country and everywhere else.

I The only question, therefore, which remains for me to consider is that which has been very properly raised by counsel for the Attorney-General, viz.: Have I, or have I not, proper and sufficient evidence before me that a marriage, valid according to the *lex loci contractus*, i.e., the law of Japan, has in fact been entered into by the petitioner in this case? Mr. Lowder, who practised for

thirty years before the Japanese courts, has been called, and has given satisfactory evidence as to the marriage law of Japan. He states that a valid marriage contract is constituted by the parties to the said contract appearing before a particular officer, the governor or his deputy, and declaring before him their intention to become man and wife, and obtaining from him a certificate to that effect. I have before me that which purports to be a certificate signed by that officer, and duly verified. He certifies that the two persons named in the certificate were duly married according to the laws of the empire, and, applying the well-known principle of law, *omnia præsumuntur rite et sollemniter esse acta*, I must of course assume that everything has been done in due form. Indeed, Mr. Lowder has proved that the person who has appended his name to the certificate, and who purports to sign the same as the governor's secretary or deputy, does in fact hold that position; also, that the person named in the certificate as the governor, is in fact the person holding that office at Tokio. The certificates are signed by competent persons, and the evidence does satisfy my mind that a valid marriage has been contracted by the petitioner and Yasu Tanaka. I, therefore, pronounce the decree prayed for, and I declare the said marriage to be a good and valid marriage, and the issue thereof legitimate.

Solicitors : *Bowman & Co.*; Solicitor to the Treasury.

[Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.]

GARDNER v. INGRAM

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Bowen, L.J.), November 29, 1889]

[Reported 61 L.T. 729; 54 J.P. 311; 6 T.L.R. 75]

Landlord and Tenant—Notice to quit—Need to be clear and unambiguous—Notice of intention to quit on or before particular date.

By an agreement for a lease of premises for five years it was provided that the tenancy might be determined "after the expiration of the term of three years out of the term of five years" by six months' notice in writing expiring on the quarter day corresponding to that on which the tenancy commenced. The tenant entered into possession on Sept. 29, 1885, and, on Mar. 29, 1888, he gave notice to the landlord in the following terms: "Kindly . . . take notice that I intend to surrender to you the tenancy of this house on or before Sept. 29, 1888."

Held: the notice was bad, since it did not plainly and unambiguously determine the tenancy, but rather expressed an intention to enter into negotiations with the landlord regarding the landlord's acceptance of the surrender.

Thompson v. Maberly (1) (1811), 2 Camp. 573, doubted.

Per LORD COLERIDGE, C.J.: Although no particular form need be followed in a notice to quit, there must be plain, unambiguous words claiming to determine the existing tenancy at a certain time.

Notes. Applied: *Re Lancashire and Yorkshire Bank's Lease*, *W. Davis & Son v. Lancashire and Yorkshire Bank*, [1914-15] All E.R. Rep. 851. Considered: *Norfolk County Council v. Child*, [1918] 2 K.B. 351. Approved: *P. Phipps & Co. (Northampton and Towcester Breweries), Ltd. v. Rogers*, [1924] All E.R. Rep. 208. Considered: *Winchester Court, Ltd. v. Holmes*, [1941] 2 All E.R. 542; *Dagger v.*

A *Shepherd*, [1946] 1 All E.R. 133. Distinguished: *British Iron and Steel Corpn., Ltd. v. Halpern*, [1946] 1 All E.R. 408. Referred to: *Associated London Properties, Ltd. v. Sheridan* (1945), 62 T.L.R. 80; *Addis v. Burrows*, [1948] 1 K.B. 444; *Hammon v. Fairbrother*, [1956] 2 All E.R. 108.

As to determination of tenancy from year to year, see 23 HALSBURY'S LAWS (3rd Edn.) 516 et seq.; and for cases see 31 DIGEST (Repl.) 493 et seq.

B Cases referred to:

(1) *Thompson v. Maberly* (1811), 2 Camp. 573, N.P.; 31 Digest (Repl.) 485, 6113.

(2) *Seymour v. Coulson* (1880), 5 Q.B.D. 359; 49 L.J.Q.B. 604; 28 W.R. 664, C.A.; 13 Digest (Repl.) 481, 1050.

C (3) *Brown v. Symons* (1860), 8 C.B.N.S. 208; 29 L.J.C.P. 251; 2 L.T. 323; 6 Jur.N.S. 1079; 8 W.R. 460; 141 E.R. 1145; 34 Digest (Repl.) 59, 317.

Appeal by the tenant from a judgment of the Mayor's Court.

By a memorandum of agreement, dated Sept. 9, 1885, and made between the plaintiff and the defendant, the plaintiff agreed to let and the defendant agreed to take, certain premises situate at Loughton, in the county of Essex, "for the term of five years commencing from Sept. 29, 1885, and thenceforth until this tenancy is determined by notice, as hereinafter mentioned," at an annual rent of £45, payable by equal quarterly payments on Mar. 25, June 24, Sept. 29, and Dec. 25, in each year. The agreement further provided that

E "The tenancy may be determined after the expiration of the term of three years out of the term of five years hereinbefore mentioned by six calendar months' notice in writing from either of the said parties to the other of them, and that such notice must expire at the corresponding quarter day at which the tenancy commenced."

The tenant entered into possession of the premises, and paid the rent payable under the agreement up to Sept. 29, 1888. During the tenancy, a question arose between the parties as to the execution of some repairs, and on Mar. 23, 1888 the tenant wrote the following letter to the landlord:

F "Dear Sir—It will not be possible for me to undergo the inconvenience involved in the suggested necessary repairs under the conditions now apparently existing. Kindly, therefore, take notice that I intend to surrender to you the tenancy of this house on or before Sept. 29 next."

G Shortly afterwards, the tenant quitted the premises, and the landlord brought an action against him for the rent payable under the agreement since Sept. 29, 1888. The assistant judge in the Mayor's Court held that the agreement created a tenancy for four years certain, and that the tenancy was not duly determined on Sept. 29, 1888, by the tenant giving, on March 23, 1888, six calendar months' notice in writing of his intention to determine the same.

H *Ashton Cross* for the tenant.
A. H. Spokes for the landlord.

I **LORD COLERIDGE, C.J.**—Two points were made in this case, and I think that both of them must be decided against the tenant. With regard to the last point relied on by counsel for the tenant in his argument, I will, for the moment, assume that the notice was good in point of time, and that for this purpose, the judgment of LORD ELLENBOROUGH, C.J., in *Thompson v. Maberly* (1), ought to be followed. But it appears to me that there was in fact no notice to quit at all, although that point does not appear from the judge's notes to have been specifically taken at the trial. The fact, however, is not material, because as was said by the Court of Appeal in *Seymour v. Coulson* (2), a point of law is sufficiently raised at the trial before the judge of the county court if it

appears that the judge necessarily decided it in order to arrive at a conclusion, and the Court of Appeal may review his decision on that point whether or not it was taken in argument before him. This notice was before the learned judge in the Mayor's Court, and his judgment must have proceeded on what was his view of the effect of it. In my judgment, the notice is not a good one.

A notice to quit must be absolute in its terms. Although no particular form need be followed, there must be plain, unambiguous words claiming to determine the existing tenancy at a certain time. This notice is not of such a character. The tenant merely says that he intends to surrender the lease on or before a particular date. The words mean that he intends to enter into negotiations as to something which cannot be done without his landlord's consent—to surrender the lease to the landlord if he will accept it. That is no notice to quit, and there is an end of the case. Counsel for the tenant relied on *Thompson v. Maberly* (1), where LORD ELLENBOROUGH, C.J., stated that, if premises are taken for twelve months certain and six months' notice to quit afterwards, the tenancy may be determined by a six months' notice to quit expiring at the end of the first year. That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word "certain," and, as LORD CAMPBELL points out in a note, the decision was for the plaintiff on another point, so that LORD ELLENBOROUGH's observation was obiter. It is true that, in *Brown v. Symons* (3), in the Common Pleas, which was an apprenticeship case and turned on the words "for twelve months certain," *Thompson v. Maberly* (1) was cited in the argument, and was not disapproved of. But I think that, in a case of a similar agreement, where the word "certain" does not occur, it would be very doubtful whether *Thompson v. Maberly* (1) should be treated as an authority.

BOWEN, L.J.—I am of the same opinion as to the question of the sufficiency of this notice to quit. I do not think that we are deciding on merely technical grounds in saying that the notice is bad. I think it is very necessary that, in a notice to quit, there should be plainness of speech—that is, it must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it. The effect of such a notice is to put an end to the relation of landlord and tenant, therefore, the landlord has a right to know whether the tenant is really going or not. If instead of adopting that course the tenant uses language which is ambiguous, makes use of expressions which leave matters at the conclusion of the term contingent on something to be done or some arrangement to be made, there is no sufficient notice to quit. We are asked to place a business construction on this notice; in my opinion, there was no business intended by it. The tenant used language on which the landlord could not safely act. On the other point I entirely agree with the Lord Chief Justice.

Appeal dismissed.

Solicitors: *W. Carpenter & Sons; Houghtons & Byfield.*

[*Reported by* ALFRED H. LEFROY, Esq., *Barrister-at-Law.*]

A

MERIVALE v. CARSON

[COURT OF APPEAL (Lord Esher, M.R., and Bowen, L.J.), December 1, 2, 1887]

[Reported 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 36 W.R. 231; 4 T.L.R. 125]

B

Libel—Fair comment—Fairness of comment—Expression of strong opinions and prejudices of fair man—Criticism of stage play.

C

The criticism of a dramatic work in the public Press is not privileged, and may constitute a libel without actual malice on the part of the writer. Such a criticism, in order to be actionable, must, in the opinion of the jury, be something more than the expression of the strong opinions and prejudices of a fair man. If it goes beyond what any fair man would say in criticising a work, it is an actionable libel.

Campbell v. Spottiswoode (1) (1863), 3 B. & S. 769, applied.

D

Notes. Considered: *McQuire v. Western Morning News*, [1900-3] All E.R. Rep. 673; *Thomas v. Bradbury, Agnew & Co., Ltd.*, [1904-7] All E.R. Rep. 220; *Hunt v. Star Newspaper Co.*, [1908-10] All E.R. Rep. 513; *Kemsley v. Foot*, [1951] 1 All E.R. 331. Referred to: *South Hetton Coal Co. v. North-Eastern News Association, Ltd.*, [1891-4] All E.R. Rep. 548; *Dakhyl v. Labouchere*, [1908] 2 K.B. 325, n.; *Walker v. Hodgson*, [1909] 1 K.B. 239; *Stopes v. Sutherland* (1923), 39 T.L.R. 677; *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449.

E

As to fair comment as defence in libel action, see 24 HALSBURY'S LAWS (3rd Edn.) 70 et seq.; and for cases see 32 DIGEST 141 et seq.

Cases referred to:

F

- (1) *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, 1802.
- (2) *Henwood v. Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, 1735.
- (3) *Macleod v. Wakley* (1828), 3 C. & P. 311, N.P.; 32 Digest 147, 1781.
- (4) *Turnbull v. Bird* (1861), 2 F. & F. 508, N.P.; 32 Digest 145, 1755.

G

Also referred to in argument:

- Thompson v. Shackell* (1828), Mood. & M. 187, N.P.; 32 Digest 147, 1786.
Wason v. Walter (1868), L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 17 W.R. 169; 32 Digest 144, 1754.
Davis v. Duncan (1874), L.R. 9 C.P. 396; 43 L.J.C.P. 185; 30 L.T. 464; 38 J.P. 728; 22 W.R. 575; 32 Digest 146, 1768.
Stevens v. Sampson (1879), 5 Ex.D. 53; 49 L.J.Q.B. 120; 41 L.T. 782; 44 J.P. 217; 28 W.R. 87, C.A.; 32 Digest 155, 1874.
Hibbs v. Wilkinson (1859), 1 F. & F. 608, N.P.; 32 Digest 147, 1788.
Eastwood v. Holmes (1858), 1 F. & F. 347, N.P.; 32 Digest 16, 72.
Carr v. Hood (1808), 1 Camp. 355, n.; 32 Digest 147, 1779.
Strauss v. Francis (1866), 4 F. & F. 939.
Paris v. Levy (1860), 9 C.B.N.S. 342; 30 L.J.C.P. 11; 3 L.T. 323; 7 Jur.N.S. 289; 9 W.R. 71; 142 E.R. 135; 32 Digest 148, 1790.
Soane v. Knight (1827), Mood. & M. 74, N.P.; 32 Digest 147, 1785.
Dibden v. Swan (1793), 1 Esp. 27, N.P.; 32 Digest 147, 1776.

I

Appeal by the defendant from the decision of a Divisional Court (MATHEW and GRANTHAM, JJ.), refusing his application to enter judgment for him or for a new trial.

The action was brought by the plaintiffs, who were the authors of a play called the "The Whip Hand," in respect of a criticism of their play, which was contained in a notice of a performance of the play at Liverpool, published in a theatrical newspaper, of which the defendant was the editor. This criticism was alleged by the plaintiffs to be in part libellous, the part complained of being as follows :

" 'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used ad nauseam, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier."

The innuendo in the statement of claim was as follows :

"Meaning thereby that the play was not original, and that the plot and action of the play were based upon the adultery of the principal female character, and that the play had an immoral tendency and belonged to a class of plays founded on sexual intrigue and of a low moral character, and that the production of the play was discreditable to authors of good literary position and repute."

The defendant denied that the words published were intended to have, or could have, the meaning alleged, and said that the occasion was privileged. The incident on which the play turned was that of a wife, who had lost money at cards to a foreign adventurer, being induced, by threats of exposure, to turn her husband's house during his absence into a gambling-house; there being no suggestion in the play against the purity of the wife or her affection for her husband.

FIELD, J., in the course of his summing-up to the jury, said :

"The question is, first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is fair, temperate criticism, and does not bear that meaning, then your verdict will be for the defendant. . . . It is not for a moment suggested by anyone that the defendant is animated by the smallest possible malice towards the plaintiffs. There is no ground for saying so, and no one has said so. . . . The malice which is necessary in this action is one which, if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you; you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that; otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

A The jury found a verdict for the plaintiffs with 1s. damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

Cock, Q.C., and W. Blake Odgers for the defendant.

Lockwood, Q.C., and Boxall for the plaintiffs.

B

LORD ESHER, M.R.—In this case, an action has been brought for an alleged libel contained in the criticism on a play written by the plaintiffs. What are the questions which ought to be left in such a case to the jury? The first question which they ought to be asked is: What is the meaning of the alleged libel? I am not sure that the jury ought not to look at the writing criticised. It is for them to say what, in the opinion of any reasonable man, the alleged libel means. In the present case, that question was left to them. The mischief of this criticism was said to be that it alleged that the play was founded on adultery without any stigma being attached to the adultery by the writers of the play. On behalf of the defendant, it was said that the criticism has not that meaning, and that the expression "naughty wife," did not mean adulterous wife. The jury had the right to put their own interpretation on the expression. Looking at the context, I should be inclined to agree with them in the interpretation that they have put on it.

D

The next question that arises is: Was this a privileged occasion? Ought the judge to tell the jury that it was, and that, therefore, to whatever length the criticism went, the defendant was entitled to a verdict, unless there was express malice, that is, malice in fact on his part, or, in other words, unless he was actuated by some indirect motive? That is clearly not the law. *Campbell v. Spottiswoode* (1) has never been overruled. That case lays down that a criticism on a published work is not a privileged occasion within the legal meaning of that term. **BLACKBURN, J.**, in his judgment, points out that a privileged occasion exists where one person may do by reason of the privilege what no other person in the kingdom could do. But, with regard to a criticism on a published work, it is not that one person may do what another may not; every person may do the same thing, and every person is forbidden to do the same thing, and, therefore, the occasion is not privileged.

E

F

The next question is: Was this criticism an actionable libel? The answer to that question must be based on the principles laid down in *Campbell v. Spottiswoode* (1). **CROMPTON, J.**, in that case says (3 B. & S. at p. 778):

G

"Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to the jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think, because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel."

H

I

Whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed is the question which should be left to the jury. On the answer to that question, the answer to the question whether the criticism is a libel or not depends. **CROMPTON, J.**, goes on to say:

"The first question is, whether the article on which this action is brought is a libel or no libel, not whether it is privileged or not. It is no libel if it is within the range of fair comment—that is, if a person might fairly and bona fide write the article; otherwise it is."

I am prepared to say that the meaning of "fair comment" is this: is it in the opinion of the jury, beyond what any fair man, however prejudiced, or however strong his opinion may be, would say in criticising a work? It is impossible to get beyond that. Full latitude must be given to the strong opinions and even to the prejudices of a fair man, but there must be nothing beyond opinion and judgment. It is easy to see what would be outside that limit. Whether any particular case is within the limit must depend on the circumstances of that case.

Then was this case satisfactorily left to the jury? I think that it was. When you look at the whole summing-up, it is really an amplification of the final direction to the jury, when the learned judge said:

"If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendant."

So that he gave them a wide limit. I think myself that even gross exaggeration would not necessarily make the criticism unfair. However wrong, however prejudiced the criticism, all that may be within the limit. The question that must be left to the jury is, would any fair man have said it? If it is more than a fair man would have said, then it is a libel. If the jury are not satisfied that it is more than that, then it is within the limits of allowed criticism and is no libel. I am aware that, in various cases, other words have been added from time to time to the definition of a libellous criticism; but I do not know of one such definition in which the word "fair" has not also been used. There is, therefore, no fault to be found with the direction of the learned judge in this case. Were the jury justified in finding that this was not a fair criticism? After they had found the meaning, they were clearly right in their other finding. If the meaning of the criticism is what they have found it to be, it is that the play is an obscene one. No fair man could say that of this play. Therefore, even if I had been dissatisfied with the summing-up, I would not have sent this case for a new trial.

I will only add that I negative the proposition of counsel for the defendant that, in an action in respect of a criticism on a published work, it is necessary to prove malice. It is said that, if that is so, there might be a case in which the writing which was alleged to be a libel would not be beyond fair criticism, but, nevertheless, might contain imputations that would be libellous if they were not contained in the criticism of a published work, and might be written by the critic for the purpose of injuring the individual criticised. But, in my opinion, such a writing would not be within what is allowed to critics apart from any question of malice—the mind of the writer not being that of a critic, nor the writing really a criticism at all.

BOWEN, L.J.—We begin by asking, what is the meaning of the alleged libel? The jury have found that the writer of this criticism has imputed to the plaintiffs that, in a play called "The Whip Hand," written by them, the main incident turns on an adulterous wife. It is immaterial whether the meaning is that they have not only founded their play on an adultery, but also have written it in such a manner as to show that they did not object to adultery. It is an admitted fact that this play does not contain an adulterous wife at all; so that there can be no question whether the plaintiffs treat adultery lightly.

What is the true question to be left to the jury in such a case? We must first see whether the matter has been properly left to the jury, and then whether there has been such a miscarriage as to justify us in ordering a new trial. I take the same view as the Master of the Rolls as to the manner in which the word "privilege" ought to be used. This is not a privileged occasion. Privilege is where one person is clothed with a greater immunity

A than the rest of the public. But the right of criticism is a right belonging to the whole world. If a person writes a book, he invites the whole world to criticise it. Another definition of the right of public criticism, by WILLES, J., is to be found in *Henwood v. Harrison* (2). WILLES, J., and the majority of the Court of Common Pleas appear to have preferred to treat it as a branch of the law of privilege, and to have found a justification for that use of the word B "privilege" by applying it to the subject of the right instead of to the person exercising the right. I do not think that that is so good an explanation of the right of criticism as that which is given by BLACKBURN and CROMPTON, JJ., in *Campbell v. Spottiswoode* (1). I do not think that it would have made any difference in the present case, whichever view is held to be the right one. C One reason why I prefer the view of BLACKBURN and CROMPTON, JJ., is because it leaves undisturbed the question which has been asked the jury for a great many years in these cases, viz., whether they think that the limits of fair criticism have been exceeded. As soon as the writer passes out of the region of fair criticism he ceases to be protected by the law, and the writing then becomes simply libellous. Until those limits are passed there is D no question of libel at all.

It is still unsettled what is the meaning of the expression which has been sanctioned by *Campbell v. Spottiswoode* (1)—"a fair comment." What standard are the jury to apply in order to ascertain whether the criticism in question is "fair?" The only limitation imposed is on the mode of expression; the opinion itself is in no way limited. It is the expression of the writer's opinion that E must be fair; the opinion may be anything that he likes. There must be some limitation conveyed in the word "fair," because all the judges are agreed in leaving the question to the jury whether the criticism goes beyond what is fair. We have no definition of what the law calls fair; perhaps it is purposely left to the jury to give its ordinary meaning to a word that is simple in itself. In *Macleod v. Wakley* (3), LORD TENTERDEN, C.J., says (3 C. & P. at F p. 313):

"Whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel."

G That is not unlike what the Master of the Rolls has said in the present case to be the meaning of fair comment. The question always must be whether the alleged libel transcends the reasonable limits of criticism by reason of the language in which it is expressed. That is to say, you must not judge the opinions expressed; you must judge the mode of expressing those opinions. In *Campbell v. Spottiswoode* (1), the first question that the jury were asked was, H whether they thought the alleged libel was a fair comment on the work criticised. That case was an instance of one class of cases in which the critic travels out of the regions of fair criticism, viz., where the author is attacked apart from the work.

There is another class of cases in which the writer travels out of the regions of fair criticism, viz., where he imputes to the author that he has I written what he has not. That is not a question of criticism at all. It is one thing to say that a work has a bad tendency; that is a matter of opinion. But to say of a work that it contains an adulterous wife, when there is no adultery in it at all, is not an expression of opinion, but a misstatement of fact. *Turnbull v. Bird* (4) was a case of that kind. It is not fair criticism to impute to a man that he has written what he has not. That applies to the present case. The criticism here was found by the jury to have the meaning alleged, viz., that the play was founded on adultery. If the learned judge left it to the jury to say whether that exceeded the limits of fair criticism,

there being no adultery in the play, it is unnecessary to go minutely into the whole of the summing-up. I have twice read through FIELD, J.'s summing-up. Perhaps there are some expressions to be found in it that are not perfectly exact. But it must be remembered that what the jury had to deal with was not really a question of opinion, but a question of fact. It would be impossible for us to send down this case for a new trial because certain expressions in the summing-up were not exact, when the result arrived at was right. Supposing the view of the law which I do not adopt to be the correct one, it would make no difference. That view is that this was a privileged occasion, and that it was necessary for the plaintiffs to prove express malice. Looking at the misstatement of fact in the present case, I think that any jury in the world would presume that this criticism was malicious.

Appeal dismissed.

Solicitors: *D. E. Langham*, for *Langham & Son*, Eastbourne; *T. Lamartine Yates*.

[*Reported by* ADAM H. BITTLESTON, ESQ., *Barrister-at-Law.*]

LEDUC & CO. v. WARD AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), February 11, 13, 1888]

[*Reported* 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908;
36 W.R. 537; 4 T.L.R. 313]

Shipping—Carriage of goods—Deviation—Bill of lading—Contract to carry by ordinary sea route—Evidence to vary terms of voyage contained in bill of lading—Admissibility.

The plaintiffs were the endorsees of a bill of lading. The bill, which excepted the usual perils of the sea, stated that the goods were shipped in a steamship lying at Fiume and bound for Dunkirk, "with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property." Instead of proceeding to Dunkirk, the ship sailed for Glasgow and was lost, with the goods, by perils of the sea. In an action by the plaintiffs against the shipowners for non-delivery of goods, evidence was given to show that the shippers of the goods knew, when the bill of lading was given, that the ship was going to Glasgow before proceeding to Dunkirk.

Held: the contract between the plaintiffs and the shipowners was contained in the bill of lading and was to carry the goods by the ordinary sea track between Fiume and Dunkirk with liberty to call at any ports substantially on the line of that voyage in any order; the evidence given was not admissible to vary the terms of the contract; Glasgow, not being a port on the line of the voyage, was out of the course of the voyage; and, therefore, the ship was lost while deviating from the voyage contracted for.

Notes. Applied: *Margetson v. Glynn*, [1892] 1 Q.B. 337. Considered: *Lecky v. Ogilvy Gillanders* (1897), 3 Com. Cas. 29; *James Morrison & Co., Ltd. v. Shaw, Savill and Albion Co., Ltd.*, [1916-17] All E.R. Rep. 1068. Applied: *United States Shipping Board v. Bunge y Born Limitada Sociedad* (1924), 132 L.T. 323. Considered: *Hain Steamship Co., Ltd. v. Tate and Lyle, Ltd.*, [1936] 2 All E.R. 597; *Reardon Smith Lines, Ltd. v. Black Sea and Baltic General Insurance Co.*, [1938] 2 All E.R. 706; *Re an arbitration between Compagnie Primera De Navigazione De Panama and Compania Arrendataria De Monopolio De Petroleos S.A.*, [1939] 2 All

- A** E.R. 240; *Reardon Smith Lines, Ltd. v. Black Sea and Baltic General Insurance Co., The India City*, [1939] 3 All E.R. 444. Distinguished: *Ardenne (Owner of cargo) v. Ardenne (Owners)*, [1950] 2 All E.R. 517. Referred to: *Frenkel v. McAndrews & Co.*, [1929] A.C. 545; *Foscolo Mango & Co., Ltd. v. Stag Line, Ltd.*, [1931] 2 K.B. 48; *The Torni*, [1932] All E.R. Rep. 374; *Connolly Shaw, Ltd. v. Nordenfjeldske Steamship Co.* (1934), 50 T.L.R. 418; *The Njegos*, [1935] All E.R. Rep. 863; *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama*, [1956] 3 All E.R. 957.

As to deviation, see 35 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and for cases see 41 DIGEST 483 et seq.

Cases referred to:

- C** (1) *Fraser v. Telegraph Construction Co.* (1872), L.R. 7 Q.B. 566; 41 L.J.Q.B. 249; 27 L.T. 372; 20 W.R. 724; 41 Digest 322, 1813.
 (2) *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260; 31 W.R. 445; 5 Asp. M.L.C. 65, C.A.; 41 Digest 422, 2648.
D (3) *Glyn, Mills & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591; 52 L.J.Q.B. 146; 47 L.T. 309; 31 W.R. 201; 4 Asp. M.L.C. 580, H.L.; 41 Digest 393, 2362.
 (4) *Lowry v. Russell*, 8 Pick. 360.
 (5) *The Delaware*, 14 Wallace, 579.
 (6) *May v. Babcock*, 4 Ohio, 334.

Also referred to in argument:

- E** *Crooks v. Allan* (1879), 5 Q.B.D. 38; 49 L.J.Q.B. 201; 41 L.T. 800; 28 W.R. 304; 4 Asp. M.L.C. 216; 41 Digest 602, 4294.
Sewell v. Burdick (1884), 10 App. Cas. 74; 54 L.J.Q.B. 156; 52 L.T. 445; 33 W.R. 461; 1 T.L.R. 128; 5 Asp. M.L.C. 376, H.L.; 41 Digest 372, 2186.
Bragg v. Anderson (1812), 4 Taunt. 229; 128 E.R. 317; 29 Digest (Repl.) 176, 1131.
F *Ashley v. Pratt* (1847), 16 M. & W. 471; affirmed sub nom. *Pratt v. Ashley*, 1 Exch. 257; 154 E.R. 109; sub nom. *Ashley v. Pratt*, *Pratt v. Ashley*, 17 L.J.Ex. 135, Ex. Ch.; 29 Digest (Repl.) 174, 1101.
Davis v. Garrett (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, 3188.

- G** **Appeal** by the defendants (except Headley) from a decision of DENMAN, J., at a trial before him without a jury.

The plaintiffs entered into a contract with merchants abroad for the purchase of goods to be shipped from a foreign port. The plaintiffs were to pay the price in exchange for shipping documents provided by the vendors. The bill of lading, signed by the defendants' captain on the shipment of the goods, was

- H** endorsed to the plaintiffs. The bill of lading, so far as material, was as follows:

I "Shipped in apparent good order and condition by Fruman Filiale de ingurischen Landesbank, in and upon the good steamship *Austria*, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property: 3123 bags of rape seed, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Dunkirk unto order or assigns, &c."

The *Austria*, which was a general ship, had goods on board for Glasgow, and went there before going to Dunkirk. During this deviation, the plaintiffs' goods were lost by perils of the sea. The plaintiffs, as endorsees of the bill of lading, brought the action against the defendant shipowners for non-delivery of the goods. At the trial, evidence was given for the purpose of showing that the shippers knew and assented to the *Austria* going to Glasgow before going to

Dunkirk. The learned judge held that the evidence did not prove any agreement on the shippers' part that the ship should proceed via Glasgow, and doubted whether it was admissible at all. He, therefore, gave judgment for the plaintiffs.

Gainsford Bruce, Q.C., and Lawson Walton (Finlay, Q.C., with them) for the defendants.

Sir Charles Russell, Q.C., and Gorell Barnes, Q.C., for the plaintiffs.

LORD ESHER, M.R.—In this case, the plaintiffs were owners of goods shipped on board the defendants' ship, and they bring an action against the defendants because they say that they were parties to a bill of lading, and put their goods on board the defendants' ship on the terms of the bill of lading, and were entitled by those terms to have their goods delivered to them at Dunkirk. The answer of the defendants is, that the goods were lost by perils of the sea. The answer to that is that the goods were not lost by any perils of the sea which the defendants are entitled to rely on; that they were lost while the defendants were committing a breach of their contract; that they were lost in a place to which the exception of the perils of the sea did not apply, and that the defendants are, therefore, liable. It is clear that the plaintiffs were assignees of the bill of lading, and the persons to whom the contracts had passed strictly within the terms of the Bills of Lading Act, 1855. That Act passes the contract, and puts the assignee in a better position than the original shipper in some respects.

The question in this case is, what is the contract contained in the bill of lading? It was suggested that a bill of lading is, in all circumstances, nothing but a receipt for the goods, and contains no contract, except that the goods have been received by the shipowners and are to be delivered by them at the place named. This is an instrument which has received one construction from the mercantile world and the courts for more than a hundred years. Where there is a charterparty, the bill of lading is only a receipt for the goods, because all the terms of the contract of carriage, as between the shipowner and the charterer, are contained in the charterparty, and the bill of lading is only given to enable the charterer to deal with the goods during transmission. But even where there is a charterparty, although the bill of lading is only a receipt as between the charterer and the shipowner, it is more than a receipt as between the endorsee and the shipowner; it contains the contract between them. Let us consider what a bill of lading is when it is to be regarded as a receipt for goods. It is not then a contract at all, nor is it conclusive as a receipt for the goods; treating it as a receipt, it can be contradicted by evidence.

The question whether a bill of lading can be anything more than a receipt for goods depends on whether the captain has received the goods, because the captain has no authority from the owner to make a contract of carriage except for goods put on board. If the bill of lading is wrong as to the goods put on board, its effect is destroyed for any other purpose. But if the goods have been received on board, the bill of lading is more than a receipt, it is a contract of carriage. The captain has authority not only to make a contract of carriage, but to reduce it into writing. The bill of lading is, between him and the shipper, the contract for the carriage of the goods reduced into writing. Whenever a contract is reduced into writing, that writing is the only evidence of the contract. It can only be varied by showing a usage so general that it must be taken to be imported into the contract. That is the only evidence that can be given outside the written contract. To show that the parties have agreed to some other terms outside the contract is to seek to vary the terms of a written contract, and that is not allowed with regard to a bill of lading any more than it is with regard to any other contract which has been reduced into writing as the evidence of the contract. It is startling to be told that this is new law.

A The law was certainly so stated by BLACKBURN, J., in *Fraser v. Telegraph Construction Co.* (1). He said (L.R. 7 Q.B. at p. 571):

"The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas, must be taken to be the contract under which goods are shipped, and until I am told different by a court of error, I shall so hold."

B In *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (2), I expressed the same view of the nature of a bill of lading as I had always expressed, and as I am now expressing. In *Glyn, Mills & Co. v. East and West India Dock Co.* (3), LORD SELBORNE said (7 App. Cas. at p. 596):

C "Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner."

D To say, therefore, except in the case which I have before stated of its being given to a charterer who has also a charterparty, that a bill of lading is only a receipt for the goods is to maintain a proposition which cannot be supported. It seems to me impossible to say that a bill of lading does not contain the terms of the contract of carriage.

E The next question is whether, assuming the bill of lading to contain the contract of carriage, it is part of that contract that the goods shall be carried on the particular voyage described. The bill of lading in the present case is in the ordinary terms that have been used in bills of lading since they were first established, and one might, therefore, expect that they had by this time received some construction. It is argued on the part of the defendants that the course of the voyage is no part of the contract; but it is not said why, if that is so, the voyage is put into the bill of lading at all. Consider the effect on business, if that contention was right. Goods are bought by someone at the place where they are to send to some other place. The purchaser buys them at one place for the purpose of selling them at another. He does not want to buy things in the air. The goods are to be sold again at some particular market. If the purchaser does not know at all when the goods will be delivered, he will not buy them, because he cannot judge whether he can make a profit by them or carry out a contract which he may have entered into. Business could not be carried on on those terms.

H Again, with regard to the insurance of the goods, what underwriters would insure a voyage, nominally from one port to another, but which might be all round the world? It would be impossible ever to insure under such circumstances. To suppose, therefore, that the voyage is no part of the contract, is to disregard the whole course of mercantile business. The voyage is a very important part of the contract of carriage. The contract is not simply to carry from one place to another, but to carry from the one place to the other by the ordinary and usual course. That is one part, and a very important part, of the contract of carriage. If the ship is to go to other places besides the port of destination, that is provided for in the bill of lading, and that is put into the bill of lading as part of the contract of carriage. The bill of lading states that the goods are shipped on a named ship lying in the port of shipment and bound for the port of destination. That being the universal mode of describing the voyage in the bill of lading, what is the construction that has always been put on that form of words? That form has received one universal construction, both from merchants and courts of law, that is, the ordinary description of a voyage from one point to another on the ordinary sea track from the one place to the other on such a voyage. That course

may vary with the winds, or according to circumstances; the ordinary sea track is not a direct line that is always the same. It is the ordinary track of the voyage according to a reasonable construction of the term.

If that is the meaning of the bill of lading, how can the exception apply to the facts of the present case? The perils of a voyage from Rotterdam to Marseilles are not the same perils as the perils of a voyage from Liverpool to New York. This is a voyage from Fiume to Dunkirk by the ordinary sea track "with liberty to call at any ports in any order." It is argued that that means that there is liberty to call at any port in the world. Here, again, it is a question of what is the mercantile meaning of the words used. The meaning obviously is liberty to call at any ports on the voyage. The ship may call at those ports for any purpose; in that respect she is not confined at all. Moreover, the meaning must be that she is at liberty, not only to call, but to stop for a time; otherwise it would be useless to allow her to call. Without such a provision, to stop at a port, even though the ship is in her course, would be a deviation within the meaning of a policy of insurance. If a ship is allowed simply to call at any ports, that has been invariably held to mean in their geographical order; so a further power is given by adding the words "in any order." Those words give the power of going back to any port that has been passed. Therefore, the persons to whom the shipper gave this bill of lading would know that the ship was to go from Fiume to Dunkirk, calling at any ports substantially on the line of that voyage in any order. To go to any port beyond that line was to commit a deviation and a breach of contract. The defendants' ship went to Glasgow, a port not on the course of the voyage from Fiume to Dunkirk. Thereupon the exception in the bill of lading did not apply to relieve them. They have failed to deliver the goods at Dunkirk, and are not within any exception which excuses that failure. The principles which I have stated seem to me to be plain and business-like.

It is said that there is an American case (*Lowry v. Russell* (4)) in which it was held that, where the voyage is described in terms in the bill of lading, the shipowner may be allowed to show that the person to whom he gave the bill of lading knew that the ship was going on another voyage. If that was said at all, which I doubt, it was said in a case where it was not wanted for the decision, as there appears to have been proof of a custom to deviate. I am inclined to think that that case has been misreported. There are two other American cases (*The Delaware* (5) and *May v. Babcock* (6)) in which the principles are laid down exactly as they have always been on this subject in England. But I rest my judgment on what I think to be clear and recognised authority in the English courts.

FRY, L.J.—In my view, a very large portion of the argument which we have heard in this case is concluded by the provisions of the Bills of Lading Act, 1855. The plaintiffs entered into a contract with merchants abroad for the purchase of goods to be shipped from a foreign port. The substance of that contract was that the vendors were to deliver shipping documents to the purchasers, and that the purchasers were to pay the price in exchange for the documents. The Bills of Lading Act provides, by s. 1, that

"... every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such ... endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Those words appear to me to be applicable to the present case. The plaintiffs are endorsees of a bill of lading to whom the property in the goods therein mentioned has passed on or by reason of the endorsement. The legislature have

A declared that there is a contract in the bill of lading, and that the benefit of that contract is vested in the endorsees. It seems to me to be impossible in the face of that section for the court to say that a bill of lading contains no contract. The Master of the Rolls has referred to *Fraser v. Telegraph Construction Co.* (1), *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (2) and the language used by LORD SELBORNE in *Glyn, Mills & Co. v. East and West India Dock Co.* (3). The contract, therefore, is to be sought for in the terms of the bill of lading itself, and I cannot bring myself to think that such an important term as the description of the voyage is no part of the contract. The question, therefore, simply becomes one of the construction of this contract. The contract says:

C "Shipped in apparent good order and condition on the steamship *Austria*, now lying in the port of Fiume and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property."

It appears to me that the only right of deviation is that described in those words; a right to deviate for the purpose of calling at any ports in any order, and for the purpose of saving life and property. Is Glasgow, which is hundreds of miles out of the course from Fiume to Dunkirk, a port within that provision? The answer is that which the Master of the Rolls has given—viz., that it is not, and that the ports referred to are the ports on the course of the voyage. But it is said that it has been laid down in an American case (*Lowry v. Russell* (4)) that notice to the shipper of the route by which the ship is going to sail will rebut the implied term in the contract that it shall proceed to the port of destination by the direct route. In the first place, it is to be observed that this was a mere obiter dictum not necessary for the decision of the case. Apart from that, however, it is impossible to say that any effect can be given to a notice to the shipper of something affecting the contract, which contract can by statute be passed on to another person. The power to deviate contained in the written contract repels the possibility of the existence of any other power to deviate. And, lastly, I may say that I agree with the learned judge who tried the case, that the evidence falls short of showing that there was any misunderstanding between the shippers and the shipowners that the vessel was to go to Glasgow before going to Dunkirk. I do not think it necessary to rely on that, because, as I have said, where a statute has made the benefit of a contract assignable to a third party, it is inconsistent with the policy of the statute to allow anything which took place between the parties to the contract, but which is not embodied in it, to affect the contract. For these reasons, I think that the appeal should be dismissed.

H **LOPES, L.J.**—I can add nothing to the exhaustive judgment of the Master of the Rolls, except to say that I think that this bill of lading is clear and distinct, not only as to the place to which the goods were to be conveyed, but also as to the voyage; and, therefore, I think that the evidence which was given was inadmissible. The judgment of DENMAN, J., was right, and the appeal must be dismissed.

Appeal dismissed.

I Solicitors: *Stokes, Saunders & Stokes; Waltons, Bubb & Johnson.*

[Reported by ADAM H. BITTLESTON, ESQ., Barrister-at-Law.]

THE CITY OF LINCOLN

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.J.J., assisted by Nautical Assessors), December 10, 1889]

[Reported 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49;
38 W.R. 345; 6 Asp. M.L.C. 475]

Shipping—Collision—Damages—Consequential damage—Loss of equipment for navigation—Mistake as to position—Vessel running aground.

As a result of a collision between a barque and a steamer, for which the steamer admittedly was to blame, the barque's steering compass, log and log glass, and gear for rudder and wheel were lost. The captain of the barque, using a spare compass, made for a place of safety but, without any negligence or want of skill on the part of those in charge of the barque, but owing to the master mistaking his position, she ran aground and was abandoned.

Held: the grounding of the barque was the natural result result of the collision, and, therefore, the owners of the steamer were liable for the damages occasioned by it.

Notes. Considered: *The San Onofre*, [1922] All E.R. Rep. 720. Distinguished: *Singleton Abbey (Owners) v. Paludina (Owners)*, *The Paludina*, [1926] All E.R. Rep. 220. Applied: *Canadian Pacific Rail. Co. v. Kelvin Shipping Co.* (1927), 138 L.T. 369. Considered: *Lord v. Pacific Steam Navigation Co.*, *The Oropesa*, [1943] 1 All E.R. 211; *The Guildford, S.S. Temple Bar (Owners) v. M./V. Guildford (Owners)*, [1956] 2 All E.R. 915. Referred to: *Dulieu v. White & Sons*, [1900-3] All E.R. Rep. 353; *Grainton Steamship Owners v. Genua Steamship Owners, The Genua*, [1936] 2 All E.R. 798; *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68; *Reardon Smith Line, Ltd. v. Ministry of Agriculture*, [1961] 2 All E.R. 577.

As to negligence causing damage and division of damage or loss in proportion to fault in collisions between ships, see 35 HALSBURY'S LAWS (3rd Edn.) 687 et seq.; and for cases see 41 DIGEST 768 et seq.

Case referred to:

- (1) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 6 Asp. M.L.C. 348, C.A.; affirmed sub nom. *Gracie (Owners) v. Argentino (Owners)*, *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433, H.L.; 41 Digest 802, 6627.

Also referred to in argument:

The Pensher (1857), Sw. 211; 29 L.T.O.S. 12; 166 E.R. 1100; 41 Digest 770, 6255.
The Countess of Durham, 9 Monthly Law Magazine, 357.
The Notting Hill (1884), 9 P.D. 105; 51 L.T. 66; 5 Asp. M.L.C. 241; 41 Digest 808, 6696.

Hadley v. Bazendale (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Wilson v. Newport Dock Co. (1866), L.R. 1 Exch. 177; 4 H. & C. 232; 35 L.J.Ex. 97; 14 L.T. 230; 12 Jur.N.S. 233; 14 W.R. 558; 2 Mar.L.C. 313; 41 Digest 976, 8658.

Anderson v. Hoen, The Flying Fish (1865), 3 Moo. P.C.C.N.S. 77; Brown. & Lush. 436; 34 L.J.P.M. & A. 113; 12 L.T. 619; 2 Mar.L.C. 221; 16 E.R. 29; 41 Digest 769, 6241.

Jones v. Boyce (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, 101.

Adams v. Lancashire and Yorkshire Rail. Co. (1869), L.R. 4 C.P. 738; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 36 Digest (Repl.) 191, 1010.

A **Appeal** by the plaintiffs from a decision of BUTT, J., reversing the registrar's report.

On Nov. 7, 1888, a collision occurred between the plaintiffs' barque the *Albatross* and the defendants' steamship the *City of Lincoln*, as a result of which the starboard quarter of the *Albatross* was cut off, her steering compass, log, log glass and gear for rudder and wheel were damaged, and she was making a

B considerable quantity of water.

The defendants having admitted liability for the collision, the assessment of damages was referred to the registrar and merchants. At the reference the plaintiffs claimed (inter alia) for the loss of their barque subsequently to the collision, when she was making for a port of safety in a damaged condition.

C The registrar allowed this claim. His report was as follows:

"On Oct. 29, 1888, the Swedish barque *Albatross* of 483 tons left Sundswall for Cardiff with a cargo of battens, and with a crew of ten hands all told.

On Nov. 7, at about 6 p.m., the defendants' steamship *City of Lincoln* of 2103 tons, bound to Bremerhaven collided with her about twelve miles north of the North Hinder Light, cutting off her starboard quarter and doing other

D damage. The mate of the *City of Lincoln* came on board her and remained while the steamship proceeded on her voyage. With the view of saving the barque, she was taken, though difficult to manage, towards the English coast, and between 3 and 4 a.m. a lightship was discerned, which those

on board the barque, as well as the mate of the *City of Lincoln*, supposed to be the *Kentish Knock*, and thereupon, after sounding, the barque's course was altered to the north, and the vessel almost immediately grounded

E on what proved to be the Long Sand, and it became necessary for those on board to abandon the vessel, and to make for the lightship, which

turned out to be the *Tongue* lightship instead of the *Kentish Knock*. On the following morning they were landed at Gravesend, while the barque was found by salvors and taken into Harwich. Under these circumstances,

F which it is not necessary I should state more fully, counsel on both sides have requested me to report at this stage solely on the question whether the grounding of this vessel under the circumstances stated in the evidence

is to be considered as damages consequential on the collision, and for which the defendants, the owners of the wrong-doing ship, are liable. Having heard counsel on this point, I am of opinion, and the merchant assessor

G concurs in it, that the grounding of the barque was not due to any culpable negligence or want of skill of those on board her, and that the defendants are liable for all additional damages which may have resulted from

such grounding."

H BUTT, J., held that there had been negligence on the part of those in charge of the *Albatross*, and reversed the registrar's report.

Gorell Barnes, Q.C., H. Stokes and Stubbs for the plaintiffs.

Sir Walter Phillimore and J. P. Aspinall for the defendants.

I **LORD ESHER, M.R.**—In this case it seems to us, having carefully considered all the evidence, that the wrongful act of the defendants did not merely damage the barque, but had this further effect, that it deprived the captain of his best charts, of his best compass, and his best log line. It was very difficult for him to know where he was. In these circumstances, he resolved, and it is not contended wrongly, to make for the Thames. But he had to make for the Thames not exactly knowing his place of departure, without having the usual means of marking off his course on a proper chart, and without having the usual means of calculating his speed. We are advised by the gentlemen who assist us that, in those circumstances, he was not guilty

of any want of skill in not knowing whereabouts on the sea he was. It almost necessarily follows from that that he was not guilty of any want of skill in not knowing what the light was which he saw; i.e., in other words in concluding that the light was the *Kentish Knock* when, in fact, it was not. If that be true, then comes this question: If he was not wrong in assuming the light to be the *Kentish Knock*, did he, on that assumption, do anything which was wrong? Was he wrong in not going up close to the lightship to see its name, as it is suggested he ought to have done? It is the first time I ever heard such a suggestion advanced. Whether it may be right in some circumstances, although to me it seems a strange thing, is immaterial for the present purpose. In this case, his omission to do so was not a want of care and skill. Taking into account the various assumptions to which I have referred, there next comes the question whether the master of the barque was wrong, when he sounded and got five fathoms, to port his helm for the purpose, as he thought, of going round these sands? We are advised that he was not wrong in so doing. The result is that he was guilty of no want of ordinary care and skill, unless it is established that he ought to have sounded as the barque sailed along. Considering how and where the barque was sailing, I doubt whether, until she came near the lightship, her master could be said to be guilty of any want of care or skill in not sounding as she came along. There is this much to be said, that, if he had sounded it would have told him nothing. He did sound when he saw the light, and that was at a time when, assuming it to be the *Kentish Knock*, it was a proper thing to do.

On the whole, the result is that we have come to the conclusion, assisted by advice from our assessors, that the captain was not guilty of any want of care and skill. I do not think that the mere fact of a master being put into the position this master was by the wrongful act of the defendants, and his not acting negligently, necessarily concludes such a case as this, and makes the defendants liable for all the damage which occurred after their wrongful act. I agree that there may be intermediate circumstances which prevent the ultimate damage being regarded as the result of the wrongful act of the defendants so as to make them liable. But in this case it seems to me to be the inevitable conclusion that the ultimate loss of the ship was caused by her master being deprived of the means of calculating where he was, such deprivation being the direct result of the defendants' wrongful act. Where defendants do a wrongful act which deprives the plaintiff or those for whom he is responsible of the means of averting that which ultimately happens, I think that it follows, as a matter of course, that that which ultimately happens is the result solely of the wrongful act of the defendants. Therefore, without considering cases in which the damage may be too remote, I think that in this case it is clear that the ultimate damage is not too remote. Under those circumstances, I think that the registrar and merchants must assess the damages on the principle we have indicated. I do not think that any of the cases cited are contrary to what I have said.

LINDLEY, L.J.—I am of the same opinion. As regards the evidence of the officer from the *City of Lincoln*, who was on board the vessel, it is obvious that it is given with a view to minimise the loss to his owners. I think that the view of the facts taken by the registrar who saw the witnesses was correct, and, having regard to what LORD ESHER, M.R., has said, it will not be necessary for me to go over them again. We are advised that there was nothing negligent or unseamanlike in the conduct of the master of the *Albatross*. We cannot, therefore, accept the view that it was his negligence or want of skill which led to the ultimate loss of this ship. On that point we differ from BUTT, J. But that does not dispose of the case, because, assuming that there was no negligence on the part of the master of the *Albatross*, the question

A arises whether her ultimate loss is not too remote a consequence of the collision to render the defendants liable for it. That depends on the application to this particular case of the general rule applicable to damages, and for that I refer to *MAYNE ON DAMAGES* (4th Edn.). It is there stated (at p. 44):

B "Damage is said to be too remote, when, although arising out of the cause of action, it does not so immediately and necessarily follow from it as that the offending party can be made responsible for it."

Later on (at p. 45)

C "The first and in fact the only inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendants' act: it will assume this character, if it can be shown to be such a consequence as in the ordinary course of things would flow from the act."

That is a general method of stating the rule which, as I understand, was applied by LORD HERSCHELL in *The Argentino* (1), and, without criticising it, I take it to be sufficiently accurate for the purpose.

D What we have to consider is, what is meant by "the ordinary course of things." Counsel for the defendants has asked us to exclude from the "ordinary course of things" all human conduct. I cannot do anything of the kind. I take it that reasonable human conduct is part of the "ordinary course of things." So far as I can see, the ordinary course of things, so far from excluding human
E conduct, includes the reasonable conduct of those who, having sustained damage, seek to save themselves from further loss. Let us see what are the facts. What was the real cause of the mischief? It seems to me that it was the deprivation of the barque's master of the means of ascertaining his position and of properly navigating his ship. He was deprived of his compass, his logline and his charts, and his vessel was practically waterlogged. I do not say that the
F barque was utterly unmanageable, for she was, as we know, navigated a considerable distance, but, in any event, I do not think that her master was to blame for making the mistake he did. In these circumstances, it appears to me that this case is one of those in which the ultimate loss was within the rule which I have stated as to the "ordinary course of things," and that, therefore, the defendants must pay for the damages incidental to the stranding
G of the barque.

H **LOPES, L.J.**—We have been advised that, having regard to the condition of the *Albatross*, her loss was not caused by a want of proper care or skill on the part of those in charge of her. That being so, it appears to me that the case may be stated thus: By the misconduct of the defendants, the plaintiffs' ship was placed in a position of the utmost peril. The plaintiffs, to save their ship and minimise as far as possible the loss to the defendants, endeavoured to reach a place of safety. While so endeavouring, without any negligence on the part of those in charge of her or any want of skill, and without any intervening independent cause, the *Albatross* ran ashore.

I In those circumstances are the defendants liable for the stranding? In my opinion, they are. The original fault being the defendants', they are, broadly speaking, responsible for what follows. They are responsible for all the natural consequences occasioned by their original misconduct, and when I say original misconduct, I mean not only the collision but also the deprivation of the *Albatross* of the usual means of navigation. If those consequences were caused by any want of skill on the part of those in charge of the *Albatross*, no liability would attach to the defendants. If the consequential loss had been brought about by the independent act of a third party, no liability would attach. If the consequential loss had been caused by anything which those on board the

Albatross by the exercise of proper skill and care could have prevented, no liability would attach. But in this case, we are advised that there was no want of skill on the part of those on board the *Albatross*, and it is not suggested that there was any interposition or act of a third party. In these circumstances, I am clearly of opinion that what happened to the *Albatross* subsequently to the collision was the natural result of the wrongful act of the defendants, and I think, therefore, that the decision of the learned judge should be reversed.

Appeal allowed.

Solicitors : *Stokes, Saunders & Stokes; Hill, Dickinson, Dickinson & Hill.*

[Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.]

Re SUFFIELD AND WATTS. Ex parte BROWN AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), February 17, March 2, 1888]

[Reported 20 Q.B.D. 693; 58 L.T. 911; 36 W.R. 584;
5 Morr. 83]

Solicitor—Charging order—Priority—Landlord's claim for rent—No distraint.

Solicitor — Charging order — Variation — Order made under Solicitors Acts — Variation by judge in bankruptcy.

Judgment having been given in an action in the Chancery Division dissolving a partnership and appointing a receiver of the partnership assets, both the partners were adjudicated bankrupt. The action was transferred to the Queen's Bench Division in Bankruptcy, and the judge sitting in bankruptcy made an order under s. 28 of the Solicitors Act, 1860, charging the costs of the solicitor for the plaintiff in the action on moneys in the hands of the receiver. Prior to the order being made the landlord of the partnership premises had made a claim on the receiver for payment of rent, but the judge was not informed of this. On the application of the receiver, the judge later made an order directing the receiver to pay the rent due to the landlord and to pay the residue of the moneys in his hands to the solicitor.

Held: (i) since the landlord had not distrained, the solicitor's order took priority under s. 28 of the Solicitors Act, 1860; (ii) the charging order not having been made under the bankruptcy jurisdiction, the judge had no power to rescind or vary it under s. 104 of the Bankruptcy Act, 1883.

Notes. The Solicitors Act, 1860, s. 28, has been repealed. See now the Solicitors Act, 1957, s. 72. The Bankruptcy Act, 1883, s. 104, has been replaced by the Bankruptcy Act, 1914, s. 108.

Applied: *Cole v. Eley* (1894), 38 Sol. Jo. 533. Considered: *Re Wood, Ex parte Fanshawe*, [1897] 1 Q.B. 314; *Re Deakin, Ex parte Daniell*, [1900] 2 Q.B. 489. Applied: *Re Harrison's Share under a Settlement, Harrison v. Harrison, Re Williams' Will Trust, Williams v. Richardson, Re Ropner's Settlement Trust, Ropner v. Ropner*, [1954] 2 All E.R. 453. Referred to: *Re Crown Bank* (1890), 44 Ch.D. 634; *Preston Banking Co. v. William Allsup & Sons, Ltd.*, [1891-4] All E.R. Rep. 688; *Re Humphreys, Ex parte Lloyd George* (1898), 67 L.J.Q.B. 412; *Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 All E.R. 736.

A As to charging orders, see 36 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 42 DIGEST 290 et seq. For the Bankruptcy Act, 1914, s. 108, see 2 HALSBURY'S STATUTES (2nd Edn.) 418, and for the Solicitors Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116.

Cases referred to :

- B** (1) *Dallow v. Garrold, Ex parte Adams* (1884), 14 Q.B.D. 543; 54 L.J.Q.B. 76; 52 L.T. 240; 33 W.R. 219; 1T.L.R. 114, C.A.; 42 Digest 302, 3366.
 (2) *Shippey v. Grey* (1880), 49 L.J.Q.B. 524; 42 L.T. 673; 28 W.R. 877, C.A.; 42 Digest 302, 3365.
 (3) *Haymes v. Cooper, Cooper v. Jenkins* (1864), 33 Beav. 431; 3 New Rep. 627; 33 L.J.Ch. 488; 10 L.T. 87; 10 Jur.N.S. 303; 12 W.R. 539; 55 E.R. 435; 42 Digest 289, 3242.
C (4) *Re St. Nazaire Co.* (1879), 12 Ch.D. 88; 41 L.T. 110; 27 W.R. 854, C.A.; 16 Digest (Repl.) 200, 892.

Also referred to in argument :

- Pinkerton v. Easton* (1873), L.R. 16 Eq. 490; 29 L.T. 364; 21 W.R. 943; sub nom.
D *Pinkerton v. Easton, Re Pinkerton*, 42 L.J.Ch. 878, L.C.; 42 Digest 294, 3288.
Bulley v. Bulley (1878), 8 Ch.D. 479; 47 L.J.Ch. 841; 38 L.T. 401; 26 W.R. 638, C.A.; 42 Digest 292, 3271.
Greer v. Young (1883), 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224; 31 W.R. 930, C.A.; 42 Digest 291, 3267.
E *Faithfull v. Ewen* (1878), 7 Ch.D. 495; 47 L.J.Ch. 457; 37 L.T. 805; 26 W.R. 270, C.A.; 42 Digest 302, 3369.

Appeal by the solicitor from an order of CAVE, J., directing the receiver in an action of *Suffield v. Watts* to pay out of the money in his hands £49 6s. 6d. to the bankrupts' landlord.

The action of *Suffield v. Watts* was commenced in the Chancery Division for a dissolution of partnership between the plaintiff and the defendant, and for a receiver. Judgment was obtained dissolving the partnership and appointing Brown receiver of the partnership assets. In consequence of the bankruptcy of both partners, the action was subsequently transferred to the bankruptcy court and afterwards stayed. On April 6, 1887, an order was made by CAVE, J., sitting in Bankruptcy, that certain moneys in the hands of the receiver, amounting to £84, produced by the sale of goods on the partnership premises, should be paid by him to the solicitor for the plaintiff in the partnership action in respect of his taxed costs, which amounted to over £100. The attention of the court was not then called to the fact that, on Mar. 19, a claim had been made on the receiver by the landlord of the partnership premises for payment of rent. The receiver afterwards applied to the court for directions as to the application of the moneys in his hands as such receiver, the landlord being then represented. On Jan. 11, 1888, CAVE, J., made an order directing the receiver to pay £49 6s. 6d. to the landlord, and to pay the residue of the moneys in his hands to the solicitor towards the amount of his taxed costs, holding that a solicitor's lien extended only to the net, not the gross, proceeds recovered.

- H** *Dundas Gardiner* for the solicitors.
I *F. Cooper Willis* for the landlord.

LORD ESHER, M.R.—In this case, it is not denied that the solicitor has preserved property by his acts, and he is, therefore, entitled to a charging order for his costs on the property preserved under s. 28 of the Solicitors Act, 1860, if nothing stands in his way. The charging order must be under the Solicitors Act, for it is only by that Act that there is power to make such an order. The charging order was made by CAVE, J., sitting as judge of the Bankruptcy Court; but he was also sitting as a judge of the High Court, and, being a judge of the High Court, he

had power to make other orders besides orders in bankruptcy, and among such other orders, orders under the Solicitors Act. An application was made to him as a judge of the High Court to make this order under the Solicitors Act, and he did so; having done so, he had no jurisdiction to alter the order. It was not made under the jurisdiction given to him by the Bankruptcy Act, 1883, and, therefore, having made the order, he could not re-hear the application. Moreover, he was not asked to re-hear the application, and, even if he was asked to re-hear it, he did not do so. The receiver in the partnership suit asked the court for direction regarding what he was to do with money in his hands.

The difficulty with regard to which he sought directions was whether the money, which was partnership assets, was to be paid to the landlord of the partnership premises for rent in priority to the charge of the solicitor. That might have been a difficulty if it had not been already decided. But there is a succession of cases which decide that, until the fund has been paid over to someone, a solicitor who has a charging order on it has priority over everyone except a bona fide purchaser for value without notice. Is that the true construction of s. 28 of the Solicitors Act, 1860? In *Dallow v. Garrold* (1), it was held in terms to be so. In that case, I said (14 Q.B.D. at p. 546):

"I really think that the statute means what it says: it means a person, who has actually purchased without notice the 'property preserved or recovered,' and who has paid in money the price for it."

It is clear that the landlord has not done that. That case is a decision that a charging order in favour of a solicitor has priority over everyone except an actual purchaser for value as long as there is money in the hands of the holder of the fund charged which has not been paid away. That case adopted and approved of the previous decision in *Shippey v. Grey* (2), in which LORD BRAMWELL, BAGGALLAY, L.J., and myself had come to the same conclusion—viz., that a solicitor's charging order has priority over everyone except a bona fide purchaser, unless the fund charged has been properly paid away to someone. Therefore, on authority and on principle, the charging order has priority over the landlord unless he has put in a distress, in the same way as it would have priority over a judgment creditor unless he had put in an execution.

It was argued that this was an order made in bankruptcy, and that it could, therefore, be rescinded under s. 104 of the Bankruptcy Act, 1883. I have already said that this was not an order made in bankruptcy. It is true that CAVE, J., was sitting in Bankruptcy when he made the order, but he made it as a judge of the High Court. Section 104 (1) says:

"Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction,"

that is, any order which is made by virtue of the powers given by the Bankruptcy Act. This order was not made by virtue of the powers given by the Bankruptcy Act, and I cannot, therefore, agree with the decision of CAVE, J., rescinding it. Neither of the cases that I have referred to were cited before CAVE, J.

FRY, L.J.—I also am of opinion that this appeal should be allowed. [His LORDSHIP stated the facts, and continued:] The first question is, was it competent to the learned judge to make an order varying the order he had previously made? I am of opinion that it was not. When once an order has been drawn up, the jurisdiction of the judge of the High Court in that matter has come to an end. The charging order in this case having been drawn up, and not having been made under the Bankruptcy Act, 1883 (which gives a special power of reviewing orders made under that Act to the bankruptcy court) but under the Solicitors Act, 1860, CAVE, J., had no power to re-hear the application. It is

A further to be observed that the form of the second application was not that CAVE, J., should re-consider his former order, nor does the order on the second application purport to vary the former order.

B Then the second question is, was the order that CAVE, J., finally made substantially right? He has given priority to the landlord's claim for rent over the solicitor's charge. It is suggested that the landlord has priority because of his right of distress. As far as I understand, if he does not avail himself of that right he has no priority because of it. The words of s. 28 of the Solicitors Act, 1860, are :

C "In every case in which a solicitor shall be employed to prosecute or defend any suit or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit or proceeding has been heard, or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference to such suit or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void, and of no effect as against such charge or right."

F That I take to be a declaration that the charge is to have priority over the claims of every one, except a bona fide purchaser for value without notice. Subject to that, the solicitor's charge takes priority over every other claim. *Haymes v. Cooper* (3), *Shippey v. Grey* (2), and *Dallow v. Garrold* (1), are all of them cases which support the plain language of the Act. I, therefore, think that there was no valid reason for rescinding the charging order.

G **LOPES, L.J.**—The charging order was made by CAVE, J., as a judge of the High Court sitting in Bankruptcy, in April, 1887, and the first question is whether it is a subsisting and binding order. It is said that it is not, because the matter was re-heard, and the order varied by CAVE, J. I am of opinion that CAVE, J., had no jurisdiction to re-hear the matter. *Re St. Nazaire Co.* (4) shows clearly that a judge of the High Court has no jurisdiction to vary or discharge his order when once it has been drawn up and perfected. But, further, CAVE, J., was never asked by the receiver, to whom the charging order was directed, or by any other person, to vary that order. All that CAVE, J., did was to give some directions with regard to the payment of rent to the landlord out of the money in the receiver's hands. What, then, does the charging order bind, if it is a subsisting order? The authorities are clear that it binds all that is under the jurisdiction of the court of the fund charged in priority to every one, except a bona fide purchaser for value without notice. The landlord, in my opinion, cannot in any way be said to be a bona fide purchaser for value of this fund. Therefore, the solicitor who has the charging order takes priority, and this appeal must be allowed.

Appeal allowed.

Solicitors : *T. J. Pullen*, for *J. J. Wiggins*, Poplar; *Jennings & Sons*.

[*Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.*]

BRITISH MUTUAL BANKING CO., LTD. v. CHARNWOOD FOREST RAIL. CO.

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), February 17,
March 21, 1887]

[Reported 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 883;
52 J.P. 150; 35 W.R. 590; 3 T.L.R. 498]

*Agent—Principal—Liability for act of agent—Unauthorised fraud committed for
agent's benefit.*

A principal is not liable in an action of deceit for the unauthorised and
fraudulent act of his agent committed, not for the general or special benefit
of the principal, but for the agent's own benefit.

Notes. Distinguished: *Crapp v. East Stonehouse L.B.* (1889), 5 T.L.R. 501;
Bishop v. Balkis Consolidated Co. (1890), 25 Q.B.D. 512; *Tomkinson v. Balkis
Consolidated Co.* (1891), 60 L.J.Q.B. 558. Followed: *Thorne v. Heard*, [1894]
1 Ch. 599. Distinguished: *Spooner v. Browing, Todd and Whish* (1897), 77
L.T. 685; *Trott v. National Discount Co.* (1900), 17 T.L.R. 37. Considered and
Applied: *Hambro v. Burnand*, [1903] 2 K.B. 399. Considered and Distinguished:
Ruben and Ladenburg v. Great Fingall Consolidated, [1904] 1 K.B. 650. Applied:
Anglo-American Oil Co. v. Manning, [1908] 1 K.B. 536. Considered: *Lloyd v.
Grace, Smith & Co.*, [1911-13] All E.R. Rep. 51; *Algar v. Middlesex
County Council*, [1945] 2 All E.R. 243. Referred to: *Hambro v. Burnand* (1904),
9 Com. Cas. 251; *Whitechurch v. Cavanagh*, [1902] A.C. 117; *Malcolm, Bruncker
& Co. v. Waterhouse* (1908), 24 T.L.R. 854; *Re Jubilee Cotton Mills*, [1923]
1 Ch. 1; *Uxbridge Permanent Benefit Building Society v. Pickard*, [1939] 2 K.B.
248.

As to liability of principal for wrongful acts of agents, see 1 HALSBURY'S LAWS
(3rd Edn.) 222 et seq.; and for cases see 1 DIGEST (Repl.) 681 et seq.

Cases referred to:

- (1) *Swift v. Winterbotham and Goddard* (1873), L.R. 8 Q.B. 244; 42 L.J.Q.B.
111; 28 L.T. 339; 21 W.R. 562; reversed sub nom. *Swift v. Jewsbury
(Jewesbury) and Goddard* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30
L.T. 31; 22 W.R. 319, Ex. Ch.; 1 Digest (Repl.) 321, 89.
- (2) *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex.
147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, 2425.
- (3) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T.
194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, 1631.
- (4) *Mackay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394;
43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest
(Repl.) 682, 2428.
- (5) *Limpus v. London General Omnibus Co., Ltd.* (1862), 1 H. & C. 526; 32
L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 9 Jur.N.S. 333; 11 W.R. 149; 158
E.R. 993, Ex. Ch.; 1 Digest (Repl.) 690, 2469.

Also referred to in argument:

- Croft v. Alison* (1821), 4 B. & Ald. 590; 106 E.R. 1052; 1 Digest (Repl.) 696,
2500.
- Ward v. General Omnibus Co.* (1873), 42 L.J.C.P. 265; 28 L.T. 850, Ex. Ch.;
8 Digest (Repl.) 100, 666.
- Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867),
L.R. 1 Sc. & Div. 145; 1 Digest (Repl.) 686, 2453.
- McGowan & Co. v. Dyer* (1873), L.R. 8 Q.B. 141; 21 W.R. 560; 9 Digest
(Repl.) 666, 4411.

A **Appeal** by the defendants from the decision of MANISTY and MATHEW, JJ., on the plaintiffs' motion for judgment.

The action was brought to recover damages for fraudulent misrepresentation by the defendants' secretary. At the trial before LORD COLERIDGE, C.J., with a jury, it appeared from the evidence that Tremayne, the defendants' secretary, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the defendants were authorised to issue. The plaintiffs' manager called on Tremayne, and made inquiries of him with reference to certain transfers of a part of the stock so issued, on which the plaintiffs had been asked to advance money. Tremayne said, in effect, that the transfers were valid, and that the stock which they purported to transfer existed. This statement did not benefit the defendants in any way, and was made solely in the interest of Tremayne and Maddison. Acting on it, the plaintiffs advanced the money and lost it. The jury found that the inquiries were made of Tremayne as secretary, and that the defendants held him out as such to answer such inquiries. The Chief Justice left either of the parties to move for judgment, and the Queen's Bench Division directed judgment to be entered for the plaintiffs.

D *Finlay, Q.C.*, and *H. Sutton* for the defendants.
W. Graham and *Edward Morten* for the plaintiffs.

Cur. adv. vult.

Mar. 21, 1887. **LORD ESHER, M.R.**—In this case, an action has been brought by the plaintiffs to recover damages for a fraudulent misrepresentation of the defendants by their secretary, the defendants being a corporation. It cannot be doubted that the misrepresentation was a fraudulent one—that is to say, that the secretary knew at the time he made it that it was false. I think that the case was not clearly argued before the Divisional Court. The point argued there seems to have been that the fact that the defendants were a corporation was a fatal defect in the plaintiffs' case. It seems to me that there was a defect in the plaintiffs' case equally fatal whether the defendants were a corporation or not. One of the purposes **F** for which the secretary was appointed was to answer questions on behalf of the defendants. If he had answered such questions falsely and fraudulently, I think that the defendants would have been liable. But he did not make the representation on their behalf; he made it for himself, having a friend whom he wished to help. If he was acting solely for himself or to assist his friend he was not acting for the defendants. The defendants would not have told a falsehood for the purpose of assisting their secretary or his friend. The secretary did that which the defendants would certainly not have done if they had been there. It is said that, if he was acting for their benefit, although the particular act was not for their benefit, they are bound by it. I know of no case where a master has been made liable for the fraud or negligence of his servant, where the purpose of such fraud or negligence is not the master's but solely the servant's own. The argument in the **H** court below was founded on the defendants being a corporation; but the principle which I have stated is equally applicable to individuals and to corporations. The appeal must be allowed.

BOWEN, L.J., read the following judgment.—There is, so far as I am aware, no precedent in English law, unless it be *Swift v. Winterbotham and Goddard* (1), a case that was overruled on appeal sub nom. *Swift v. Jewsbury and Goddard* (1), for holding that a principal is liable in an action of deceit for the unauthorised and fraudulent act of a servant or agent, committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of WILLES, J., delivered in *Barwick v. English Joint Stock Bank* (2) (L.R. 2 Exch. at p. 265):

I "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by LORD SELBORNE in the House of Lords, in *Houldsworth v. City of Glasgow Bank* (3). *Mackay v. Commercial Bank of New Brunswick* (4) is consistent with this principle. It is a definition strictly in accordance with the ruling of MARTIN, B., in *Limpus v. London General Omnibus Co.* (5), which was upheld in the Exchequer Chamber: see per BLACKBURN, J.

It was argued on behalf of the plaintiffs in the present appeal, that the defendants, although they might not have authorised the fraudulent answer given by the secretary, had, nevertheless, authorised the secretary to do "that class of acts" of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of an expression which, in *Barwick v. English Joint Stock Bank* (2), was perfectly appropriate with regard to the circumstances there. In that case, the act done, though not expressly authorised, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of "that class." Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of "that class" begs the very question at issue, for the defendants' proposition is, on the contrary, that an act done, not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorised to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation, unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case, the defendants could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?

The action against them, therefore, to be maintainable at all, must be an action of tort, founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorised him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not have been within it, for the defendants had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the defendants be made responsible for an agent's act done beyond the scope of his employment, and from which they derived no benefit? This shows that the proposition that the secretary in the present case was employed to do that "class of acts" is fallacious, and cannot be maintained. The judgment of the court below is based on the view that the act done was, in fact, within the scope of the secretary's employment, and, if this proposition cannot be maintained, the judgment must fall with it. How far a statutory corporate body could in any case be made liable in an action for deceit beyond the extent of the benefits which they have reaped by the fraud is a matter on which I desire to express no opinion, for none is necessary to the decision here; but even if the principals in the present case were not a statutory body, with limited powers of contracting and of action, I think that there would be danger in departing from the definition of liability laid down by WILLES, J., in *Barwick v. English Joint Stock Bank* (2), and in extending the responsibility of a principal for the frauds committed by a servant or agent beyond the boundaries hitherto recognised by English law.

I think, therefore, that this appeal must be allowed, with costs.

FRY, L.J.—I am entirely of the same opinion. I agree with the judgment which has just been delivered. It appears to me that the misrepresentations of

A the secretary, which are relied on in this case, were made in the interest of his friend, and not in the interest of the defendants. The defendants cannot be estopped from saying that the secretary had no authority to make these representations. If there was any ground of estoppel in this case, the effect would be that the defendants would be estopped from denying that the stock was good.

B But no corporate body can be bound by estoppel to do something beyond their corporate powers, such as issuing stock beyond the authorised limit. If there is no estoppel, it certainly cannot be said that the secretary had, in fact, authority to make these representations. Nor can it be put on any ground of ratification by the defendants, as it perhaps might have been if the defendants had accepted benefits that accrued to them owing to the representations. I am unable, therefore, to

C see any ground for maintaining this action, and the appeal must be allowed.

Appeal allowed.

Solicitors: *J. White; G. H. K. & G. A. Fisher.*

[*Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.*]

D

E ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH

[CHANCERY DIVISION (Kekewich, J.), January 15, 17, 1887]

[*Reported 35 Ch.D. 390; 56 L.J.Ch. 840; 57 L.T. 179*]

F *Sale of Land—Contract—Breach—Person in unlawful occupation—Right of purchaser to eviction by sheriff.*

Sale of Land—Contract—Breach—Damages—Measure—Right of purchaser to compensation for loss of profit.

Sale of Land—Contract—Position pending completion—Vendor's duty to take reasonable care of property.

G A purchaser agreed to buy two houses, vacant possession of which was to be given on completion. When the day fixed for completion arrived, the houses were occupied by someone who was holding over. He was evicted by the sheriff a month later, but, as a result of the delay, the purchaser lost a tenant to whom he had agreed to let one of the houses. The vendors had failed to take reasonable care of the property since the agreement. The purchaser having refused to complete, in an action for specific performance brought against him

H by the vendor, he counterclaimed for specific performance, with compensation for the rent he had lost and damages for the injury to the property.

I **Held:** (i) although the purchaser could have had the person in occupation evicted by the sheriff, the vendor was in breach of his obligation to give vacant possession on completion; (ii) where damages in respect of delay caused by one party's refusal to perform the contract were claimed in addition to specific performance, the other party might recover in respect of loss of profit, damages naturally arising from the delay, or which might be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach, and, therefore, the purchaser was entitled to compensation for the rent lost; (iii) the vendors were trustees of the property for the purchaser from the date of the contract and ought to have taken reasonable care of the property, and, therefore, they were liable for the injury which had happened to it.

Bain v. Fothergill (1) (1874), L.R. 7 H.L. 158, distinguished.

Notes. Distinguished: *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546. **A**
 Referred to: *Clarke v. Ramuz*, [1891-4] All E.R. Rep. 502; *Jones v. Gardiner*,
 [1902] 1 Ch. 191; *Cumberland Consolidated Holdings, Ltd. v. Ireland*, [1946]
 1 All E.R. 284; *Phillips v. Lamdin*, [1949] 1 All E.R. 770.

As to a vendor's duty to preserve property, see 34 HALSBURY'S LAWS (3rd Edn.)
 293-294; as to damages for breach of a contract for the sale of land, see *ibid.*
 333-338; as to vacant possession on completion, see *ibid.* 259. For cases see 40 **B**
 DIGEST (Repl.) 200.

Cases referred to:

- (1) *Bain v. Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387;
 39 J.P. 228; 23 W.R. 261, H.L.; 17 Digest (Repl.) 104, 188.
- (2) *Hughes v. Jones* (1861), 3 De G.F. & J. 307; 31 L.J.Ch. 83; 5 L.T. 408; **C**
 8 Jur.N.S. 399; 10 W.R. 139; 45 E.R. 897, L.J.J.; 40 Digest (Repl.) 135,
 1043.
- (3) *Phelps v. Prothero*, *Prothero v. Phelps* (1855), 7 De G.M. & G. 722; 25
 L.J.Ch. 105; 26 L.T.O.S. 231; 2 Jur.N.S. 173; 4 W.R. 189; 44 E.R. 280,
 L.J.J.; 21 Digest (Repl.) 252, 344.
- (4) *Jaques v. Millar* (1877), 6 Ch.D. 153; 37 L.T. 151; 25 W.R. 846; sub nom. **D**
Jacques v. Millar, 42 J.P. 20; 42 Digest 567, 1327.
- (5) *Foster v. Deacon* (1818), 3 Madd. 394; 56 E.R. 550; 40 Digest (Repl.) 201,
 1625.
- (6) *Phillips v. Silvester* (1872), 8 Ch.D. 173; 42 L.J.Ch. 225; 27 L.T. 840; 21
 W.R. 179, L.C.; 40 Digest (Repl.) 197, 1595.
- (7) *Earl of Egmont v. Smith*, *Smith v. Earl of Egmont* (1877), 6 Ch.D. 469; **E**
 46 L.J.Ch. 356; 40 Digest (Repl.) 197, 1600.

Also referred to in argument:

Engel (Engell) v. Fitch (1868), L.R. 3 Q.B. 314; 9 B. & S. 85; 37 L.J.Q.B.
 145; 18 L.T. 318; 16 W.R. 785; affirmed (1869), L.R. 4 Q.B. 659; 10
 B. & S. 738; 38 L.J.Q.B. 304; 17 W.R. 894, Ex. Ch.; 40 Digest (Repl.)
 285, 2369. **F**

Action in which the plaintiffs, the Royal Bristol Permanent Building Society,
 claimed specific performance by the defendant, T. S. Bomash, of an agreement by
 him to purchase from them certain property, and a **Counterclaim** by the defendant
 for specific performance of the agreement, damages for not having been given
 possession on the date fixed for completion, and damages for deterioration of **G**
 the property since the agreement was entered into.

The plaintiffs were the mortgagees from Mr. W. Fleming of two leasehold houses
 at Penarth, Glamorganshire. On Oct. 14, 1885, the houses were put up
 for sale by the plaintiffs under the power of sale contained in their mortgage,
 and were bought by the defendant, Mr. T. S. Bomash, for £650, subject to con-
 ditions of sale. The defendant signed the usual memorandum of agreement, and **H**
 paid a deposit of £65. By the particulars of sale it was stated that the property
 was "recently in the occupation of Mr. William Fleming." The day fixed by the
 conditions for the completion of the purchase was Nov. 11, 1885. By the 15th
 condition it was provided that as from the day fixed for completion the rents
 or possession should belong to the purchaser, but, unless otherwise provided by
 the special conditions, he should not be let into the actual possession or receipt of **I**
 the rents until the completion of the purchase. By condition 16 it was provided
 that if the purchaser should not complete at the time appointed he should pay
 interest on the remainder of the purchase money until the same should be paid;
 or the vendors might, at their option, take the rents or retain possession of the
 property; but that, if the delay in completion should arise from any cause other
 than the neglect or default of the purchaser, and he should place the remainder of
 the purchase money in the bank named in the conditions upon a deposit account
 bearing interest and give notice to the vendors, they should, during the continuance

- A of such deposit, be entitled to such interest only as should be produced thereby, and should not be entitled to take the rents. On Nov. 28, 1885, the defendant deposited £585, the balance of the purchase money, in the bank named in the conditions, and gave notice of such deposit to the vendors. Fleming was in occupation of the houses at the date of the agreement for sale, and was not removed until Dec. 15, 1885, after an action of ejectment against him by the
- B plaintiffs. Possession was not offered to the defendant until Dec. 12, 1885. The defendant having refused to complete until the plaintiffs performed their part of the agreement by giving him possession, the plaintiffs instituted this action on Dec. 17, 1885, and claimed specific performance of the agreement of Oct. 14, 1885, and damages. The defendant relied upon the misdescription in the
- C particulars as to the occupation as implying that there was vacant possession, and asserted that he had bought with a view of immediate letting, and had lost a tenant for a term of fourteen years at £85, and had otherwise suffered damage from the plaintiffs having failed to give him possession. He, therefore, counterclaimed for specific performance of the agreement, and for damages for the failure of the plaintiffs to give him possession on Nov. 11, or, at any rate, Nov. 28, 1885.
- D *E. Ford* for the plaintiffs.
Vernon Smith for the defendant.

KEKEWICH, J.—I have now to dispose of two questions which depend more or less on the main question who is in default.

- E The first question is as to the possession. I have no doubt, quite independently of *Hughes v. Jones* (2), that this contract was a contract for the sale of these houses, with vacant possession. I have no doubt that this contract contains what I may describe as a guarantee that, on completion of the purchase, the purchaser would be let into possession. That being so, and it being admitted on all hands that he could not have possession at the date fixed for the completion of the
- F contract, and could not have had possession until either Dec. 15 or 16, the question is, whether the purchaser or the vendors were in default, and whether, if the vendors were in default, the purchaser is entitled to any and what compensation.

- Counsel for the plaintiffs has argued with considerable force that the sheriff could have given possession and would have given possession to the purchaser on a day which would have satisfied all the reasonable requirements of the purchaser. I do not think that a purchaser having a contract to sell, with vacant possession, is bound to take possession from the sheriff when he knows, as he did know in this case, that the man to be evicted, the man who had been holding over, was still on the premises, and would have to be turned out by force. I think the purchaser is, under those circumstances, entitled to say: "Exercise your
- H rights; first turn the man out; then give me vacant possession." Therefore, I think the vendors were in fault; that they had contracted to give vacant possession; that they were not prepared to give vacant possession; that they were not prepared to give vacant possession at the time when the contract ought to have been completed; and that in fact the purchaser could not have got within a reasonable time that vacant possession for which he had contracted; and to
- I that extent he has obtained something less than that which he contracted to buy.

The question is whether he is entitled to be compensated for that. On Nov. 2, 1885—that is, before the date fixed for the completion—he entered into an agreement with a Mr. Wilson to let him these houses for a term of fourteen years at the yearly rent of £85, and that was to be completed on Nov. 16, 1885. The day of completion of the original contract having been the 11th there was five days' margin. As a matter of fact, Mr. Wilson's contract went off. He wanted vacant possession; he could not get vacant possession; and on some

day not accurately fixed, but varying, I think, from Nov. 16 to 23, 1885, he threw up his bargain as he was entitled to do. He was cross-examined to show that he was willing to stay on. I dare say he was. The premises seemed suitable to him. He does not seem to say that it was too much rent to pay, and it may be, after all, he will take them; but was the purchaser bound to urge him to wait, and can we say now that Mr. Wilson was not reasonable in throwing them up? At that time there was no proof that Mr. Fleming would be turned out at any particular day. He was still in possession, and was apparently not intending to go out, and I do not think Mr. Wilson acted otherwise than prudently in throwing up a bargain of that kind, nor that the purchaser acted otherwise than prudently in acquiescing, and saying: "I cannot help it. I am not prepared to give you the possession which I bargained for, and I must part with you." Therefore, the defendant suffered some reasonable loss. I think he might fairly presume that the vendors would do their duty and get rid of Fleming, so as to complete the contract, say by Dec. 3; and I do not think it was an unreasonable contract for him to enter into. He did enter into it, and lost it; and he claims to be compensated for that loss.

This question deals with a branch of law which is very difficult, and for the reason that there is certainly a distinction between compensation and damages. It has always been held that a purchaser may, if he likes, take specific performance with compensation, though a vendor cannot force it upon him; but where what he wants is strictly damages, such as were claimed in *Bain v. Fothergill* (1)—damages for the loss of a bargain where the title has failed—then it has been held that he cannot get those damages. The question here is, not whether this is compensation or damages, because the distinction is not sufficiently defined for that, but whether it is damages in the nature of compensation or not. In *FRY ON SPECIFIC PERFORMANCE* (2nd Edn.), p. 550, the distinction is drawn, and reference is made to *Protheroe v. Phelps* (3), in which damages were given in the nature of compensation. I hold the distinction applicable here, and, giving the purchaser damages in the nature of compensation, I must consider what is the proper measure of damages. There, again, I am assisted by *Jaques v. Millar* (4). *Fry, J.*, says in his judgment (6 Ch.D. at p. 159):

"The question of damages is a more difficult one. Damages are claimed in addition to the specific performance of the agreement, in respect of the delay which was caused by the defendant's wilful refusal [here it is the plaintiffs' refusal, though there is no wilful refusal on their part, and I do not impute it to them] to perform his contract, and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between Sept. 5, 1876, and the time when he actually obtained possession of other premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract."

I hold this case to fall, not within *Bain v. Fothergill* (1), which seems to me to deal with a different class of circumstances altogether, but to fall within a class of cases which is illustrated by *Jaques v. Millar* (4), and I must give the defendant damages calculated on some such principle as *Fry, J.*, indicated. I think that the proper way of doing that is simply to take the rent which he would have received under that contract, against which there is nothing to set off. That seems to me to be the reasonable way of dealing with the case. I take it at a year and three months roughly, and I shall award the defendant £110 damages by way of compensation for not having obtained that vacant possession, which I think he was entitled to under the contract.

A There is one other question, and that is the question of deterioration of the premises after the date of the contract. I have to consider what was the duty of the vendors. The duty of the vendor was considered in *Foster v. Deacon* (5), which was cited to me on behalf of the defendant; but I prefer to turn to the later case of *Phillips v. Silvester* (6). There LORD SELBORNE in substance says that the vendor under a contract of sale of real estate is a trustee for the purchaser. Of course we all know that he is a trustee in a modified sense. There are many things to be done before he becomes a mere trustee; but still LORD SELBORNE says he is a trustee, and I have no doubt that that is the right position, and I so decide. He deals with the question on p. 177 of 8 Ch.D. I will not read his language at length; but it comes to this: that a vendor having property under his control, and in his possession, which he has contracted to sell, is bound to keep it in a reasonable state of repair, so that a purchaser may take the thing which he has contracted to buy, unless there are some special circumstances which alter that obligation. He suggests the possibility of a case where the expenses of repair might be greater than those which the property would bear; and cases of that kind might of course occur. But the general nature of the case is what I have stated. I was referred to DART ON VENDORS AND PURCHASERS (5th Edn.), p. 650, in which comments are made on *Phillips v. Silvester* (6) as with the authority of SIR GEORGE JESSEL, M.R., who decided the case on further consideration. That makes me regret still more that the case was not reported on further consideration. I must take *Phillips v. Silvester* (6) as laying down the law, unless in the remarks made upon it (which I may take to be SIR GEORGE JESSEL's remarks) I can see established some exception to the general rule, as laid down by LORD SELBORNE. I do not find any such exception, and, on turning to *Earl of Egmont v. Smith* (7), I find SIR GEORGE JESSEL, M.R., himself stating the obligation of the vendor precisely in the language which was used by LORD SELBORNE. He says that it is the duty of the vendor to re-let the farm which he had sold to the purchaser, as to which he says (6 Ch.D. at p. 475): "I have no doubt whatever." But I rely on this passage F (ibid.):

"He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee."

G Therefore, I regard the vendors in this case as trustees for the purchaser from the date of the contract. I think they ought to have taken that reasonable care of the property which would have prevented it from being damaged by Fleming in the exercise of his legal rights, or by anyone who removed the fixtures, or by vagrants or other persons coming in, or by people who broke windows, or anything of the kind. I think they ought to have kept it in a reasonable state of repair, and the evidence proves conclusively that they have done nothing of the kind. H The place is much dilapidated. It is difficult to say how much would put it in repair, because the evidence on that point has been mixed up with that as to the removal of the fixtures; but I think it right and fair under the circumstances to award £25 under that head.

I There will be judgment on the claim, and counterclaim for specific performance, and for the payment by the defendant to the plaintiffs of the purchase money with interest until the agreed day when the money was deposited in the bank, with the following deductions: £1 for damage to the garden; £110 as compensation for the want of vacant possession; and £25 for the damage to the property since the date of the contract. The plaintiffs must pay the general costs of the action.

Solicitors: Mead & Daubeney for Fox & Whittuck, Bristol; Smiles, Binyon & Ollard for T. H. Belcher, Cardiff.

[Reported by G. MACAN, Esq., Barrister-at-Law.]

BARTON v. NORTH STAFFORDSHIRE RAIL. CO.

[CHANCERY DIVISION (Kay, J.), March 5, 6, 7, 8, 15, 1888]

[Reported 38 Ch.D. 458; 57 L.J.Ch. 800; 58 L.T. 549;
36 W.R. 754; 4 T.L.R. 403]

Company—Shares—Transfer—Forged transfer—Joint holders—Co-executors—Transfer by one executor—Signature of other executor forged—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16), s. 20.

Limitation of Action—Company—Invalid transfer of shares—Subsequent discovery of fraud—Accrual of cause of action.

Executor—Powers—Co-executors—Shares—Sale by one executor—Signature of other executor forged—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16), s. 20.

Under the will of a testator, who died in 1870, railway stock was vested in his executors, T. B. (his son) and A. B. (his widow), upon certain trusts. At various times during the years 1880 to 1885 T. B., without the knowledge of A. B., entered into contracts for sale of the stock, and signed and executed transfers thereof to the several purchasers, forging the signature of A. B. to such transfers, so that they appeared to be signed and executed by her. These transfers were duly registered by the railway company, and the proceeds of sale were received by T. B. and applied by him to his own purposes, but he continued to pay the amount of the dividends to the persons entitled. A. B. remained ignorant of the forgeries until May, 1886, when she discovered them. She then wrote to the secretary of the railway company asking whether any stock was standing in the names of herself and T. B., and a deed was executed appointing a new trustee of the will in the place of T. B. In August, 1886, A. B. and the new trustee informed the company that the transfers resulting from T. B.'s transactions were invalid, and claimed to be registered as holders of the stock. The company declined to accede to the claim, and in December, 1886, A. B. and the new trustee brought an action, alleging that the transfers were invalid, and claiming that the company might be ordered to register the plaintiffs as owners of the stock. The action was brought more than six years after some of the transfers were executed and registered, and, as to the stock comprised in such transfers, the defendants sought to raise by amendment the defence of the Statute of Limitations. They also contended (among other grounds of defence) that T. B., being one of the two executors, had power to transfer the stock, and that the transfers were, therefore, valid.

Held: (i) the cause of action was not the invalid transfer of the shares in question, but the refusal of the company, when the forgery was made known to them, to treat the plaintiffs as shareholders, and, therefore, the action was not statute-barred; (ii) the transfers were invalid, since, whatever the powers of the executors as to other property vested in them in that character, one co-executor had no power alone to transfer stock or shares governed by the Companies Clauses Consolidation Act, 1845, which were in the joint names of the executors; (iii) in equity, A. B. had sufficient interest to enable her to sue; (iv) whatever remedies the company might have against T. B., they could not, at the suit of A. B., deny that the stock had not been validly transferred; (v) the fact that the purchase money had been paid to T. B., one of the co-executors, did not give rise to any counterclaim by the company against the testator's estate; and, therefore, the plaintiffs were entitled to be registered as the owners of the shares.

A Per CURIAM : If A. B. had signed a transfer, supposing it to be a document of some other kind, her signature would in law be as complete a nullity as a forged signature.

Notes. Followed : *Barton v. London and North Western Rail. Co., Same v. Scinde, Punjab and Delhi Rail. Co.* (1889), 5 T.L.R. 644. Considered : *The Pongola* (1895), 73 L.T. 518; *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559. Applied : *Welch v. Bank of England*, [1955] 1 All E.R. 811. Referred to : *Bank of England v. Cutler*, [1908] 2 K.B. 208.

B As to trusts affecting shares, see 6 HALSBURY'S LAWS (3rd Edn.) 27; as to transmission of shares, see *ibid.* 37-38; as to forged transfers, see *ibid.* 261-262; as to joint personal representatives, see 16 HALSBURY'S LAWS (3rd Edn.) 282; as to accrual of a cause of action, see 24 HALSBURY'S LAWS (3rd Edn.) 193-197. For cases see 10 DIGEST (Repl.) 1233-1235. For the Companies Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 288, 289.

C Cases referred to :

- D** (1) *Knox v. Gye* (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234; 32 Digest 511, 1702.
 (2) *Davis v. Bank of England* (1824), 2 Bing. 393; 9 Moore, C.P. 747; 3 L.J.O.S.C.P. 4; 130 E.R. 357; reversed sub nom. *Bank of England v. Davis* (1826), 5 B. & C. 185; 7 Dow. & Ry. K.B. 828; 4 L.J.O.S.K.B. 145; 3 Digest (Repl.) 131, 22.
 (3) *Coles v. Bank of England* (1839), 10 Ad. & El. 487; 2 Per. & Dav. 521; 9 L.J.Q.B. 36; 4 Jur. 266; 113 E.R. 166; 3 Digest (Repl.) 133, 30.
E (4) *Sloman v. Bank of England* (1845), 14 Sim. 475; 14 L.J.Ch. 226; 5 L.T.O.S. 326; 9 Jur. 243; 60 E.R. 442; 3 Digest (Repl.) 132, 26.
 (5) *Taylor v. Midland Rail. Co.* (1860), 28 Beav. 287; 29 L.J.Ch. 731; 2 L.T. 558; 6 Jur.N.S. 595; 8 W.R. 401; affirmed sub nom. *Midland Rail. Co. v. Taylor* (1862), 8 H.L. Cas. 751; 31 L.J.Ch. 336; 6 L.T. 73; 8 Jur.N.S. 419; 10 W.R. 382; 11 E.R. 624, H.L.; 10 Digest (Repl.) 1233, 8676.

F Also referred to in argument :

- Charlton v. Earl of Durham* (1869), 4 Ch. App. 433; 38 L.J.Ch. 183; 20 L.T. 467; 17 W.R. 995, L.C.; 24 Digest (Repl.) 667, 6556.
Re Tanqueray-Willauve and Landau (1882), 20 Ch.D. 465; 51 L.J.Ch. 434; 46 L.T. 542; 30 W.R. 801, C.A.; 24 Digest (Repl.) 639, 6303.
G *Re Whistler* (1887), 35 Ch.D. 561; 56 L.J.Ch. 827; 57 L.T. 77; 51 J.P. 820; 35 W.R. 662; 24 Digest (Repl.) 628, 6230.

H **Action** by the plaintiffs, Ann Barton and Elizabeth Ashe, the then trustees of the will of Samuel Barton deceased, claiming that the defendant company might be ordered to appropriate or purchase and to transfer to and register in the names of the plaintiffs £5,000 consolidated stock, and £1,090 preference stock of the company. Purchasers of the stock were joined as third parties, but an order was made directing that the question of their liability should be determined at a future time.

I On Jan. 2, 1870, Samuel Barton died, having by his will appointed his son, Thomas Barton, and his widow, the plaintiff, Ann Barton, trustees and executors, and having made bequests under which £3,000 ordinary stock of the North Staffordshire Rail. Co. was held upon certain trusts for the benefit of his three daughters, sisters of Thomas Barton, and their respective children, and £1,090 preference stock of the same railway company upon trust for his widow, Ann Barton, who was his third wife and not the mother of Thomas Barton, and his two daughters by her, now Mrs. Dyer and Mrs. Rogers. Thomas Barton and Ann Barton both proved the will. After the testator's death they invested a portion of his estate in the purchase of a further sum of £2,000 ordinary stock of the same railway company upon trust for the widow and her two daughters. The probate of the will was produced to the railway company, and all the stock was registered in the

names of the two executors, the address of both being given as Parvey Cottage, near Macclesfield, which was the family residence at the testator's death, so that any notice as to the stock would be sent to them there. Other part of the testator's estate was invested in stock of the London and North-Western Rail. Co., which was also, I understand, registered in the names of both executors in like manner.

For a short time after the testator's death Thomas Barton and Ann Barton and her daughters continued to live together at Parvey Cottage, but in June, 1870, the widow and her daughters removed to Willow Cottage, another house belonging to the testator, about two hundred yards distant. Thomas Barton, who was a married man and was engaged with his brother George in a business of silk manufacturers in Macclesfield, continued to live with his family at Parvey Cottage. In 1875 one of Mrs. Barton's daughters, Mrs. Dyer, married and left Willow Cottage. She attained twenty-one in 1877. The other daughter, Mrs. Rogers, lived with her mother till July 5, 1883, when she also married. Down to the year 1872 the widow was accustomed to sign the dividend warrants on the railway stock. In August of that year she seems to have gone away for a fortnight's visit to Southport, and after that time she alleges that these warrants were no longer signed by her, though they seemed to have been signed with her name as well as that of Thomas Barton. It has, however, been proved that she did sign and cash at Messrs. Brocklehurst's bank at Macclesfield two dividend warrants, dated Mar. 1, 1876, and that on Mar. 1, 1877, she also signed two other dividend warrants, and divided the amount with her daughter, Mrs. Rogers. The dividends on all these stocks were paid regularly to the parties respectively entitled down to the end of 1885 by remittances, generally in cash, from Thomas Barton. The certificates of the railway stock and other trust documents were kept in a box at Parvey Cottage, of which Thomas Barton and Ann Barton each had a key. On May 26 or 27, 1886, Mrs. Dyer went to visit her sister, Mrs. Rogers, who lived at Seaforth, near Liverpool, and on the 29th, being a Saturday, Mrs. Dyer went to visit her mother, Ann Barton, at Willow Cottage, and on Monday, the 31st, Mrs. Rogers followed her.

One of her stepdaughters, the plaintiff, Mrs. Ashe, a sister of Thomas Barton, whose suspicions seemed to have been aroused by the irregularity in the payment of her dividends, and by the reluctance of her brother Thomas to produce the papers which were necessary to prove the will of another sister, who had died in November, 1885, induced Ann Barton to take the advice of Mr. Hand, a solicitor at Macclesfield, and at his suggestion, some time in May, 1886, they went to Parvey Cottage when Thomas Barton was not there and opened the deed box and ascertained that the certificates of the railway stock had disappeared. Thereupon they took away the deed box to the office of Mr. Hand. Afterwards they had an interview with Thomas Barton, at which—so Mrs. Barton stated—he told her that he had sold all the stock, and had signed her name and that of a witness to the transfers. Mrs. Ashe said that she and Mr. Hand were present when she heard him confess the forgery. Mrs. Dyer, in her cross-examination, stated that she only heard him say he had signed the name of a witness.

On June 14, 1886, the following letter, which had been composed by Mr. and Mrs. Dyer and Ann Barton, was written out by Ann Barton and sent to the North Staffordshire Rail. Co., and a similar letter was at the same time sent to the London and North-Western Rail. Co., some stock of which it seemed Barton had also sold :

"Sir,—Will you kindly inform me if there are still any shares in the North Staffordshire Rail. Co. standing in my name and that of my co-trustee, Thomas Barton, of Parvey, Sutton, Macclesfield? The reason I ask for the information is that all the scrip relating to the shares has disappeared from the deed box. If any transfer has taken place, would it be possible to inform me when it occurred, and to whom? £3,000 N. S. consolidated stock was

- A bought prior to the date of the will of my late husband, Samuel Barton, Esq., of Parvey, Sutton, Macclesfield, made in 1864; £1,090 five per cent. preference stock and £2,000 ordinary stock was bought between the years 1864 and 1880. The will of my late husband was proved at Chester on Feb. 14, 1870, by my co-trustee, Thomas Barton, and myself. An early answer will greatly oblige me, as the matter is most urgent.—Faithfully yours, ANN BARTON.
- B I may as well state that I have received no intimation of any transfer. Address Mrs. Barton, care of Mrs. Cooper, Rushton, near Macclesfield."

On June 17, 1886, the secretary of the railway company answered thus :

- C "Secretary's Office, North Staffordshire Railway, Stoke-upon-Trent, June 17, 1886. Madam,—In reply to your letter of 14th inst., I beg to give you on the other side details of the sale of the £3,000 ordinary stock, and the £1,090 new preference stock originally registered in the name of the late Samuel Barton, of Macclesfield, and to state that all the transfers are signed by yourself and Mr. Thomas Barton, and witnessed by William Broadhurst, Sutton, clerk. Your obedient servant, J. PEARCE, for the Secretary. Mrs. Barton, care of Mrs. Cooper, Rushton, near Macclesfield."

D On the other side there was the following statement :

- E "Re £3,000 ordinary stock; £1,000 sold by transfer registered Aug. 10, 1880; £700 ditto, Mar. 23, 1881; £300 ditto, April 19, 1881; £1,000 ditto, Aug. 9, 1881—total £3,000. Re £1,090 new Five per Cent. Preference stock : £400 sold by transfer registered Mar. 7, 1882; £690 ditto, Mar. 16, 1882—total £1,090."

- F On July 1, 1886, two deeds were executed by Thomas Barton, one appointing the plaintiff Mrs. Ashe a new trustee in his place, and the other assigning his interest under his father's will to indemnify the other beneficiaries from any loss which they might incur owing to his having sold the railway stock. On July 17 Thomas Barton sailed for America. On the 24th the husband of Mrs. Rogers, who it seems was a sailor, came home from sea, and in August Mrs. Rogers swore an information against Thomas Barton, on which, however, no proceeding was taken.

- G On Aug. 26, 1886, a solicitor's letter was written to the railway company stating distinctly that the transfers were alleged to be forged, and claiming that the plaintiffs were still shareholders, and this not being acceded to, on Dec. 10, 1886, the writ in this action was issued against the railway company.

- H There was evidence by Mrs. Barton and her two daughters, Mrs. Dyer and Mrs. Rogers, that after her removal to Willow Cottage, Mrs. Barton very seldom saw her stepson Thomas Barton. He visited her, it was said, about three times by special invitation, but except on these occasions he did not go to her house. Mrs. Barton left Willow Cottage and went to reside at Rushton, about six miles distant, on June 12, 1886.

- I The stock in the defendant railway company was transferred by eleven deeds in different sums on the following dates : £1,000 ordinary stock on July 31, 1886; £1,000 on the same day; £700 on Feb. 28, 1881; £300 on the same day, and £1,000 on July 16, 1881; £200 preference stock on Feb. 17, 1882, £200 and £150 on the same day, £540 on Mar. 22, 1882; £800 ordinary stock on Sept. 30, 1882, and £200 on July 18, 1885. The sales were all made by Mr. Reynolds, a dealer in stocks and shares, living at Walbrook, on the instructions of Thomas Barton, to whom all the proceeds were sent by cheques, which Thomas Barton endorsed and cashed. For each of the sums of stock last mentioned, a separate transfer deed was executed which purported to be signed both by Thomas and Ann Barton. Mrs. Barton's signature in every case appeared to be witnessed by William Broadhurst, who was a clerk in the employ of Thomas Barton.

By the Companies Clauses Consolidation Act, 1845, s. 20 :

"The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any of the said shares may be subject; and the receipt of the party in whose name any such share shall stand in the books of the company, or if it stands in the names of more parties than one the receipt of one of the parties named in the register of shareholders, shall from time to time be a sufficient discharge to the company for any dividend or other sum of money payable in respect of such share, notwithstanding any trusts to which such share may then be subject, and whether or not the company have had notice of such trusts; and the company shall not be bound to see to the application of the money paid upon such receipt."

Rigby, Q.C., Renshaw, Q.C., and Whitaker for the plaintiffs.

Sir Charles Russell, Q.C., Marten, Q.C., and Farwell for the defendants, the railway company.

Swinfen Eady for third parties, transferees of the stock.

Cur. adv. vult.

Mar. 15, 1888. **KAY, J.**, read a judgment in which he stated the facts as set out above, and continued: Mrs. Barton, in her evidence, denied that she executed any of the transfers, or knew anything about them, but she said in effect that Thomas Barton was the acting executor, and that she was accustomed to sign, and probably would have signed, anything he asked her. I cannot bring myself to believe that the signatures to the deeds of transfer were really hers. Even if they were, the inference seems to be irresistible that they were obtained under circumstances which would support a plea of non est factum. A signature to a deed which the party signing did not know to be a deed of transfer, but supposed to be a document of some other kind, is in law as complete a nullity as a forged signature. But the fair inference from all the evidence is that Ann Barton's signatures to these eleven deeds of transfer were forgeries actually written by Thomas Barton. The plaintiffs and defendants are all perfectly innocent in this matter, and have been deceived by the fraud of Thomas Barton.

Possibly some amendments of the pleadings on both sides may be necessary to raise the issues with which I am going to deal. Whatever amendments may be requisite I allow and shall consider as made.

The real claim of the plaintiffs is to be treated by the railway company as shareholders. They say, and I agree with the contention, that the forged transfers must be considered as nullities. One defence raised by amendment is a plea of Statute of Limitations. The actual plaintiffs are Ann Barton and Mrs. Ashe, who was appointed her co-trustee by the deed of July 1, 1886, in the place of Thomas Barton. This suit was instituted on Dec. 10, 1886, more than six years after most of the attempted dealings with this stock. It is settled that after a partnership has ceased any claim on simple contract by one former partner against the others in respect thereof is prima facie subject to be barred after the expiration of six years: *Knox v. Gye* (1). On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of **LINDLEY, L.J.**, is to the contrary: **LINDLEY ON PARTNERSHIP** (4th Edn.), p. 966. In a case of exclusion time would begin to run from the act of exclusion. It has been argued in this case that if a partner does not draw his share of profits or act as partner for six years he, at the end of that time, loses all remedy against his co-partners, and, therefore, practically ceases to be a partner. And it is urged that this being the case as to a partnership, the analogy ought to be followed in railway companies and other trading corporations, and that a shareholder who makes no claim for six years has no remedy in respect of his share against the company. If this be so, any such company might direct that after six years' silence a pen should be drawn through the

A shareholder's name on the register, and he would practically cease to be a member of the corporation. And, in answer to a question from the court, the argument was pressed to this extent. Such a conclusion shows that there must be a fallacy in the premises. I know of no authority for saying that a partner who does nothing for six years loses all remedies against his co-partners. Time only begins to run against him from an act of exclusion.

B If the analogy be applicable there must be a similar act in the case of a shareholder to enable the company to avail itself of the statute against him. Nothing of the kind took place here until the resistance by the company to the claim made in this action. The cause of action is, not the invalid transfers of the shares in question, but the refusal of the company, when the forgery was made known to them, to treat the plaintiffs as shareholders. It is an elementary principle that
C time does not begin to run until there is a complete cause of action, and there was no complete cause of action in this case until such refusal.

In *Davis v. Bank of England* (1) there is a judgment of BEST, C.J., in which the question of the Statute of Limitations, in a similar case, is considered. The facts of that case somewhat resembled the present. Certain sums of consols and other government securities standing in the name of the plaintiff had been sold under
D forged powers of attorney. The plaintiff sued the Bank of England in an action on the case for permitting the transfer without his authority, and for refusing to pay him dividends. The action was brought within six years from the date of the sales, so that no decision on the question of the Statute of Limitations was necessary. BEST, C.J., said (2 Bing. at p. 405):

E "We cannot do justice to this plaintiff unless we hold that the stocks are still his. . . . Another consequence of the stocks being considered as transferred will be most alarming to those who live at a distance from London, and receive their dividends by attorney, namely, that their claim to compensation in case their stocks should be transferred without their authority may be barred by the Statute of Limitations."

F Later on he says (*ibid.* at p. 410):

"If the plaintiffs' action had been founded on the concealment of the forgeries it could not have been supported, but the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff due on stocks belonging to him;"

G and judgment was given for the plaintiff accordingly. That decision was reversed in error upon the ground that there was no allegation in the declaration, and no finding in the verdict that the bank had ever received the dividends from the government, but the judgment of BEST, C.J., has not been considered as affected by such reversal: see *Coles v. Bank of England* (3); *Sloman v. Bank of England* (4).

H Then it was suggested that Thomas Barton and Ann Barton being co-executors, one of them alone could have transferred the stock which was registered in the names of both. No authority for this proposition was cited, and I am clearly of opinion that, whatever the powers of executors may be as to other property vested in them in that character, they have no such power as to railway shares or stock which are governed by the Companies Clauses Consolidation Act, 1845.

I With respect to these their rights and liabilities as between themselves and the company are the same as those of other shareholders, and the company is expressly exonerated by s. 20 from being bound to see to the execution of any trust.

The next argument was that if they are to be treated as joint holders of the stock, the transfers must be good as to one moiety, because it is not denied that they were executed by Thomas Barton. This was answered by SHADWELL, V.-C., in *Sloman v. Bank of England* (4) (14 Sim. at p. 488). If the transfers were good as to one half, the other half would remain in the names of the two, and he might then transfer one moiety of that, and so on until the residuum was infinitesimal.

Another consideration which was not pressed at the Bar, but which I cannot overlook, is that it may be said that this action is practically brought by Thomas Barton as one of the co-plaintiffs. Mrs. Ashe has been appointed a trustee in his place. Of course she is not executrix of Samuel Barton, but she and Ann Barton are suing as co-trustees of the will, and, as far as the legal interests in this stock are concerned, the suit may be said to be the same as a suit by or in the names of Thomas and Ann Barton. One of two joint owners having forged the name of the other to transfers, the two then come and say those transfers are nullities. Doubtless they are; but could Thomas Barton be heard to say so, and if not, how does this estoppel affect Ann Barton? I apprehend that the answer is that in equity Ann Barton has sufficient interest to enable her to sue, making Thomas Barton a defendant. Of course, if he were here, the company might have remedies against him personally—criminal and civil. But at the suit of Ann Barton they could not deny that the stock had not been validly transferred. This seems to have been taken for granted in more than one case. In *Sloman v. Bank of England* (4) government stock standing in the names of two trustees was sold by one of them under a forged power of attorney. The bill was filed by the other trustee and the beneficiaries suggesting that the remedy was in equity, for if an action had been brought it must have been in the joint names of the two trustees, one of whom had fraudulently sold the stock. It was held by SHADWELL, V.-C., that relief could be had in equity, because the other trustee could say against the bank, "Stock stood in my name, and I have not authorised the transfer of it. You are responsible to me; that is to say, you must make the account stand as it ought to have stood." In *Taylor v. Midland Rail. Co.* (5) stock of the Midland Rail. Co. standing in the names of Taylor and Bright was attempted to be transferred by Bright by a deed of transfer to which he forged the name of Taylor. After Taylor's death his legal personal representatives were held entitled to recover his share of the stock against the railway company; and this was affirmed in the House of Lords. And it was distinctly decided that there was a right to sue in equity even if the right at law was gone by the death of Taylor in the lifetime of Bright.

It was suggested that the pleadings should be amended by allowing a counter-claim on the ground that the money for the purchase of the shares was properly paid to Thomas Barton as one of two executors. The answer is obvious. The money was not paid by the railway company, but by the purchaser of the shares. They are not parties, and I am not dealing with their rights in any way. Another answer is that, if the railway company could make any claim to this money, that claim must be made against Thomas Barton, not against the estate of the late Samuel Barton. The claim must proceed upon an admission that the money was obtained by forgery and fraud. How could the estate be made liable for it? I cannot permit such an amendment. The defence, as actually framed, denies the forgery, and also pleads that the loss has been occasioned by the negligence of Ann Barton. This latter point was not insisted on at the Bar, and I think properly, for it seems to me that no such case of negligence is established by the evidence.

Upon the whole, I am of opinion that the plaintiffs have made out their case and are entitled to a declaration that the alleged transfers were invalid by reason of the forgery of the name of Ann Barton as a person executing the same, and the railway company must be ordered to register the plaintiffs as owners of the shares. No doubt the matter deserved the closest investigation, and it was quite natural that the railway company should desire to have it formally tried. But the present plaintiffs are, I think, free from all blame, and, as my opinion upon all the points raised is in their favour, I think they are entitled to judgment, with costs. I observe that the costs were given to the plaintiff in *Sloman v. Bank of England* (4).

Solicitors: *Stephens & Stephens*, for Henry Hand, Macclesfield; *Burchell & Co.*; *Taylor, Hoare & Box*.

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

A

WHITHAM v. KERSHAW

[COURT OF APPEAL (Lord Esher, M.R., Cotton and Bowen, L.JJ.), December 18, 1885, February 1, 1886]

B

[Reported 16 Q.B.D. 613; 54 L.T. 124; 34 W.R. 340; 2 T.L.R. 281]

Landlord and Tenant—Waste—Damages—Measure—Diminution in value of property.

In an action for waste brought by a landlord against a tenant during the continuance of the tenancy, the measure of damages is the diminution in value of the property caused by the acts of waste, and not the cost of restoring the property to the condition in which it was before such acts were committed.

C

Notes. LORD ESHER, M.R., in his judgment states that the amount of damages recoverable for breach of the implied covenant against waste is not so great as that recoverable for breach of the covenant to deliver up the premises in good condition at the expiration of the term. At common law, the measure of damages for breach of the latter was the sum which it would cost to put the premises in the state of repair in which the tenant ought, under the covenant, to have left them, but it is now limited to the amount by which the value of the reversion has been diminished: *Landlord and Tenant Act, 1927, s. 18 (1).*

D

Referred to: *Rust v. Victoria Graving Dock Co. and London and St. Katharine's Dock Co.* (1887), 36 Ch.D. 113; *Joyner v. Weeks*, [1891] 2 Q.B. 31; *Espir v. Basil Street Hotel Co., Ltd.*, [1936] 3 All E.R. 91; *Lavender v. Betts*, [1942] 2 All E.R. 72; *Landeau v. Marchbank*, [1949] 2 All E.R. 172; *Perera v. Vandiyar*, [1953] 1 All E.R. 1109.

E

As to remedies for waste, see 23 HALSBURY'S LAWS (3rd Edn.) 569-570; as to damages for breach of a repairing covenant, see *ibid.*, 587-591. For cases see 31 DIGEST (Repl.) 399. For the *Landlord and Tenant Act, 1927, s. 18*, see 13 HALSBURY'S STATUTES (2nd Edn.) 902.

F

Cases referred to in argument:

Wigsell v. School for Indigent Blind (1882), 8 Q.B.D. 357; 51 L.J.Q.B. 330; 46 L.T. 422; 30 T.L.R. 474; 17 Digest (Repl.) 93, 105.

Jones v. Gooday (1842), 9 M. & W. 736; 11 L.J.Ex. 297; 152 E.R. 311; 12 Digest (Repl.) 360, 2795.

G

Hosking v. Phillips (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L.J.Ex. 1; 12 L.T.O.S. 198; 12 Jur. 1030; 154 E.R. 801; 31 Digest (Repl.) 371, 5021.

Hide v. Thornborough (1846), 2 Car. & Kir. 250, N.P.; 19 Digest (Repl.) 211, 1544.

Morgan v. Powell (1842), 3 Q.B. 278; 2 Gal. & Dav. 271; 11 L.J.Q.B. 263; 6 Jur. 1109; 114 E.R. 513; 34 Digest 657, 569.

H

Martin v. Porter (1839), 5 M. & W. 351; 2 Horn & H. 70; 151 E.R. 149; 34 Digest 657, 567.

Appeal by the defendant, a tenant, on the issue of damages, from a decision of MATHEW, J., without a jury at Leeds Assizes awarding £60 damages to the plaintiff, the landlord, for waste committed by the defendant.

I

The plaintiff and the defendant being allottees of adjoining plots of moorland, the plaintiff demised his plot of seven acres to the defendant. At the period when the acts of waste complained of were committed, about nine years of the term remained unexpired. The acts of waste consisted in removing portions of the soil of the plot of land which the defendant held on lease from the plaintiff, and depositing the soil so removed on the defendant's own allotment, for the purpose of fertilising and bringing into cultivation the land of the defendant's allotment. The learned judge gave judgment in favour of the plaintiff for £60 damages, being the amount which it appeared from the evidence it would cost

to reinstate the land of the plaintiff's allotment in the same condition in which it was before the commission of the acts complained of. The defendant appealed from this judgment on the ground that the damages were assessed on a wrong principle, and were excessive. On the hearing of the appeal, in order to avoid the necessity for a new trial, it was arranged by the consent of both parties that, in the event of its being decided that the principle on which the damages had been assessed was erroneous, the Court of Appeal should decide as to what reduction should be made.

Forbes, Q.C. (Charles, Q.C. and Spokes with him) for the defendant.

Arthur Powell (Lockwood, Q.C. with him) for the plaintiff.

Cur. adv. vult.

Feb. 1, 1886. **LORD ESHER, M.R.**—This is an action for waste. The plaintiff and the defendant were allottees of adjoining plots of moorland, and the plaintiff let his allotment to the defendant. While the defendant was in occupation of both allotments he took away a quantity of soil off the plaintiff's land and put it on his own land.

The question to be decided is what is the proper measure of damages in an action for waste brought by a landlord against his tenant. I am of opinion that the mistake which has been made is that the learned judge at the trial treated the implied covenant against waste as producing the same result as the covenant to deliver up the premises in good condition at the expiration of the term. The two cases are not the same, and the amount of damages recoverable in the former case is not so great as that recoverable in the latter. The effect of the implied covenant against waste is that the tenant must not do anything to affect the value of the property, and that is not the same thing as putting the property in the same condition as before. The value is proved by calling valuers as witnesses, and asking them how much the property is diminished in value by the injury which has been done to it.

I am, therefore, of opinion that the learned judge took the wrong measure of damages, and as the parties have consented, in order to avoid the expense of a new trial, that we should say what the damages ought to be, I think the amount may fairly be assessed at £10, and that the judgment ought to be varied by reducing the damages to that sum. With regard to costs, as the case has raised a point of law, and the plaintiff has proved his cause of action, we think that he should have his costs of the trial on the High Court scale. There will be no costs of the appeal.

COTTON, L.J.—I agree that the wrong test has been taken in assessing the damages recoverable by the plaintiff. The action is brought by the reversioner for injury caused by acts of waste done by the tenant in possession. It is true that in some cases the extreme limit of the damages might be the costs of putting the property in the same condition as before, but that is only the limit, and the plaintiff is not entitled to recover that amount in such a case as the present. As the parties leave us to determine the amount to which the plaintiff is entitled, I agree that the damages should be reduced to £10, and I also agree with what has been said by the Master of the Rolls as to costs.

BOWEN, L.J.—I am of the same opinion. Viewing this as an action for waste, I think the true measure of damages is the diminution of the value of the reversion. If it is treated as an action for wrongful severance of soil from the freehold, the measure of damages is only the value of the soil severed. Therefore, taking either view of the case, the measure of damages adopted by the learned judge was wrong. It is clear that no value can be attached to the soil which has been severed in the present case which can be assessed at anything like the sum which has been awarded to the plaintiff. In deciding this

A case we do not in any way derogate from the principle that where a wrongful act is done and the circumstances call for vindictive damages, a jury may give such damages, but there are no such circumstances here.

Appeal allowed.

Solicitors : *Radford & Frankland; Bolton, Robbins, Busk & Co.*

B [Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

C

NICOL v. NICOL

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), January 30, February 1, 1886]

[Reported 31 Ch.D. 524; 55 L.J.Ch. 437; 54 L.T. 470; 50 J.P. 468;
34 W.R. 283; 2 T.L.R. 280]

D

Husband and Wife—Separation agreement—Resumption of cohabitation—Termination of agreement—Construction of agreement.

E

At the trial of a suit for judicial separation terms were agreed upon as follows: "If judicial separation decreed, following terms to be agreed upon: Mrs. N. to be permitted to enjoy during her life the use of all furniture . . . now in No. 7, C. Terrace, with full right to remove the same. . . . After her death same to revert to Mr. N. . . . The right of Mrs. N. to enjoy the furniture . . . as above to be subject to the condition that she is not to interfere with or annoy Mr. N." Judicial separation was decreed. Subsequently a reconciliation took place between the parties who resumed cohabitation, but later the wife again left her husband. On a claim by her to be entitled to a life interest in the furniture,

F

Held: a renewal of cohabitation might put an end to all or any of the provisions of a separation agreement, and would do so if the language of the agreement, properly construed in the light of the surrounding circumstances, showed that its provisions were intended to take effect only while the separation lasted; on the construction of the present agreement, the wife's right to the furniture ceased on re-cohabitation.

G

Dictum of LORD CAMPBELL in *Randle v. Gould* (1) (1857), 8 E. & B. 457, disapproved.

Decision of NORTH, J., 30 Ch.D. 143, affirmed.

H

Notes. The Matrimonial Causes Act, 1857, s. 25, has been repealed. For the wife's property in case of judicial separation, see the Matrimonial Causes Act, 1950, s. 21.

Referred to: *Haddon v. Haddon* (1887), 18 Q.B.D. 778; *Kirk v. Eustace*, [1936] 3 All E.R. 520; *Langstone v. Hayes*, [1946] 1 All E.R. 114; *Hinde v. Hinde*, [1953] 1 All E.R. 171.

I

As to construction and operation of separation agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 882-883; and for cases see 27 DIGEST (Repl.) 109-110, 243-245.

Cases referred to:

- (1) *Randle v. Gould* (1857), 8 E. & B. 457; 27 L.J.Q.B. 57; 30 L.T.O.S. 198; 4 Jur.N.S. 304; 6 W.R. 108; 120 E.R. 170; 27 Digest (Repl.) 244, 1969.
- (2) *Bateman v. Countess of Ross* (1813), 1 Dow, 235; 3 E.R. 684, H.L.; 27 Digest (Repl.) 243, 1956.
- (3) *Crouch v. Waller* (1859), 4 De G. & J. 302; 33 L.T.O.S. 215; 7 W.R. 523; 45 E.R. 117, L.C.; 27 Digest (Repl.) 213, 1696.

- (4) *Charlesworth v. Holt* (1873), L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647; 22 W.R. 94; 27 Digest (Repl.) 229, 1837.
- (5) *Negus v. Forster* (1882), 46 L.T. 675; 30 W.R. 671, C.A.; 27 Digest (Repl.) 188, 1441.

Also referred to in argument :

Wilson v. Muskett (1832), 3 B. & Ad. 743; 1 L.J.K.B. 250; 110 E.R. 271; 27 Digest (Repl.) 244, 1966.

Webster v. Webster (1853), 4 De G.M. & G. 437; 22 L.J.Ch. 837; 1 W.R. 509; 43 E.R. 577, L.J.J.; 27 Digest (Repl.) 243, 1960.

Gandy v. Gandy (1882), 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 30 W.R. 673, C.A.; 27 Digest (Repl.) 235, 1887.

Appeal by Mrs. Nicol from a decision of NORTH, J, reported 30 Ch.D. 143, dismissing her claim against her husband, the defendant, for the recovery of furniture to which Mrs. Nicol claimed to be entitled for her life.

A suit was brought by the husband against the wife, in the Probate, Divorce and Admiralty Division, for judicial separation on the ground of the wife's cruelty. On the suit coming on for trial before a judge and jury, on Feb. 26, 1880, terms of agreement were arranged as follows :

"Order for jury discharged. Case to be tried before the judge. If judicial separation decreed, following terms to be agreed upon: Mrs. Nicol to be permitted to enjoy during her life the use of all furniture, and all the articles of every kind and description, now in No. 7, Chichester Terrace, Brighton, with full right to remove the same elsewhere in Great Britain. After her death same to revert to Mr. Nicol, or his personal representatives. Inventory of such articles to be taken by some person to be named by Mr. Lewis and by Mr. Campbell. Mrs. Nicol to be at liberty, if she think fit, to continue to occupy No. 7, Chichester Terrace, on terms of lease, she being liable as tenant. If she determine to quit the house, to be at liberty to do so on giving Mr. Nicol two months' notice within six months from this date. The right of Mrs. Nicol to enjoy the furniture and articles as above to be subject to the condition that she is not to interfere with or annoy Mr. Nicol. In the event of her so doing her right to enjoy the use of same to cease."

A judicial separation was decreed and leave was given for the terms of arrangement to be filed. At the date of the arrangement the furniture and articles were the property of Mr. Nicol. Mrs. Nicol was possessed of considerable separate property. After the decree for judicial separation, Mrs. Nicol for some time resided by herself at No. 7, Chichester Terrace, having the sole possession of the furniture and articles according to the agreement. On or about Sept. 29, 1880, Mrs. Nicol took a lease of a house in Sussex Square, Brighton, and removed thither with the furniture and articles. Shortly afterwards, namely, on Mar. 10, 1881, it became necessary to institute proceedings in lunacy against Mrs. Nicol. An inquisition followed, and Mrs. Nicol was removed to a private asylum, where her health improved, and she made applications to her husband, asking to be allowed to return home to him. About Feb. 10, 1883, Mrs. Nicol was allowed to leave the asylum, and she went to reside again with her husband, under the care of a guardian. Mrs. Nicol continued with her husband until the end of July, 1883. On June 12, 1883, a supersedeas of the inquisition was obtained. At the end of July, 1883, Mrs. Nicol left her husband under the circumstances mentioned in the judgment of COTTON, L.J., and the cohabitation was not renewed. The husband had re-taken possession of the furniture under an arrangement in the lunacy, and the present action was brought by the wife to obtain delivery up by him of the furniture to certain persons as trustees for her. NORTH, J., found that the parties had been reconciled and the cohabitation renewed, and that such reconciliation and re-cohabitation had put an end to the agreement. Mrs. Nicol appealed.

A By the Matrimonial Causes Act, 1857, s. 25 :

"In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

C Hilbery for Mrs. Nicol.

Barber, Q.C., and Hadley for the defendant, Mr. Nicol.

D COTTON, L.J.—This is an appeal from a decision of NORTH, J., dismissing an action by Mrs. Nicol against her husband under an agreement which was come to in a suit brought by Mrs. Nicol against her husband for a judicial separation. The ground of that suit was the cruelty of the defendant here. The suit came on for hearing on Feb. 26, 1880. Judgment was not then given, because it is the practice of the court in such cases, before giving the husband a decree, to require him to make a proper provision for his wife. The case accordingly stood over till Feb. 27, and in the meantime the agreement was signed upon which this action is brought. Judicial separation was decreed, and Mrs. Nicol took possession of the furniture. She afterwards became of unsound mind, and was removed to an asylum and found lunatic by inquisition on proceedings instituted in March, 1884, committees of her person and estate being appointed. Under an arrangement made in the lunacy Mr. Nicol resumed possession of the furniture, and it is now said that it is the separate property of the wife, and that he must be ordered to restore it to her. The husband's rights and those of his wife are not under the lunacy, but under the agreement. In February, 1883, Mrs. Nicol's state of mind had improved, and she went to reside with her husband, and on June 12, a supersedeas of the inquisition in lunacy was obtained. From that time till July 30, 1883, she was living on friendly terms with her husband, and she then, having, as the judge below has found, become reconciled to him, left him and went to Buxton in order to get medical advice, as she had sustained an injury through a carriage accident.

The questions argued were, whether there was reconciliation between the parties, and if so, what was the effect of the reconciliation and cohabitation on this agreement? In the first place, let us consider what is the effect of reconciliation and re-cohabitation on a separation deed. There is the authority of LORD ELDON in *Bateman v. Countess of Ross* (2) that the effect of reconciliation and re-cohabitation is to entirely put an end to a separation deed. That is the general principle; but it has been contended by Mrs. Nicol that in this case the arrangement is not to be considered as at an end, as it was intended to be a post-nuptial settlement on the lady, her rights under which were to be independent of her cohabitating with her husband, and not to be affected when the separation was at an end. But that is a question of terms, and depends on the true construction of the agreement. The agreement was one made in an action for judicial separation, and the provisions for Mrs. Nicol entirely depended on there being a decree for judicial separation. It is contended that the usual rule applicable to agreements on separation—that they should end with the separation—ought not to apply here, because the agreement contains a special provision as to the circumstances under which the wife's enjoyment of the furniture, which

was to be during her life, was to cease, and that this excludes the idea of her enjoyment being limited to the period of separation.

But this view is erroneous. We must inquire what the object of the agreement was. The sole object of the agreement was to provide for the separation, and the provisions contained in it as to the wife's user of the furniture are inconsistent with the state of things which would arise if the separation came to an end. The provisions of the instrument could not be applicable if the husband and wife lived together again. To such a state of things the agreement would be wholly inapplicable. In taking this view we are not introducing any new condition into the agreement, for the whole of it comes to an end when the separation ends. Apart from authority, therefore, I consider this deed was merely intended as a provision for the separation while it continued, and not as an independent post-nuptial settlement on the wife, and the proviso for enjoyment by the wife during her life was only intended to guard against the idea of her having any greater interest under the agreement.

It is said that, as the gift of the furniture to her was complete, she cannot now be deprived of it; but this is a mere affair of words. It may be that if, under an agreement such as this, there had been a completed gift to the wife, such as payment of a sum of money, that would continue unaffected, except perhaps as to what might remain of the gift when cohabitation was resumed and having regard to the rights of the wife under s. 25 of the Matrimonial Causes Act, 1857. But here the gift, if complete, was entirely under a contract lasting only during the separation.

A variety of cases have been cited to us, of which it is useless to consider those which only lay down that an agreement on a separation may be of such a character as not to depend on the continuance of the separation, but may be such as to last although the husband and wife are living together again. But cases have also been cited in support of the construction which it is sought to place on the agreement, viz., that it was not the intention of the parties that the wife's rights should come to an end with the separation. It is unnecessary to consider whether such an intention could lawfully exist.

In *Randle v. Gould* (1) there was an express agreement that the provision for the wife was to terminate in the event of their agreeing in writing to resume cohabitation, and cohabiting accordingly. That condition was not fulfilled, and it was held that the presence of that condition excluded the contention that a cohabitation resumed under different conditions put an end to the wife's rights under the separation deed. There is, however, in that case a dictum of LORD CAMPBELL that, even if there had been no express proviso for avoiding the deed in a certain manner, the wife's allowance would not have ceased on the reconciliation and renewed cohabitation. I doubt whether I could concur in that dictum. But even that dictum cannot be relied on in support of the Mrs. Nicol's argument.

In *Crouch v. Waller* (3) a provision was made for the wife under two deeds, one of which was expressly to be avoided on the husband and wife again cohabiting; the other being a settlement. It was sought to have the other avoided also, but it contained a trust in favour of future children of the marriage, which trust could only arise in the event of cohabitation being resumed; and this was used to show that the second deed amounted to a post-nuptial settlement on the wife, and was not dependent on her living separate from her husband. It is true that *Randle v. Gould* (1) was referred to by the Lord Chancellor without disapproval, and it is said that he, therefore, approved of that judgment. I think it right, therefore, now to express my dissent from the dictum in *Randle v. Gould* (1), lest it should hereafter be said that it was approved of by this court.

Then Mrs. Nicol relied on *Charlesworth v. Holt* (4), where it was contended that subsequent divorce put an end to the wife's rights under a separation deed,

A because the marriage itself was at an end, which is a totally different state of facts from those in the present case. The case which is most in point is *Negus v. Forster* (5). There the court held that a wife's provision under a separation deed continued, though the separation was at an end. But that was only a case of construction of the particular instrument, and, whatever the judges said, they
B other than that which, as I think, follows from the general principle which I have stated.

The terms of the agreement in the present case depend simply and solely on the continuance of the separation; and, in my opinion, if it is shown that there was such a reconciliation between the husband and wife as put an end to the separation, the appeal must fail. Then were the parties reconciled? It has
C been urged that, if a reconciliation took place during the lunacy, that would not put an end to the separation. But from the time when the supersedeas was obtained until July 30, they were living together as man and wife, and in my opinion there is nothing to induce us to interfere with the finding of fact that the parties were reconciled.

D **BOWEN, L.J.**—I am of the same opinion. The first question is: What is the effect of this agreement, and what is the principle of law to be applied thereto? In my opinion, the true principle is that a renewal of cohabitation may put an end to all or any of the provisions of a separation deed, and will do so, so far as the language of the deed, properly construed by the light of the surrounding circumstances, shows that its provisions were intended to take
E effect only while the separation lasted.

The language of LORD ELDON goes a little further—to this extent indeed, that there exists a presumption which ought to lead one to hold that it ended by a renewal of cohabitation. This view was not adopted by the Court of Queen's Bench in *Randle v. Gould* (1), and I am not myself in favour of applying
F presumptions to the construction of written documents in such a way as to dictate the inferences to be drawn from the circumstances outside the deed, and from the relations between the parties. In a complicated deed of this description some of the provisions, usually from their nature, are intended to come to an end when the separation is over; others may, from their nature, be wholly perfected when cohabitation is renewed, or be wholly inapplicable to the then existing
G circumstances, and others may be intended to continue though the separation is at an end. I would rather construe such deeds with reference to the surrounding circumstances than lay down any strong and unbending presumption as to when marital rights are to be suspended.

This like most cases, can be decided by the light of the fact that the agreement was entered into with the view to meet a certain set of circumstances.
H All the cases which have been cited were decided on deeds differently expressed, and are, therefore, not of binding authority in this case. *Randle v. Gould* (1) turned on the special words of a particular document. There the court said that the decision would have been the same if there had been no such provisions of the deed; but this is merely an obiter dictum in which I find it difficult to acquiesce. *Crouch v. Waller* (3) also turned on the special terms of the deed, and
I the same may be said of *Negus v. Forster* (5) in the Court of Appeal. Whether we should acquiesce in the construction put upon the deed in that case is wholly beside the point, for there is nothing in the law as laid down in that case to affect the present decision.

I come back, therefore, with confidence to the document on the construction of which this case depends. Are there any facts differentiating this document from an ordinary separation deed? The agreement was entered into in a suit for judicial separation, and was not intended to come into effect unless a decree was pronounced. In the light of that fact, it is clear that there was no absolute

gift of the furniture to the wife, but only a licence, irrevocable because given for a valuable consideration, that the wife should enjoy the furniture during her life. Ought we to imply a condition limiting this to the duration of the separation? The subject-matter to be enjoyed is the furniture of a particular house, which the wife was to be at liberty to remove, and her enjoyment was to cease if she annoyed her husband. I cannot doubt that the licence was to operate on an implied condition that the separation lasted, and that on the separation coming to an end it was to cease. In other words, the enjoyment was to depend on a decree being pronounced, and there was an implied condition that it was to last only so long as it continued in effect. If this be the true construction, it is obvious that the wife's interest in the furniture cannot be preserved to her under s. 25 of the Matrimonial Causes Act, 1857, because all her property in the furniture came to an end as soon as the separation ended.

On the question of fact, whether cohabitation was resumed and a reconciliation took place between the husband and wife, I agree with the view taken by COTTON, L.J.

FRY, L.J.—The question we have to decide is, whether the terms of the arrangement come to in 1880 amount merely to an agreement for a separation, under which provision is made for the wife during its continuance, or one under which it was intended to give her some property, irrevocable licence, or benefit, to endure whether the separation came to an end or not. There may be cases where a separation deed is made, the terms of which are to continue notwithstanding re-cohabitation, and which amounts in fact to a post-nuptial settlement on the wife, and there may be included therein provisions which are to last only during separation. That is the true nature of the inquiry, and all the cases cited to us have proceeded on that view.

In *Randle v. Gould* (1) the court had to consider whether the instrument was merely a separation deed, or was a post-nuptial settlement, and it is unnecessary for us to consider whether the conclusion we should have come to would have been the same. The court added that, had the condition which was present in that case been absent, they would still have held the instrument to be a post-nuptial settlement, but that expression of opinion, whether correct or not, is immaterial in this case. The question considered by the court in *Negus v. Forster* (5) was the same. The answer must depend on the construction of the instrument, and those cases do not apply because the deeds were differently worded from the instrument before us.

This document begins with the words, "If judicial separation decreed, following terms to be agreed upon"; and it is obvious that, so far as the parties were concerned, if no separation had been decreed no part of the instrument would have taken effect. This is strong to show that the arrangement was made with a view to separation. The proviso that the wife was to enjoy during her life is relied upon; but the clauses which follow are quite inconsistent with that proviso continuing in force after the separation was at an end. For it is obvious that, if the husband and wife became reconciled and cohabited, it would be inconsistent with the ordinary relation between husband and wife that the wife should still be enjoying the use of the furniture separate from her husband, with the right of removing the same. It is obvious that these stipulations were to last only during the separation, and not while the husband and wife were living together. The intention of the parties that this was to be so is apparent, and without hesitation I arrive at the conclusion that this was not intended to be an independent settlement for the wife's benefit, the words "during her life" being intended to limit, not to enlarge, the wife's right of enjoyment.

On the question of fact I have nothing to add. The evidence is clear and distinct that a reconciliation took place.

A It has been contended that, by s. 25 of the Matrimonial Causes Act, 1857, the furniture became the separate property of the wife, but on this point I agree with NORTH, J., and the other lords justices that the wife has nothing on which the section can operate. In my opinion, the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

B Solicitors : *Campbell, Reeves & Hooper; Tyrrell, Lewis & Co.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

C

BETHUNE v. BETHUNE

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), June 21, 1890]

[*Reported* [1891] P. 205; 60 L.J.P. 18; 63 L.T. 259]

Divorce—Cruelty—Conduct other than violence.

E From the time of the marriage a husband repeatedly refused to occupy the same room with his wife, and told her he loathed being with her and hated the sight of her. He habitually neglected her and would not take her out, but he often went out by himself and refused to tell his wife where he had been. On some occasions the husband left the wife for several days at a time. He received letters in a woman's handwriting, but when his wife asked about them he told her it was no business of hers. He threatened to leave his wife unless she did exactly what he liked, and often was angry, his wife becoming frightened. He often swore at his wife and used violent language towards her. On one occasion only did the husband use physical violence on his wife; that was when she went into his room to speak to him and he pushed her away roughly and she fell to the ground. The wife's health suffered as a result of this conduct, and she warned the husband of this, but he continued to behave in the same way. It was subsequently discovered that the husband was carrying on an adulterous association with another woman and for that purpose had been using money brought into a marriage settlement by the wife.

Held: the husband's conduct amounted to cruelty.

Kelly v. Kelly (1) (1870), L.R. 2 P. & D. 31, followed :

H **Notes:** Followed : *Walmesley v. Walmesley* (1893), 69 L.T. 152. Referred to : *Beauclerk v. Beauclerk*, [1891] P. 189; *Jeapes v. Jeapes* (1903), 89 L.T. 74; *Moss v. Moss*, [1916] P. 155; *Lauder v. Lauder*, [1949] 1 All E.R. 76; *Simpson v. Simpson*, [1951] 1 All E.R. 955; *Jamieson v. Jamieson*, [1952] 1 All E.R. 875.

I As to what constitutes cruelty where there is no physical violence, see 12 HALSBURY'S LAWS (3rd Edn.) 272-3; and for cases see 27 DIGEST (Repl.) 303 et seq.

Case referred to :

(1) *Kelly v. Kelly* (1869), L.R. 2 P. & D. 31; 39 L.J.P. & M. 9; 21 L.T. 564; 18 W.R. 191; affirmed (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 18 W.R. 767; 27 Digest (Repl.) 298, 2434.

Also referred to in argument :

Mytton v. Mytton (1886), 11 P.D. 141; 57 L.T. 92; 50 J.P. 488; 35 W.R. 368; 27 Digest (Repl.) 299, 2443.

Petition by Evelyn Isabel Bethune for the dissolution of her marriage with Charles Congleton Bethune on the grounds of his cruelty and adultery. The respondent filed an answer admitting the adultery, but denying the cruelty. The case is reported on the issue of cruelty. A

The marriage took place on Feb. 24, 1886, the petitioner being at that time about twenty-eight, and the respondent thirty-six years of age. The wife was absolutely possessed of property to the amount of about £3,000 a year, with the reversion, on the death of her mother, to some £4,000 or £5,000 a year more. The respondent had little or no income of his own, but he had inherited an estate in Scotland which was very fully mortgaged. Upon the marriage, the petitioner settled an income of £1,000 a year upon the respondent for life, in case he should survive her, and shortly after the marriage she paid some debts of his, amounting to about £4,000. B C

After the marriage the parties went to various places, at all of which the respondent told his wife that he could not sleep unless he were alone, and he ordered a separate bedroom for her. In April, 1886, on their return from Cairo, they put up at the Grand Hotel. Up to that time there had been no attempt by the respondent to consummate the marriage. The petitioner spoke to her husband, and the petitioner's mother also remonstrated with him upon his conduct to the petitioner. He made the excuse that he was not well, and could not sleep unless he were alone. He told the petitioner that he hated being in the same room with her; he repeated that on many occasions. The petitioner was very much attached to him, and was anxious to live with him as his wife. In the summer of 1886 they went to Scotland, to the respondent's seat; he still insisted on occupying a separate room. While there, the respondent left the petitioner for nearly a fortnight; she implored him not to go, or to take her with him. She went to his room at night to speak to him about it. He gave her a violent push, which threw her to the ground, and so prevented her entering the room. D E

The respondent habitually neglected the petitioner, and would not take her out with him. When he had absented himself from her, she frequently asked him where he had been and what he had been doing, but he refused to tell her. From Scotland they went to stay with the petitioner's mother for a time. His unkind conduct continued. He frequently said very unkind things to the petitioner; he told her he loathed being in the same room with her, and that her presence made his life a hell. He was constantly receiving letters in a lady's handwriting, and when the petitioner asked him about them, he said it was no business of hers. She once saw a postal order; when asked by the petitioner about it, he said it was to help a friend who was in trouble; and he got very angry and excited, and left the house. About the end of 1886 the respondent was ill, though not very seriously; his illness lasted five or six months, and the petitioner did what she could for him, but he never appreciated what she did. F G H

About the end of 1887 they took a house at 5, Seymour Street, and kept it until the respondent went abroad, in 1888. He often threatened to go away and leave her, unless she did exactly what he liked. The petitioner did all she could to make him fond of her, as she was very fond of him. His continued neglect and unkindness made her very ill; she was continually crying, got very thin, and could not eat or sleep. Her mother and servants noticed the petitioner's altered appearance, and the petitioner told her husband about it. He said that she should live her own life apart from him. In the autumn of 1888 he said that he was going to Ems. She entreated him to take her. He refused. So far as she then knew, he went alone, but she had since found out that he had someone with him. Previously, in July, 1887, the petitioner and respondent had been to Ems together, but, at the respondent's request, they occupied separate rooms; he was constantly receiving letters from women, and left the petitioner alone a great deal. He used to get very angry when she spoke I

A to him, and she was much frightened at his anger. The petitioner and her mother, in order to try and please him, paid off the encumbrances on the respondent's Scottish property. They also bought the equity of redemption, and paid £16,000 or £17,000 in all upon the property. Even this had no good result.

B Before that, in the summer of 1888, the petitioner and respondent were at the Cliftonville Hotel, Margate. The respondent was acquainted with a gentleman and two ladies, and the petitioner used to see him walking about with them. He said he could not introduce her to them, as they were not ladies. He told the petitioner she must go, as he wanted to be alone, and that if she did not go, he must. The petitioner went to an old servant's. Subsequently, he said C the petitioner must go to Scotland alone, as he did not wish to travel with her.

The petitioner frequently spoke to him about changing his mode of life towards her; he said he never could change. Her health was being seriously injured. The respondent told the petitioner he was going to take a sea voyage, and promised to take his wife with him; she took the tickets and paid for them; he had already engaged a large cabin; he afterwards refused to permit her to

D go with him; she was extremely desirous of going, and suggested that, if she took a separate cabin, he might let her go, and his brother might share his cabin. He consented, on condition that she was not to sit next to him, and that he should treat her as an entire stranger. He said he could not bear to be with her, and that she would have more liberty if he were not there. She told him her doctor was very anxious that she should go on a sea voyage, and her

E mother also wrote to the respondent about it. Finally, he refused to take her. The respondent was so ill that she went to her mother's. The respondent would only allow his wife to go to their own house in Seymour Street by appointment. The respondent constantly used violent language and swore in the presence of, and towards the petitioner. On December 28, 1888, the respondent left England.

F By the time he returned, the petitioner had found out that he had been keeping a mistress during the whole of their married life, and she instituted these proceedings.

Dr. Quain was called, and said that he had known the petitioner from her childhood. He saw her a few weeks after she was married, and noticed that she was very much depressed, and was feeble and weak. He saw her on many G occasions, in 1887 and 1888, and noticed that her health was rapidly failing. In 1888 he was satisfied that, if the trouble lasted from which she was suffering, she would not continue to live. If her husband's conduct, such as described, were persisted in, it would injure her health, and it did, in fact, injure it. After her husband had been away some time, and she discovered the position she was in, her health partially recovered.

H Dr. Broadbent gave evidence that, in 1887, the petitioner was suffering from excitement and depression, and great disarrangement of digestive organs, and weakness; she complained of sleeplessness and loss of appetite. That state of things was clearly produced by mental distress and anxiety but that he knew only a little of the history of the parties. On Oct. 19, 1888, and on several occasions I during that month, he saw the petitioner, and found her then so thin that he was apprehensive that she might be in consumption. The same weakness, depression, want of sleep, and indigestion were all present, as before. He had then heard something of her marital relations, and, in his opinion, they would account for all she was suffering from, and, in his belief, they did, in fact, cause the injury to her health.

Evidence as to the respondent's ill-treatment of the petitioner was also given by the mother of the latter; and witnesses were also called upon the issue of adultery.

Sir Charles Russell, Q.C., Inderwick, Q.C., and C. A. Middleton for the A
petitioner.

Bayford, Q.C., for the respondent, did not cross-examine the witnesses, nor address the court.

SIR JAMES HANNEN, P.—It is not necessary for me to say more than that I think the medical evidence, taken in conjunction with the evidence given by B
the petitioner, brings the case within the authority of *Kelly v. Kelly* (1), and I, therefore, pronounce a decree nisi, on the grounds of cruelty and adultery, with costs against the respondent.

Solicitors: *Lewis & Lewis; W. H. Herbert.*

[Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.] C

HANCOCK v. SMITH D

[CHANCERY DIVISION (North, J.), February 1, 1889]

[COURT OF APPEAL (Lord Halsbury, L.C., Cotton and Fry, L.JJ.), May 3, 1889]

[Reported 41 Ch.D. 456; 58 L.J.Ch. 725; 61 L.T. 341;
5 T.L.R. 459] E

Agent—Payment to agent of money for principal—Balance in agent's bank—Right of judgment creditor to garnishee order.

A judgment creditor of a stockbroker obtained a garnishee order on a balance standing to the credit of the broker in his banking account. All money received by the stockbroker for his clients was paid into this account, and the main part F
of the balance belonged to two clients.

Held: as the money in the account belonged, not to the broker, but to the clients, the judgment creditor had no right to the balance of the account.

Notes. Distinguished: *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433. Followed: *Re Wretford, Carmichael v. Rudkin* (1897), 13 T.L.R. 153. Distinguished: *Wilsons and Furness-Leyland Line v. British and Continental Shipping Co.* (1907), G
23 T.L.R. 397. Referred to: *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; *Harrods, Ltd. v. Tester*, [1937] 2 All E.R. 236; *Loescher v. Dean*, [1950] 2 All E.R. 124; *Re A Solicitor*, [1952] 1 All E.R. 133.

As to principal's right on agent's bankruptcy, see 1 HALSBURY'S LAWS (3rd Edn.) 212; and for cases see 3 DIGEST (Repl.) 197 et seq.

Cases referred to: H

(1) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 3 Digest (Repl.) 340, 1099.

(2) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 3 Digest (Repl.) 199, 405.

Also referred to in argument: I

Re Strachan, Ex parte Cooke (1876), 4 Ch.D. 123; 46 L.J.Bcy. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 42 Digest 793, 24.

Appeal by the claimants from a decision of NORTH, J., in a motion, in chambers, disallowing their claims to the balance of a banking account (a client's account) of the defendant a stockbroker in an action in which the plaintiff a creditor, had obtained a judgment for a specific sum and being a judgment creditor had attached the defendant's banking by a garnishee order.

A On Jan. 17, 1888, the plaintiff obtained judgment against the defendant for £650 and costs, and on Nov. 5, 1888, he obtained a garnishee order nisi attaching a balance of £301 1s. 3d. then standing at the defendant's credit at the London and Westminster Bank, Lothbury. The defendant was a stockbroker and had been a member of the Stock Exchange until December, 1886. Since that time he had continued to act as broker for his former clients, with the assistance of

B a broker who was a member of the Stock Exchange. He deposed that all moneys paid into his account at the London and Westminster Bank were moneys received by him on behalf of clients. On Nov. 27, 1888, the defendant's solicitor gave notice to the bank that the balance of £301 1s. 3d. belonged to the following persons in the following proportions: Mrs. Eliza Jones, £221 3s.; Edmund Shaw, £60; Miss Palmer, £14 12s. 6d.; Miss Abrey, £3 8s. 6d., the remainder

C consisting of small commissions to which the defendant was entitled. The above-mentioned persons were summoned to appear under R.S.C. Ord. 45, r. 5. The chief clerk allowed the claim of Mrs. Jones and Miss Abrey, and disallowed those of E. Shaw and Miss Palmer. The latter claims were adjourned to the judge, and on Jan. 14, 1889, NORTH, J., in chambers, disallowed them. The claims were all similar, the particulars of Shaw's being as follows. On

D Oct. 15, 1888, the defendant paid into his account £409 15s. received by him as broker for Shaw. On that day he paid in no other sum, but drew out sums amounting to £554 16s. 2d., and at the close of the day the balance at the defendant's credit was £522 13s. 6d. On Oct. 30 the defendant drew out £340 to complete a purchase for Shaw, having previously drawn out on his behalf

E £9 15s., and, therefore, £60 remained due to him from Shaw. After Oct. 15, and before the presentation of the cheque for £340, sums amounting to £1,073 18s. 9d. had been paid in, and sums amounting to £1,187 2s. 1d. drawn out. If the rule in *Clayton's Case* (1) applied, no money of Shaw's remained in the bank. On Feb. 1, 1889, Shaw and Miss Palmer moved in court before NORTH, J., to discharge the order of Jan. 14, 1889.

F *Townsend* for the claimants.
R. F. Norton for the creditor.

NORTH, J., stated the facts, and continued: Applying the doctrine of appropriation of payment out to the payments in in order of date, the sums paid in representing the two claimants' money had been more than paid out, and no part

G of the balance left in the bank consisted of any part of either of the two sums claimed. But, say the claimants, that does not preclude them, because as between themselves and the bank they are entitled to everything left in. No doubt they are entitled to say that all payments out of the bank, on the broker's private account, are made out of the money of the broker's own in the

H bank. But the broker has sworn that he had no private moneys in the bank, and the whole of the money paid into the account represented and consisted of money received for his clients. The result is, that all the moneys paid in were trust moneys, and as between the persons to whom these moneys belonged the payments out are to be taken to be set off against the moneys first paid in in order of date. That was settled by Fry, J., in *Re Hallett's Estate* (2), and his decision

I on that point was not questioned in the Court of Appeal. There the rule, as stated in the headnote (13 Ch.D. 696), is,

"as between two cestuis que trust, whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's Case* (1) applies, so that the first sum paid in will be held to have been first drawn out."

I can see other difficulties in the way of the claimants, but it seems to me that the principle laid down by Fry, J., is a fatal difficulty, and it is unnecessary to go into other matters. The motion must be refused.

Accordingly the claims of Mrs. Jones and Miss Abrey were paid out of the balance in hand, and the balance paid to the plaintiff. On Feb. 8, 1889, Shaw gave notice of appeal from the orders of Jan. 14 and Feb. 1, 1889. A

Townsend and Fossett Locke for Shaw.

R. F. Norton for the plaintiff.

LORD HALSBURY, L.C.—We are all clearly of opinion that the plaintiff is not entitled to attach this balance, but we are not quite satisfied that we can make an order in Mr. Shaw's favour. It does not appear to be distinctly made out that there is no other client of Smith who can make a claim. B

The defendant, being in court, was then called, and gave evidence. He stated that all the moneys which had been paid into the account were moneys of his clients, and that he had paid all the moneys received on behalf of his clients to or for the purpose of the clients on whose behalf respectively he had received the same, except as regarded the four claimants, to whom there remained due the above-mentioned sum, making together £299 4s., the small excess being some small transfer fees which he had paid for his clients without drawing them out of the bank. C D

LORD HALSBURY, L.C.—I am of opinion that the orders under appeal cannot be supported. I do not think that the case raises the question which NORTH, J., seems to have considered it to raise, viz., that of appropriation of payments. The rule in *Clayton's Case* (1) is a very sound rule in cases such as that in which it was first applied, but here the circumstances are entirely different. The whole fund here consists of money not borrowed by the defendant from his clients, but received by him as agent for them, and, therefore, for the present purpose may be treated as trust money. As between cestuis que trust, the rule is applicable, but it cannot be applied here because no question arises between the different cestuis que trust. The question arises between them and a person who claims under a judgment against their trustee. An execution can only take effect on property which the debtor has a right to dispose of for his own purposes. The balance here in question was not the debtor's own money; he had no right to deal with it as his own, and his execution creditor has no claim upon it. The only doubt I have felt was whether we could order payment to the claimants, but on the evidence now before us I think that we can do so without any risk of doing injustice to any person not before us. E F G

COTTON, L.J.—An execution creditor can only lay hold of what is the property of his debtor, and the evidence shows clearly that this money was paid in under such circumstances that no part of it is the debtor's own. The rule in *Clayton's Case* (1) would apply as between the cestuis que trust if there was not enough to pay them all. Here there is no conflict between them, for the evidence shows that there is no client of the defendant who can claim an interest except these four persons, and there is money in hand to pay them, so the rule in *Clayton's Case* (1) does not apply. It was said that the money to be paid out is not the same money that was paid in, and that, therefore, the claimants cannot follow it; but no one ever does receive out of a bank the same sovereigns that he paid in. If a trustee has money of his own mixed with trust money in the same account, all his drawings out for his own purposes must be attributed to his own money, and he cannot claim to apply the rule in *Clayton's Case* (1) for his own benefit as against the cestuis que trust, nor can his execution creditor do so, and still less in a case where no money of the debtor's own has ever gone into the account. H I

FRY, L.J.—I am of the same opinion. An execution creditor can only take subject to all equities. The plaintiff, therefore, stands in the shoes of Smith, and

A the case is as between Smith and the persons whose money he had in his hands. Smith could not set up the rule in *Clayton's Case* (1), and say that this money was his; so neither can the plaintiff. I think that this case is decided by *Re Hallett's Estate* (2); not by that branch of the case on which NORTH, J., relied, but by the other branch.

B Solicitors: *G. Presswell; R. Chapman.*

Appeal allowed.

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

C

D FRY v. MOORE

[COURT OF APPEAL (Lindley and Lopes, L.JJ.), May 17, 1889]

[Reported 23 Q.B.D. 395; 58 L.J.Q.B. 382; 61 L.T. 545;
37 W.R. 565]

E *Practice—Substituted service—Defendant out of jurisdiction—No leave obtained for issue of writ out of jurisdiction—Irregularity—Service under order for substituted service—Waiver by defendant taking some step in proceedings—R.S.C. Ord. 2, r. 4., Ord. 9, r. 2.*

An order for substituted service of a writ cannot be made when the defendant is out of the jurisdiction and no leave has been obtained for issue of the writ out of the jurisdiction. An order for substituted service obtained under such circumstances is not a nullity, but an irregularity, and service in pursuance of such order is an irregularity which can be waived by the defendant taking some step in the proceedings.

Notes. Applied: *Wilding v. Bean*, post p. 1026. Referred to: *Morgan v. Cullen*, [1936] 2 All E.R. 147; *Craig v. Kanseen*, [1943] 1 All E.R. 108; *Sheldon v. Brown*, [1953] 2 All E.R. 382.

G As to requirements for substituted service, see 30 HALSBURY'S LAWS (3rd Edn.) 322; and for cases see DIGEST (Practice) 329 et seq.

Cases referred to:

H (1) *Field v. Bennett* (1886), 56 L.J.Q.B. 89; 3 T.L.R. 239; Digest (Practice) 330, 482.

(2) *Hillyard v. Smyth* (1887), 4 T.L.R. 7; 36 W.R. 7; Digest (Practice) 330, 483.

Also referred to in argument:

Wright v. Mills (1889), 60 L.T. 887; Digest (Practice) 393, 968.

Ford v. Sheppard (Shephard) (1885), 53 L.T. 564; 34 W.R. 63; Digest (Practice) 331, 491.

I *Société Industrielle et Commerciale des Metaux v. Companhia Portuguesa dos Minas de Huelva*, [1889] W.N. 32; 33 Sol. Jo. 253; Digest (Practice) 332, 500.

Sloman v. New Zealand Government (1876), 1 C.P.D. 563; 46 L.J.C.P. 185; 35 L.T. 454; 25 W.R. 86; 2 Char. Pr. Cas. 202, C.A.; Digest (Practice) 330, 486.

Appeal by the defendant from a decision of the Divisional Court (FIELD and CAVE, JJ.), refusing an application by the defendant for an order that the service

of the writ and all subsequent proceedings in the action might be set aside, on the ground that at the date of the issuing of the writ the defendant was not within the jurisdiction of the court. A

A writ in an action for breach of promise of marriage within the jurisdiction was issued on November 23, 1888, addressed to the defendant, at Woodbridge, Suffolk. The alleged promise was made on September 17, 1888, and the defendant had left England for Canada in October, 1888, and no licence was obtained to issue the writ out of the jurisdiction. On Jan. 3, 1889, the plaintiff obtained an order for substituted service of the writ on the defendant's brother, a solicitor in London, and on Jan. 4 the writ was served on defendant's brother. B
No appearance was entered to the writ, and on Jan. 12, judgment was signed against the defendant in default of appearance. On Jan. 28 a summons was taken out, by the defendant's brother, purporting to act on behalf of the defendant, asking that the judgment might be set aside, and that the plaintiff might be ordered, within ten days, to deliver a statement of claim. On Mar. 2, after the defendant had been communicated with, and had himself retained a solicitor, another summons in the same terms was taken out by the defendant, and was dismissed. The defendant's application to set aside the service of the writ, and all subsequent proceedings, having been dismissed by the Divisional Court, D
the defendant appealed.

W. S. Robson for the defendant.

Macaskie for the plaintiff.

LINDLEY, L.J.—The writ for a cause of action within the jurisdiction was issued on Nov. 23, 1888. The defendant was then out of the jurisdiction so that it could not be served within the jurisdiction; and as no leave had been obtained for the issue of the writ out of the jurisdiction it could not be served on the defendant; but it was perfectly regular, because the plaintiff might have kept it until the defendant came within the jurisdiction. On Jan. 3, 1889, an order was made for substituted service of the writ on the defendant's brother. That order was in the common form; but at the time that it was made the defendant was out of the jurisdiction. E

The first question is whether, under those circumstances, the defendant being abroad, the order that was obtained for service on his brother was right. When one comes to look at the rules, it appears that they have not particularly provided for this point. But the principle that underlies the rules for service out of the jurisdiction, and *Field v. Bennett* (1) sufficiently show that there cannot be substituted service of a writ which could not be served personally; and that is a sound principle, because a principal cannot be affected by an act done to an agent when he could not be affected by the same act done to himself. I think that, when one looks at the consequences of an opposite conclusion, it is apparent that the decision in that case is sound common sense. The consequences of a contrary decision would be that, in the case of a defendant who was a foreigner resident out of the jurisdiction, the plaintiff might say, "I will not or I cannot obtain an order for service out of the jurisdiction, but I will apply for an order for substituted service." I think that there is principle and authority for saying that an order for substituted service of a writ of summons cannot be obtained when the defendant is out of the jurisdiction. Therefore, the order for substituted service that was made in this case was wrong. F
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Then comes the question whether the service of the writ under that order was an irregularity or a nullity. It appears to me to have been an irregularity rather than a nullity. I am not prepared to say that an improper mode of serving the writ is a nullity that cannot be waived. Then, was the irregular service of the writ waived in the present case? The defendant has taken two steps which are inconsistent with there having been no proper service of the writ: First, the

A brother, who had been served, took out a summons to set aside the judgment that had been signed in default of appearance, and for delivery of a statement of claim. I think that the brother knew the facts, and had authority to act for the defendant. But further, after the defendant had been communicated with and had himself instructed a solicitor, another summons was taken out in the same terms. These two summonses appear to me to be so inconsistent with the contention that the writ had not been properly served as to amount to a waiver of the irregularity.

Under these circumstances the case stands thus: The writ itself was perfectly regular; the order for substituted service of the writ was wrong; service of the writ in pursuance of that order was an irregularity, but not a nullity; and the irregularity has been waived. The appeal will, therefore, be dismissed.

C **LOPES, L.J.**—The two cases of *Field v. Bennett* (1) and *Hillyard v. Smyth* (2), clearly show that there cannot be substituted service of a writ which could not itself be served upon the defendant. In the present case the writ of summons being one for service within the jurisdiction, could not have been served upon the defendant, who was out of the jurisdiction. The order for substituted service of that writ was, therefore, irregular. If we were to hold otherwise, all the rules as to obtaining leave for service out of the jurisdiction would be entirely useless. Then a further question arises as to whether the service under that order was a nullity or an irregularity, and, if an irregularity only, whether the irregularity has been waived. I think that the substituted service was not a nullity. The writ was perfectly regular, and I think that the mistake in the mode in which the service was carried out was an irregularity only. I further think that that irregularity has been waived. After the defendant was himself represented by a solicitor, a second summons was taken out asking that the plaintiff be ordered to deliver a statement of claim. That is inconsistent with there being no action pending at that time. This appeal must, therefore, be dismissed.

Appeal dismissed.

F Solicitors: *A. W. Mills, J. Greenfield.*

[*Reported by H. BITTLESTON, Esq., Barrister-at-Law.*]

G

THORNTON v. THORNTON

H [COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), April 14, 1886]

[*Reported 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774;
34 W.R. 509*]

Conflict of Laws—Lis alibi pendens—Stay of proceedings—Petition for divorce presented abroad—Restitution petition presented in England by respondent to divorce suit.

I The husband, an officer in the Indian army, commenced proceedings in India for dissolution of marriage on the ground of the wife's adultery in that country. Two months previously, with the husband's consent, the wife had returned to England and the petition was served on her in England. Shortly afterwards the wife commenced proceedings in England for the restitution of conjugal rights, the husband then being in England on leave. The husband applied to the court to stay the English proceedings until the suit in India had been

determined on the ground that all his witnesses, as well as the co-respondent, were resident in India. A

Held: as each court had jurisdiction in the matter before it, the wife's proceedings in the English court ought not to be stayed.

Notes. Considered and Explained: *Re Norton's Settlement, Norton v. Norton*, [1908] 1 Ch. 471; *Cohen v. Rothfield*, [1918-19] All E.R. Rep. 260; *Sealey (otherwise Callan) v. Callan*, [1953] 1 All E.R. 942. Referred to: *Armytage v. Armytage*, [1895-9] All E.R. Rep. 377; *Keyes v. Keys and Gray*, [1921] P. 204; *St. Pierre v. South American Stores (Gath and Chaves), Ltd.*, [1935] All E.R. Rep. 408; *Klosser v. Klosser*, [1945] 2 All E.R. 708; *Matalon v. Matalon*, [1952] 1 All E.R. 1025. B

As to stay of English proceedings, see 7 HALSBURY'S LAWS (3rd Edn.) 170 et seq.; and for cases see 11 DIGEST (Repl.) 542 et seq. C

Appeal from a decision of BUTT, J., refusing to stay proceedings in a suit brought by the wife for restitution of conjugal rights until a petition for the dissolution of the marriage brought by the husband in India had been determined.

The husband was a captain in the Indian Army, and resided there with his wife. In December, 1885, he discovered a correspondence between his wife and another officer, and later he alleged that his wife had confessed that she had been guilty of adultery. Shortly afterwards, with the husband's consent, the wife left India and went to her father's house in England. In February, 1886, the husband presented a petition to the High Court of Judicature at Bombay for dissolution of the marriage on the ground of the wife's adultery in India. An office copy of the petition was received by the wife on Mar. 23 or 24, 1886, and on Mar. 25 she was served with the petition in England under an order of the Indian court. On Mar. 26, 1886, the wife presented to the Probate, Divorce and Admiralty Division a petition for restitution of conjugal rights, and this was served on the husband in England. He had left India in February, 1886, bringing the children with him, his object being to provide a home for them in England. When the wife's petition was served on the husband he moved BUTT, J., for an order that the suit for restitution be dismissed, or, in the alternative, that all proceedings therein be stayed pending the determination of the proceedings in India. In his affidavit the husband deposed that the co-respondent and all the witnesses needed to corroborate the wife's confession of adultery were resident in India. BUTT, J., dismissed the application and the husband appealed. D

Inderwick, Q.C., and *Bargrave Deane* for the husband.

Bayford, Q.C., and *Searle* for the wife. E

COTTON, L.J.—This is a case of some nicety, and the point is this. The husband commenced in India a suit for dissolution of marriage against his wife and the co-respondent. Before that suit was commenced the wife came over to England—I will not say whether she was sent here or came of her own accord. When her husband accidentally came over to England for a short time, she commenced proceedings in this country for restitution of conjugal rights. Therefore, there are suits going on in two courts, both of which, according to my present opinion, had jurisdiction over the matter as against the husband. The Probate, Divorce and Admiralty Division of the High Court in this country has jurisdiction over him, from the fact of his presence here. On the other hand, he had commenced proceedings in a court which, as far as I can see, had jurisdiction, notwithstanding that his wife had gone abroad before the suit there was commenced. In that state of things what the husband asks is, that, as his objection and defence to the suit for restitution of conjugal rights is the adultery of his wife, which is his ground of action in India, the proceedings in England, on the petition of the wife, should be stayed until the question of adultery has been decided, not only as F

A against her but as against the co-respondent in the suit in India. Undoubtedly there are certain advantages in taking that proceeding, for it will make that suit effectual, not only as against the wife but as against the co-respondent; the action will be in a place where all the witnesses, except the wife, are now resident; and certainly, if one could avoid it, one would not allow the husband
B to be put to the expense of having two proceedings for proving the adultery of the wife, especially when the fact is considered that one of the suits is in England and the witnesses are in India.

But then what we have to consider is whether we can deprive the wife, in a suit duly instituted by her, in a court having jurisdiction, of her right to have the questions which arise in that suit decided in England, and say the matter
C should be tried somewhere else. I feel a difficulty in doing that; indeed, I feel it would not be right for us to do it. The wife says that, although there is some evidence by the husband that she made a confession of adultery to him, yet she did not commit adultery, and wishes to have that question tried, and to be able, without going to India, to give her explanation in court of the circumstances relied upon by her husband. I do not think it can be said to be unnatural or un-
D reasonable that she should wish to do that in England rather than have to go to India to give her evidence in the suit commenced by her husband in that country. I think that, notwithstanding the inconvenience and expense which the husband must be put to if both actions are allowed to go on, we ought not to prevent the wife, as she insists upon it, from going on with her proceedings here free from any stay, free from any prohibition from going into this question here, and without putting
E her upon the terms of her action being stayed until the action in India is decided. The appeal must, therefore, fail.

BOWEN, L.J.—I am of the same opinion. The decision comes, in the end, to rest upon a very small point. The lady has, *prima facie*, a right to prosecute her suit here. She thinks she has an advantage in doing so. She thinks it is
F for her benefit that, if the issue of her adultery is raised, she should have it tried in England, and in London. I can conceive that that is not an unreasonable view if she is an innocent woman. Even if she is guilty, she might not unreasonably hope to escape more easily in England. Ought we then to interfere with the natural course of this suit, which she has a right to prosecute here, by making an order in it which, in the result, might possibly transfer the
G decision of the question of her adultery from this English court to an Anglo-Indian court? I do not deny we could do so if we saw clearly that the ends of justice required it, if we saw clearly that there would be oppression, or waste of time, or vexation in allowing her to proceed here with the suit without interference on our part. I do not think we ought to interfere in such a way unless it is very clear that we could not do any harm at all by the interference, and I do not
H think that such a case has been made clear to us. It seems to me we cannot interfere with the judgment, and that we ought to dismiss the appeal with costs.

FRY, J.—I am also, but not without regret, of the same opinion.

Appeal dismissed.

I Solicitors: *Godden, Holme & Co.; William Horsley.*

[*Reported by F. EVANS, Esq., Barrister-at-Law.*]

STANLEY v. POWELL

[QUEEN'S BENCH DIVISION (Denman, J.), October 25, November 3, 1890]

[Reported [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809;
55 J.P. 327; 39 W.R. 76; 7 T.L.R. 25]*Trespass to the Person—Accidental wounding—Absence of intention or negligence.*

In the absence of intention and negligence an action for trespass to the person is not maintainable.

The plaintiff was employed to carry cartridges and game for a shooting party. The defendant, who was one of the party, fired at a pheasant, and a shot from his gun glanced off the bough of a tree and wounded the plaintiff in the eye. The jury found that the plaintiff was injured by a shot from the defendant's gun, but that the defendant was not guilty of any negligence.

Held: as the defendant had fired his gun without negligence and without intending to injure the plaintiff, he was not liable.

Notes. Considered: *National Coal Board v. Evans & Co. (Cardiff), Ltd.*, [1951] 2 All E.R. 310. Followed: *Fowler v. Lenning*, [1959] 1 All E.R. 290. Referred to: *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Murray v. Harringay Arena, Ltd.*, [1951] 2 All E.R. 320, n.; *Morriss v. Marsden*, [1952] 1 All E.R. 925.

As to trespass to the person, see 38 HALSBURY'S LAWS (3rd Edn.) 760 et seq.; and for cases see 15 DIGEST (Repl.) 992 et seq.

Cases referred to:

- (1) *Leame v. Bray* (1803), 3 East 593; 102 E.R. 724; 43 Digest 420; 429.
- (2) *Weaver v. Ward* (1616), Hob. 134; Moore, K.B. 864; 80 E.R. 284; 15 Digest (Repl.) 992, 9720.
- (3) *Gibbons v. Pepper* (1695), 1 Ld. Raym. 38; 4 Mod. Rep. 404; 91 E.R. 922; 15 Digest (Repl.) 992, 9721.
- (4) *Wakeman v. Robinson* (1823), 1 Bing. 213; 8 Moore, C.P. 63; 1 L.J.O.S.C.P. 70; 130 E.R. 86; 43 Digest 373, 9.
- (5) *Hall v. Fearnley* (1842), 3 Q.B. 919; 3 Gal. & Dav. 10; 12 L.J.Q.B. 22; 7 Jur. 61; 114 E.R. 761; 43 Digest 435, 627.
- (6) *Underwood v. Hewson* (1724), 1 Stra. 596; 93 E.R. 722; 43 Digest 431, 566.
- (7) *Day v. Edwards* (1794), 5 Term Rep. 648.
- (8) *Holmes v. Mather* (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 23 W.R. 869; 15 Digest (Repl.) 992, 9725.

Further Consideration by DENMAN, J., of an action tried by him at Maidstone Assizes.

Kemp, Q.C. (with him *W. H. C. Payne*) for the plaintiff.

H. Dickens and *T. Willis Chitty* for the defendant.

Cur. adv. vult. I

Nov. 3, 1890. **DENMAN, J.**, read the following judgment.—This case was tried before me and a special jury at the last Maidstone Summer Assizes. In the statement of claim the plaintiff alleged that the defendant had negligently and wrongfully and unskillfully fired his gun and wounded the plaintiff in his eye, and that the plaintiff in consequence had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the

A jury: (i) Was the plaintiff injured by a shot from defendant's gun? (ii) Was the defendant guilty of negligence in firing the charge to which that shot belonged, as he did? (iii) Damages.

The undisputed facts were, that on Nov. 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside a wood which the beaters were beating. The right of shooting was in one
B Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a
C pheasant rose inside the plantation. The defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details, but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his
D second barrel and killed the bird, but that a shot glancing from the bough of an oak which was in or close to the hedge, and striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line that the shot must have been diverted to a considerable
E extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant in a direct line when the second barrel was fired was about thirty yards. The case for the plaintiff was entirely different, but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to
F them in the negative.

Before summing up the case to the jury I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases that, even in the absence of negligence, an action of trespass might lie, and it was agreed that I should leave the question of negligence to the jury, but that if necessary the pleadings were to be deemed to have been amended
G so as to raise any case or defence open upon the facts, with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment, but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved
H it for further consideration before myself.

Having heard the arguments, I am of opinion that by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts, and this contention was mainly founded on certain dicta which, until considered
I with reference to the cases in which they were uttered, seem to support that contention; but no decision was cited, nor do I think that any can be found which goes so far as to hold that if A. is injured by a shot from a gun fired at a bird by B. an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence, and without intending to injure the plaintiff.

The jury having found that there was no negligence on the part of the defendant, the most favourable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and

to consider that the defendant has put upon the record a defence denying negligence and specifically alleging the facts sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law. A

The earliest case relied upon by the plaintiff was one in the YEAR BOOK 21 Hen. 7, 28A, which is referred to by GROSE, J., in the course of the argument in *Leame v. Bray* (1), in these words: B

“There is a case put in the YEAR BOOK 21 Hen. 7., 28A, that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass.”

On turning to the case in the YEAR BOOK it appears that the passage in question was a mere dictum of REDE, who (see 5 FOSS' LIVES OF THE JUDGES, p. 230) was at the time (1506) either a judge of the King's Bench or Chief Justice of the Common Pleas, in a case of a very different kind from that now in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are: C

“Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte il sera dit un trespassor incontre son entent.” D

But in that very passage REDE makes observations which show that he has in his mind cases in which that which would be prima facie a trespass may be excused. E

The next case in order of date relied upon for the plaintiff was *Weaver v. Ward* (2), decided in 1616. There is no doubt that that case contains dicta which per se would be in favour of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are prima facie trespasses: F

“Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault,”

showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and the defendant were skirmishing as soldiers of the trainband, and the one “casualiter et per infortunium et contra voluntatem suam” (which must be translated “accidentally and involuntarily”) shot the other, an action of trespass would lie unless he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed in which there could be no two opinions about the matter; but other cases may—as the present case did—involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. *Gibbons v. Pepper* (3), decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was inevitable was a bad plea in an action of trespass—because, if inevitable, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which show clearly the ratio decidendi of that case, are these: G

“He should have pleaded the general issue, for if the horse ran away against his will, he would have been found not guilty, because in such case it cannot be said with any colour of reason to be a battery in the rider.” H

The more modern cases of *Wakeman v. Robinson* (4) and *Hall v. Fearnley* (5) lay down the same rule as regards the pleading point, though the former case was also relied upon as an authority by way of dictum in favour of the I

A plaintiff, and the latter may be fairly relied upon by the defendant, for WIGHTMAN, J., in his judgment, explains *Wakeman v. Robinson* (4) thus (3 Q.B. at p. 922):

B "The act of the defendant—viz., driving a cart at the very edge of a narrow pavement on which the plaintiff was walking so as to knock the plaintiff down—was prima facie unjustifiable, and required an excuse to be shown. When the motion was first made I had in my recollection the case of *Wakeman v. Robinson* (4). It was there agreed that an involuntary act might be a defence on the general issue. The decision, indeed, turned on a different point, but the general proposition is laid down. I think the omission to plead the defence has deprived the defendant of the benefit of it and entitled the plaintiff to recover."

C But in truth neither case decided whether, where an act such as discharging a gun is voluntary, but the result injurious, without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established to the effect that there was no negligence on the part of the defendant.

D *Underwood v. Hewson* (6), decided in 1724, was relied on for the plaintiff. The report is very short (1 Stra. 596):

"The defendant was uncocking a gun, and, the plaintiff standing to see it, it went off and wounded him, and at the trial it was held that the plaintiff might maintain trespass. Strange pro defendente."

E The marginal note in NOLAN's edition of 1795—not necessarily STRANGE's own composition—is this, "Trespass lies for an accidental hurt," and in that edition there is a reference to BULLER's N.P., p. 16. On referring to BULLER, p. 16, where he is dealing with *Weaver v. Ward* (2), I find he writes as follows:

F "So it is no battery if one soldier hurts another in exercise; but if he plead it he must set forth the circumstances so as to make it appear to the court that it was inevitable and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it casualiter et per infortunium contra voluntatem suam, for no man shall be excused of a trespass unless it be justified entirely without his default (*Weaver v. Ward* (2)), and, therefore, it has been holden that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded: *Underwood v. Hewson* (6), per FORTESCUE and RAYMOND, Stra. 596."

G On referring back to *Weaver v. Ward* (2), I can find nothing in the report (Hob. 134) to show that the court held that in order to constitute a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that that was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* (2) really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault." *Day v. Edwards* (7), decided in 1794, merely decides that where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass and not case.

H But the case on which most reliance was placed by the plaintiff's counsel was *Leame v. Bray* (1). That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricule, which the plaintiff's servant was driving, by means whereof the servant was thrown out and the horses ran away, and the plaintiff, who jumped off to save his

life, was injured. The facts stated in the report (3 East, at p. 593) include A
a statement that

"the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other, and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." B

The report goes on to state :

"But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was, therefore, objected for the defendant that, the injury having happened from negligence and not wilfully, the proper remedy was by an action on the Case and not C
of trespass vi et armis, and the plaintiff was thereupon nonsuited."

On the argument of the rule to set aside the nonsuit the whole discussion turned upon the question whether the injury was, as put by LAWRENCE, J., ibid. at p. 596, immediate from the defendant's act or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found D
negligence, and, indeed, the defendant's counsel assumed it in the very objection which prevailed with LORD ELLENBOROUGH when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night rendering it impossible to distinguish E
one side of the road from the other, and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875 in *Holmes v. Mather* (8), and BRAMWELL, B., in giving judgment in that case, dealt with them thus (L.R. 10 Exch. at pp. 268, 269): F

"As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. G
Where the act is not wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by counsel for the defendant from BACON'S ABRIDGMENT, "Trespass," p. 706, with a marginal reference to *Weaver v. Ward* (2), where the word "inevitable" does H
not find a place.

"If the circumstance which is specially pleaded in an action of trespass does not make the act complained of lawful [by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence], and only make it excusable, it is I
proper to plead this circumstance in excuse, and it is in this case necessary for the defendant to show not only that the act complained of was accidental [by which I understand, 'that the injury was unintentional'], but likewise that it was not owing to neglect or want of due caution."

In the present case the plaintiff sued in respect of an injury owing to defendant's negligence, and there was no pretence for saying that it was intentional so far as any injury to the plaintiff is concerned. The jury

A negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that to any statement of claim which the plaintiff could suggest the defendant must succeed if the defendant pleaded the facts sworn to by the witnesses for the defendant

B in this case, and the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have done as regards negligence. In other words, I am of opinion that, if the case is regarded as an action on the case for an injury by negligence, the plaintiff has failed to establish that which is the very gist of such an action. If, on the other hand, it is turned into an action of trespass, and the defendant is (as he must be) supposed

C to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant.

Judgment for defendant.

D Solicitors: *H. Fawcett; Smith, Stenning & Croft, for Stenning, Tonbridge.*

[*Reported by A. H. LEFROY, Esq., Barrister-at-Law.*]

E

BOUCH AND OTHERS v. SPROULE

F [HOUSE OF LORDS (Lord Herschell, Lord Watson, Lord Bramwell and Lord FitzGerald), April 5, 8, 9, 12, 1886, June 13, 1887]

[*Reported 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193*]

Company—Capital—Increase—Issue of new shares—Payment by shareholders out of "bonus dividend"—Distribution of accumulated profits.

G Where a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life and what

H is paid by the company to the shareholders as capital, or appropriated as an increase of its capital stock in the concern, enures to the benefit of all who are interested in the capital.

I A testator died in 1876 having bequeathed his residuary personal estate to T. B. in trust for the testator's widow for life, and, after her death, to T. B. absolutely. Part of the residuary estate consisted of 600 £10 shares in a company, on which £7 10s. per share had been paid up. In August, 1880, the directors of the company recommended that a reserve fund, the whole of which, and an "undivided profit fund" a great part of which, had been accumulated out of undivided profits of the company during the testator's lifetime, should be distributed as a "bonus dividend" of £2 10s. per share, and that new £10 shares should be created to the number of one-third of the original shares, so that one new share might be allotted to each shareholder for every three original shares which he held, £7 10s. per share to be paid on allotment, payable out of the bonus received by the shareholders. In September, 1880,

these recommendations were adopted at a general meeting, in valid exercise of the powers of the company. T. B. accepted the 200 new shares allotted to him, and signed a memorandum directing the registrar of the company to apply the bonus in payment of the call. The new shares were registered in the name of T. B., who died in 1880, predeceasing the testator's widow.

Held: the bonus declared in 1880, and the new shares did not belong to the tenant for life, but were capital and belonged to the estate of T. B. the remainderman.

Irving v. Houstoun (1) (1799), 4 Pat. App. 521, distinguished.

Decision of the Court of Appeal, 29 Ch.D. 635, reversed.

Notes. Distinguished: *Re Bromley, Sanders v. Bromley* (1886), 55 L.T. 145. Applied: *Re Alsbury, Sugden v. Alsbury* (1890), 45 Ch.D. 237. Considered: *Re Paget, Listowel v. Paget* (1892), 9 T.L.R. 88. Applied: *Re Eastern and Australian Steamship Co., Ltd., and Reduced* (1893), 68 L.T. 321. Considered: *Re Armitage, Armitage v. Garnett*, [1893] 3 Ch. 337; *Re Malam, Malam v. Hitchens* [1894] 3 Ch. 578; *Re Despard, Hancock v. Despard* (1901), 17 T.L.R. 478. Distinguished: *Re Hume Nisbet's Settlement* (1911), 27 T.L.R. 461. Applied: *Re Palmer, Palmer v. Cassel* (1912), 28 T.L.R. 301. Considered: *Re Evans, Jones v. Evans*, [1913] 1 Ch. 23; *Re Thomas, Andrew v. Thomas*, [1916] 2 Ch. 331; *Re Ogilvie, Ogilvie v. Ogilvie* (1919), 88 L.J.Ch. 159; *I.R.Comrs. v. Blott, I.R.Comrs. v. Greenwood*, [1921] 2 A.C. 171; *Re Speir, Holt v. Speir*, [1923] All E.R. Rep. 640; *I.R.Comrs. v. Fisher's Executors*, [1926] A.C. 395. Followed: *I.R.Comrs. v. Wright* (1926), 95 L.J.K.B. 982; *Re Taylor, Waters v. Taylor*, [1926] Ch. 923. Distinguished: *Re Bates, Mountain v. Bates*, [1928] All E.R. Rep. 126; *Parker v. Chapman* (1928), 138 L.T. 729; *Hill (R.A.) v. Permanent Trustee Co. of New South Wales*, [1930] All E.R. Rep. 87. Considered: *Re Doughty, Burridge v. Doughty*, [1946] 2 All E.R. 341; *Re Duff's Settlement Trusts, National Provincial Bank, Ltd. v. Gregson*, [1951] Ch. 721. Followed: *Re Outen's Will-Trusts*, [1962] 3 All E.R. 478. Referred to: *Re Bromley, Sanders v. Bromley* (1886), 55 L.T. 145; *Re Bridge-water Navigation Co.*, [1891-4] All E.R. Rep. 174; *Re Northage, Ellis v. Barfield* (1891), 60 L.J.Ch. 488; *Re Piercy Whitwham v. Piercy*, [1907] 1 Ch. 289; *Pool v. Guardian Investment Trust Co.*, [1922] 1 K.B. 347; *I.R.Comrs. v. Burrell*, [1924] All E.R. Rep. 672; *I.R.Comrs. v. Doncaster* (1924), 93 L.J.K.B. 338; *Re Railways Act, 1921, Re Standard Charges Schedule* (1925), 94 L.J.K.B. 364; *Income Tax Comr., Bengal v. Mercantile Bank of India, Ltd.*, [1936] 2 All E.R. 857; *Re Joel, Johnson v. Joel*, [1936] 2 All E.R. 962; *Re Ward, Ringland v. Ward*, [1936] 2 All E.R. 773; *I.R.Comrs. v. Marbob, Ltd.*, [1939] 3 All E.R. 309; *Nicholas v. Victoria State Comr. of Taxes*, [1940] 3 All E.R. 91; *Re Whitehead's Will Trusts, Public Trustee v. White*, [1959] 2 All E.R. 497.

As to capitalisation of profits see 6 HALSBURY'S LAWS (3rd Edn.) 137, 138, 406, and for cases see 9 DIGEST (Repl.) 146-149, 638.

Cases referred to :

- (1) *Irving v. Houstoun* (1799), 4 Pat. App. 521.
- (2) *Paris v. Paris* (1804), 10 Ves. 185; 32 E.R. 815; 40 Digest (Repl.) 724, 2147.
- (3) *Brander v. Brander* (1799), 4 Ves. 800; 31 E.R. 414; 40 Digest (Repl.) 724, 2144.
- (4) *Clayton v. Gresham* (1804), 10 Ves. 288; 32 E.R. 855; 40 Digest (Repl.) 724, 2145.
- (5) *Witts v. Steere* (1807), 13 Ves. 363; 33 E.R. 330; 40 Digest (Repl.) 724, 2148.
- (6) *Re Hodgkins, Ex parte Hodgkins* (1847), 11 I.Eq.R. 99; 40 Digest (Repl.) 708, *352.
- (7) *Barclay v. Wainwright* (1807), 14 Ves. 66; 33 E.R. 446; 40 Digest (Repl.) 718, 2106.
- (8) *Preston v. Melville* (1848), 16 Sim. 163; 60 E.R. 835; 40 Digest (Repl.) 718, 2109.

- (9) *Warde v. Combe* (1886), 7 Sim. 684; 58 E.R. 981; 40 Digest (Repl.) 724, 2146.
- (10) *Price v. Anderson* (1847), 15 Sim. 473; 60 E.R. 703; 40 Digest (Repl.) 718, 2108.
- (11) *Re Barton's Trust* (1868), L.R. 5 Eq. 238; 37 L.J.Ch. 194; 17 L.T. 594; 16 W.R. 392; 40 Digest (Repl.) 724, 2150.

Also referred to in argument :

Hooper v. Rossiter (1824), M'Cle. 527; 13 Price 774; 147 E.R. 1151; 40 Digest (Repl.) 724, 2149.

Appeal from a decision of the Court of Appeal, reported 29 Ch. D. 635, reversing an order of Kay, J., in an action brought by the respondent as executor of Jane Bouch, the tenant for life under the will of one William Bouch deceased, against the appellant, as executor of Sir T. Bouch, the remainderman.

William Bouch, who died on Jan. 19, 1876, by his will bequeathed all the residue of his personal estate to Sir Thomas Bouch upon trust to convert the same into money, or, with the consent of Jane Bouch (the testator's wife), to allow the same to remain unconverted, and upon further trust to permit his wife to receive the interest, dividends, and annual income of the personal estate during her life. Subject thereto, he bequeathed the residue of his personal estate to Sir Thomas Bouch absolutely. Part of the residuary personal estate of William Bouch consisted of 600 shares of £10 each in the Consett Iron Co., upon which £7 10s. per share had been paid. These shares were, with the consent of Jane Bouch, allowed to remain unconverted, and she received the dividends thereon during her life. Sir Thomas Bouch died on Oct. 30, 1880, having by his will appointed the appellants his executors and trustees. Jane Bouch, the tenant for life, died on Feb. 22, 1883, having by her will appointed the respondent her executor.

The Consett Iron Co. was incorporated in the year 1864, with a capital of £400,000 divided into £10 shares. The articles of association provided that whenever the net profits of the company during any financial year ending June 30 would admit, the directors should recommend to the meeting to declare a dividend on the company's capital, and thereupon it should be competent at such meeting to make and declare a dividend of such amount, and payable at such time, as the meeting should determine. By art. 109 :

"The directors may before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund for meeting contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities or in such manner as they may think proper."

The capital of the company was afterwards increased to £552,000 by the addition of 6,000 and 9,200 new shares of £10 each, with £7 10s. per share paid thereon. In the accounts of the company for the year beginning June 30, 1874, there stood to the credit of a reserve fund £100,000, made up from undivided profits of previous years, and there stood to the credit of another fund, styled "undivided profit," a further sum of £6,203 12s.

In August, 1880, the £100,000 still stood to the credit of the reserve fund, and, in addition to the profits of the previous year, £36,070 1s. 8d. was standing to the credit of the undivided profit fund. The report of the directors of Aug. 12, 1880, after recommending that the profits of the previous year should be appropriated to the payment of a certain dividend, and that £7,246 4s. 5d. should be carried forward as undivided profit, proceeded as follows :

"Your directors feel that the time is now come when they may safely recommend some permanent appropriation of the £100,000 standing to the credit of the reserve fund, and of a considerable portion of the undivided

profit fund. They, therefore, propose that the reserve fund £100,000 and £38,000 out of the £43,316 6s. 1d. (to which the undivided profit would be brought up by the mode of appropriating the year's profit previously recommended), making together £138,000 shall be distributed as a bonus dividend of £2 10s. per share, equalling £7 10s. in respect of every three existing shares; but as the company's operations render it desirable to raise an equal amount as capital account, your directors propose that there be created 18,400 new shares of £10 each with £7 10s. per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividends would pay the £7 10s. on each such new share. Your directors propose that the bonus dividend and the call of £7 10s. per new share be made payable on Sept. 30, the members registered in the company's books on Sept. 25 being treated as those entitled to such dividend, and to the allotment of new shares. They also propose that the new shares shall take dividend from July 1, 1880, as if the £7 10s. per share had been paid up on that date. They will, therefore, stand on an equal footing with the present shares in regard to all dividends beyond that about to be declared. Every member of the company on Sept. 25 would consequently receive a new £10 share in respect of every three shares he then holds, such new share having, like the existing shares, £7 10s. paid thereon."

On Sept. 4, 1880, the directors' report and accounts were received and adopted, and a special resolution was passed adding to the articles of association a new article empowering the directors, with the sanction of the company in general meeting, to declare a bonus to be paid to the members in proportion to their shares out of the reserve fund, or out of any other accumulated profits of the company. Special resolutions were also passed sanctioning the creation of capital and its allotment in the manner recommended by the directors.

At a meeting of the company on Sept. 25, 1880, these resolutions were confirmed, and a resolution was passed sanctioning the payment of a bonus of £2 10s. per share out of the £100,000 standing to the credit of the reserve fund, and £38,000 part of the undivided profit then in hand. On the same day the registrar of the company sent to the shareholders, including Sir Thomas Bouch (in whose name the 600 shares belonging to William Bouch's estate were registered), a letter enclosing a warrant and forms relating to the new shares. The letter was in the following terms:

"I am instructed to inform you that in accordance with the special resolutions confirmed at the meeting of the company held this day, the directors have, in respect of the 600 shares now registered in your name, allotted to you 200 new shares of £10 each, subject to the sum of £7 10s. per share being paid up thereon on or before the 30th inst., and I enclose you a bonus dividend warrant payable on that date for £1,500, which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10s. per share on your above named new shares. Regarding the registration of these new shares, I have to explain that, if you desire to have all that you are entitled to registered in your own name, you must fill up and sign the enclosed form No. 1. If you desire to have all or part registered in some other name, forms No. 2 must be filled up and signed both by yourself and by the person in whose name the shares or any of them are to be registered."

The enclosed form No. 1 was as follows:

"Gentlemen, I hereby accept the 200 new shares which have been allotted to me, subject to the conditions on which they are issued, and request that the whole be registered in my own name."

A This was signed and returned by Sir Thomas Bouch. He also signed and returned the enclosed warrant, which was in the following form :

B "Consett Iron Co., Ltd. Bonus dividend warrant of £2 10s. per share payable on Sept. 30, 1880. To the members registered in the company's books on Sept. 25, 1880. No. 102. Name of member—Thomas Bouch, Esq. Number of shares, 600. Amount of bonus dividend, one thousand five hundred pounds. (Signed) WM. COCKBURN, Registrar. I hereby authorise and request you to apply the above amount in payment of the call of £7 10s. per share on the 200 new shares that have been allotted to me in accordance with the special resolutions passed at the ordinary general meeting of the company held on Sept. 4, and confirmed at the extraordinary general meeting held on Sept. 25, 1880. N.B. This warrant must be signed and sent to the registrar Mr. Wm. Cockburn, 33, Westgate Road, Newcastle-on-Tyne, on or before Sept. 30, 1880."

C The 200 new shares were accordingly registered in the name of Sir Thomas Bouch, and £7 10s. was credited as paid on each share. The dividends on these new shares, as well as on the original shares, were paid to Jane Bouch, the tenant for life, down to the last dividend day prior to her death.

D KAY, J. expressed an opinion that the bonus of £2 10s. per share sanctioned on Sept. 25, 1880, on the 600 shares in the company was capital of the estate of William Bouch deceased, and declared that the plaintiff, as executor of William Bouch's widow, was not entitled to the payment of the amount of the bonus or any part thereof, nor to the 200 new shares allotted to Sir Thomas Bouch or any part thereof, and interest accordingly. His judgment was reversed by the Court of Appeal, and the defendants in the action, the executors and trustees of Sir Thomas Bouch appealed.

Graham Hastings, Q.C., and Freeman for the appellants.

Rigby, Q.C., and Buckley for the respondent.

F Their Lordships took time for consideration.

July 13, 1887. The following opinions were read.

LORD HERSCHELL (a) (after stating the facts as set out, ante).—This appeal arises upon a Case stated for the opinion of the court to determine whether a bonus of £2 10s. per share, sanctioned in the circumstances I have mentioned, on 600 shares in the Consett Iron Co. Ltd., was income of the estate of William Bouch or capital of that estate. It is to be observed that before the allotment of the new shares in 1880 the shares of the company were at a premium of about £21 per share, but immediately after such allotment they fell to £14 per share premium. The case came, in the first instance, before H KAY, J. He considered that it might be open to doubt whether the bonus at the time it was declared belonged to the tenant for life, or was to be regarded as an accretion to capital, though, on the authority of *Paris v. Paris* (2), he inclined to the latter opinion. But he came to the conclusion that the bonus had been capitalised with the consent of the tenant for life, and that she had agreed that the shares should be treated as capital of the testator's estate, so I as to avoid raising this question. The Court of Appeal reversed this judgment. They held that there was no evidence to show that the tenant for life had agreed to relinquish any of her rights, and that the bonus belonged to her, and, having been invested by the trustees in shares of the Consett company, those shares became her property. I quite concur with the Court of Appeal in thinking that there is no evidence that the tenant for life relinquished her right to the bonus if she was ever entitled to it; and, in my judgment, the sole question for

(a) In the interval between the argument of the case and the judgment, Lord Herschell had ceased to hold the office of Lord Chancellor, having been succeeded by Lord Halsbury on August 3rd, 1886.

determination is whether this bonus is to be regarded as income passing to the tenant for life under the trusts of the will, or an accretion to capital, to the income of which alone she was entitled, and which enured after her death for the benefit of the remainderman. A

I think this is a question of very considerable difficulty. It was argued at your Lordships' Bar on behalf of the appellants that it was really settled in their favour by authority. It was said to be well established that where a dividend or bonus appeared to be declared out of accumulated profits, which, de facto, had formed part of the capital of the company, it must be treated as an addition to capital, and that the tenant for life was not entitled to it. If I thought that any such rule had been established and was applicable to the circumstances of the present case, I should certainly advise your Lordships to decide in accordance with it, whatever I might think of its expediency. The division of the enjoyment of property between a tenant for life and a remainderman is itself artificial, and if any artificial rule had been established regulating such enjoyment, every settlor or testator may well be presumed to have intended that the objects of his bounty should share its benefits according to this rule. I may observe, however, at the outset, that there would often be considerable difficulty in the application of the suggested rule, and that it does not appear to rest on any satisfactory basis of principle. B C D

I will proceed now to consider the authorities relied on. The earliest of these was *Brander v. Brander* (3), decided in 1799. The Bank of England, having paid out of their funds for the public service £1,000,000, received £1,125,000 three per cent. Annuities. These they resolved to distribute pro rata among the then proprietors of bank stock. The question arose whether the proportion allotted to the testator's representatives was to be regarded, as between the tenant for life and remainderman, as income or capital. LORD ROSSLYN, L.C., took the latter view. He said (4 Ves. at p. 801): E

"If I am to go upon principle, I must hunt back to see to what part of that saving each is entitled. I have often considered this question, and it seemed to me in all the different ways I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to capital." F

Fry, L.J., says in the present case that the principle of this decision was that what the company says is income shall be income, and what it says is capital shall be capital. He says (29 Ch.D. at p. 654): G

"The Lord Chancellor seems to have proceeded on the ground that the original £1,000,000 was part of the capital of the bank. . . . If that were so, it follows that the bank was distributing amongst its proprietors that which had been returned by the government in satisfaction for the outlay of a part of its capital." H

I cannot concur in this view of *Brander v. Brander* (3). It does not appear to me to have proceeded on any such principle. The company had in no way said that either the £1,000,000 which had been advanced for the public service, or the annuities which were received in return for it, should be capital. Moreover, it is to be observed (and the importance of this will be seen when we come to consider the scope of this authority and of those which have followed it), that the bank could not have declared that either of these sums should be added to, or form part of, its capital property so-called, for the bank had no power (as is pointedly stated in the case) to increase its capital, except by obtaining an Act of Parliament. I think the decision in *Brander v. Brander* (3) proceeded on the ground which Fry, L.J., accurately states as the foundation of the judgment in *Irvine v. Houstoun* (1), viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by I

A reason of any declaration of the company that they should be so, but only in the sense that, having accumulated, they were de facto used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company may equally be said to form part of its floating capital. And I think that the learned counsel for the appellants were well founded in saying that the greater part, if not the whole, of the accumulated profits of the Consett Iron company, the division of which has given rise to this controversy, were in this sense a portion of the capital of the company.

I pass to *Irving v. Houstoun* (1), the most important of the series, for, being a decision of this House, your Lordships are bound by it. In that case the Bank of Scotland had passed a resolution that an extraordinary dividend or bonus should be given to proprietors holding stock on June 1. LORD ELDON, in delivering his opinion in this House, after stating that *Brander v. Brander* (3) had been frequently acted upon, and pointed out the inconvenience of having a different law as to English and Scottish bank stock, proceeded as follows:

"It is impossible to deny that great difficulties attend this matter; the proper question is on which side the fewer difficulties lie. The Bank of England, to which the Bank of Scotland is similar in this respect, has a capital limited by Parliament to a certain amount. This limitation, if strictly adhered to, would have this inconvenience attached to it, that circumstances might occur to oblige them to reduce their ordinary dividends. Therefore, it is that these companies have what is termed their floating capital, which they lay out in the shape of Exchequer and Navy Bills, in discounts, and in every species of property that can be turned into cash at pleasure. Every person who buys bank stock is aware of this; and if he gives a life interest of his estate to anyone, it can scarcely be his meaning that the life-renter should run away with the bonus that may have been accumulating on the capital for half a century."

LORD ROSSLYN, the only other learned Lord who expressed an opinion, said:

"When I first came to consider the case of *Brander v. Brander* (3), I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death, and what since, to do justice between the claimants. The bank were very much alarmed when I hinted at any intention of that kind. On considering the matter maturely in all its consequences, the judgment was pronounced in that case."

The decision in *Irving v. Houstoun* (1) was followed in 1804 in *Paris v. Paris* (2), and again in *Clayton v. Gresham* (4), though in the former case the Lord Chancellor said that he had great difficulty in stating the principle that led to the earlier decisions. It was further followed in 1807 in *Witts v. Steere* (5); and again in 1847 in *Re Hodgkins, Ex parte Hodgkins* (6), where the directors of the Bank of Ireland having decided, "on account of the favourable result of the last four years," to recommend a bonus of 5 per cent. in addition to the ordinary dividend of 4 per cent., BRADY, L.C., held that this bonus must be considered as capital. But a disposition was early shown to limit the operation of the rule laid down in *Brander v. Brander* (3), and adopted by this House, and it is manifest that from the first it was felt not to rest on any stable principle. Thus, in *Barclay v. Wainwright* (7), the directors of the Bank of England declared a dividend of 5 per cent. interest and profits for the half year. It was contended that as this exceeded their ordinary dividend of $3\frac{1}{2}$ per cent., a portion of it must be considered as arising from accumulated profits, and, therefore, treated as capital. LORD ELDON, L.C., in repelling this contention, said (14 Ves. at p. 80):

"If it be contented that any part of the 5 per cent. is given out of, or to be paid from, capital, a case must be brought before the court, either making that out by evidence or under circumstances forming a fair ground for inquiry. But, as the case now stands, I have no means of considering it as more or less than a declaration in the due execution of the right and duty of the bank that the dividend, which the proprietor ought to receive, is a half-yearly dividend of 5 per cent."

Again, in *Preston v. Melville* (8), the directors of the Bank of England, having declared a dividend of £3 10s. per cent. out of interest and profits for the half-year, and in addition thereto a bonus of interest and profits of 1 per cent., SHADWELL, V.-C., held the tenant for life entitled to both. It is to be noticed that here, as in the case just cited, there was nothing to show that the bonus was to be paid out of accumulated profits. FRY, L.J., commenting in the court below on the several cases to which I have referred, says (29 Ch. at p. 656):

"These cases, however binding they may be under similar circumstances with regard to the same stocks, certainly do not appear to us to support to any extent the proposition now under investigation [i.e., that the authorities have established a rule that where a sum is paid, whether called bonus or dividend, out of the accumulations of profits in previous years it must be taken as a payment out of, or on account of, capital]. The last case, viz., that of *Preston v. Melville* (8), seems to lean strongly in the other direction."

Unwilling as I confess myself to be to apply the decision in *Irving v. Houstoun* (1), in any case where I am not bound to do so, I feel some difficulty in limiting it to the extent suggested by the lord justice when I consider the language used by LORD ELDON and LORD ROSSLYN. Their language seems equally applicable to any company unable to increase its capital, which uses, and is known to use (as many companies are) accumulated profits for capital purposes. I may add that, for the reason I have noted above, *Preston v. Melville* (8), appears to me to be in complete harmony with the earlier authorities. It seems clear that the decision in *Irving v. Houstoun* (1), was not considered as applicable only to bank dividends. It was followed, as FRY, L.J., has pointed out, in the case of other companies. Thus in *Ward v. Combe* (9), the question arose in 1836 in respect of certain settled shares in the London Assurance Co. At a court in 1835 the ordinary dividend of £1 a share was voted, and by another resolution on the same day it was provided that a sum at the rate of £12 per share should be taken out of the profits of the company and divided among the shareholders. SHADWELL, V.-C., held that the £12 a share was capital; and he observed that there was nothing to show at what time the profits out of which the sum was taken arose, and that they might have been profits that had lain dormant for a series of years. It may be doubted whether this decision is altogether consistent with that in *Preston v. Melville* (8), already alluded to. But it is a clear recognition of the doctrine that a division of accumulated profits among the shareholders is to be regarded as given by way of increase of capital. It is true, indeed, as FRY, L.J., says, that in *Price v. Anderson* (10), SHADWELL, V.-C., held in the case of the Royal Exchange Assurance Co., whose practice was to declare dividends on their stock half-yearly, and bonuses at intervals of two or more years, that a dividend of £12 10s. per cent. declared in 1846, in addition to the ordinary dividend, belonged entirely to the tenant for life. But it will be observed, on examining the report, that where the same company in 1840 had resolved that in addition to the ordinary dividend of £2 10s. per cent., a distribution of 5 per cent. out of accumulated profits be made to the proprietors, the Vice-Chancellor held that, as this was not made as dividend, it must be considered capital, and ordered it to be invested. The distinction apparently was that in this case the dividend in terms was paid out of accumulated profits, and was not expressed to be a dividend.

A I think therefore, that *Irving v. Houstoun* (1) must still be regarded as good law, unaffected by any counter-current of authority. But it is, in my opinion, an authority governing only a case similar in its facts—that is to say, a case where the company has no power to increase its capital, but has accumulated profits and has used them, in fact, for capital purposes, and afterwards distributes these profits among the proprietors. I think it will be seen that there is a substantial reason for the limitation I have suggested. I quite agree with the court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and, in my opinion, the only sound principle is that which is well expressed in the judgment of FRY, L.J. (29 Ch. at p. 653):

C “When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, ensures to the benefit of all who are interested in the capital.”

D And it appears to me that, where a company has power to increase its capital, and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such.

E I come now to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital; and here I find myself constrained to differ from the conclusion at which the Court of Appeal arrived. I think we must look both at the substance and form of the transaction. It is to be observed, in the first place, that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of profits to be distributed. And it was obviously contemplated, and was, I think, certain, that no money would, in fact, pass from the company to the shareholders, but that the entire sum would remain in their hands as paid-up capital. It is said in the judgment below that a shareholder who refused to take new shares, and to fill up the form of authority at the foot of the dividend warrant, would have been nevertheless entitled to receive his dividend from the company. I agree that this is so. But, to my mind, it was certain, and known to be so by the company, that no shareholder would make such a claim. Take the facts of the present case as an illustration. The holder of 600 shares was, we will assume, entitled to claim from the company £1,500, and to decline to take any new shares. But if he had been indisposed to add any new shares to those he already held, he would not have dreamed of adopting such a course. By doing so he would have received in cash £1,500 only. If his desire was to have cash, instead of new shares, he would have sold his interest in the new shares, and signed the second form enclosed in the registrar's letter, and the authority at the foot of the dividend warrant, for he would then have obtained from a purchaser, not £1,500, but probably upwards of £4,000.

I It is said by FRY, L.J., that the two transactions—the payment of the dividend and the payment of the call—could not be carried into effect as one operation, inasmuch as in the case of a person holding less than three shares, or holding a number not a multiple of three, the dividend on the odd share or shares must, in the absence of arrangement with some other member, have been paid in cash. But it must be remembered that the directors undertook to afford facilities for

the sale or exchange of fractional new shares, and such arrangements were so obviously to the advantage of those entitled to fractional parts of a share, that it was certain they would be effected. I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares. And the form in which the operations were effected points in the same direction. The dividend warrant is not in the ordinary form. It is assumed that it will be signed by the member only at the foot of the authority to apply the amount in payment of the calls on the new shares. And it is intimated on the face of it that it must be "signed and sent" to the registrar before Sept. 30, 1880. Moreover, the letter of the registrar enclosing it contains these terms,

"which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10s. per share on your above-mentioned new shares."

It is to be observed also that, although the bonus was not sanctioned until August, and the £7 10s. per share was expressed to be made payable on Sept. 30, the new capital was to rank for dividend *pari passu* with the old capital from June 30 preceding, which is only explicable on the ground that these moneys, in the hands of the company, which were, in fact, in use as capital, were to be so treated as from that date. Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to, and did, appropriate the undivided profits dealt with as an increase of the capital stock in the concern. I, therefore, move your Lordships that the judgment of the court below be reversed, and the judgment of *KAY, J.*, restored, and that the respondents do pay the costs in the Court of Appeal, and the costs of this appeal.

LORD WATSON.—I am of opinion, with the learned judges of the Court of Appeal, that the present case does not come within the principle to which this House, following the decision of the Lord Chancellor in *Brander v. Brander* (3) gave effect in the Scottish case of *Irving v. Houstoun* (1).

In the first of these cases the Bank of England, and in the second the Bank of Scotland, whose constitution gave them no power to increase their capital, had, nevertheless, for a long period of years retained and employed a large amount of accumulated profits as capital in the course of their business; and they ultimately paid a considerable portion of these accumulations to their shareholders in the shape of bonus. In *Irving v. Houstoun* (1), **LORD ELDON, L.C.**, appears to me to have come to the conclusion that the bonus belonged to the *fiar*, and not to the *liferentrix* of the testator's shares in the Bank of England upon two grounds. He expresses the opinion, in the first place, that these accumulated profits, which he describes as the floating capital of the bank, were regarded by the testator and the other owners of bank shares as being in the nature of capital; and in these circumstances, his Lordship says:

"if he [the testator] gives the life interest of his estate to anyone it can scarcely be his meaning that the *liferenter* should run away with a bonus that may have been accumulating on the floating capital for half a century."

In the second place, his Lordship intimates his opinion that on no ground of equity could it be contended that the *liferentrix* was entitled to accumulations made during the lifetime of the testator, and that an inquiry into the precise amounts of profit which had accrued before and after the commencement of the life-rent right would lead to inconveniences which would be intolerable. **LORD ROSSLYN**, who had, as Lord Chancellor, decided *Brander v. Brander* (3), concurred in the judgment. His opinion, so far as reported, proceeds upon the second ground stated by **LORD ELDON**. He said:

A "When I first came to consider the case of *Brander v. Brander* (3), I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death and what part since that period, to do justice between the claimants. The bank were very much alarmed when I hinted any intention of this kind. Upon considering the matter maturely in all its consequences, the judgment was pronounced in that case holding the bonus to be an accretion to the capital."

B The Consett Iron Co., Ltd., stands in a different position from these two banks. By art. 109 of its articles of association, the directors are empowered, before recommending any dividend, to set aside, out of the profits of the concern, such sum as they may think proper

C "as a reserved fund for meeting contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof."

D The company has likewise under its articles the power which it exercised in 1872 of increasing its capital by the creation and allotment of new shares to its members according to their respective interests, and of crediting them with a sum as paid on each share from its reserved or undivided profits. It is also worthy of observation, although in the view which I take of this case the circumstance is not material, that the books of the company were kept, and the annual balance-sheets issued to the shareholders prepared in such a form as to disclose the precise amount of profit and loss upon each year's trading, and that the parties have consequently been enabled to state in their joint case the exact proportion of the reserved profits in question which accrued during the currency of the life tenant's right. So that the obstacles to an inquiry, which were regarded as insuperable in *Brander v. Brander* (3) and *Irving v. Houstoun* (1), do not exist in the present case.

F I do not doubt that the rule applied by this House in *Irving v. Houstoun* (1) must receive effect in all similar cases. But, in a case like the present, where the company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company. I entirely concur in the observations made upon this point by Wood, V.-C., in *Re Barton's Trusts* (11) (L.R. 5 Eq. at p. 244):

G "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so; and, when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain."

H In my opinion, that rule must obtain, whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purposes of its business.

I Applying these principles to the present case, I am unable to concur in the view which the Court of Appeal has taken of the real character of the arrangements under which the Consett Iron Co., on Sept. 25, 1880, issued a bonus dividend warrant, and a relative allotment of new shares to each and all of the shareholders of the company. The balance sheet of the company for the year ending June 30, 1880, states as an asset a sum of £100,000, which had in the year 1874 been carried from the undivided profits of previous years to a reserve fund, and had subsequently been entered, under that heading, in the books and balance sheets of the company. I do not think (and so far I agree

with the learned judges of the Court of Appeal) that the mere fact of moneys being taken from undivided profits and carried to a reserve fund is equivalent to capitalisation of them. But the whole or part of the reserve fund may be legitimately expended on the repair and maintenance of works and plant in such a way as to make it practically unavailable for the purpose of paying dividend, so long as there is no increase of the capital of the company and the works continue in operation. The balance-sheet of June 30, 1880, shows that, in point of fact, not only the whole reserve fund of £100,000, but a large additional sum of undivided profits had, at that date, been spent upon, and were represented by, not cash or convertible securities, but the works and plant of the company. In these circumstances, it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalise these sums by issuing new shares against them to its members in proportion to their several interests.

I am of opinion that the latter alternative was, in substance, that which was followed by the company. The directors issued their annual report on Aug. 12, 1880, to which a copy of the balance sheet was annexed. In their report they recommended

“to the shareholders some permanent appropriation of the £100,000 standing to credit of reserve fund, and of a considerable portion of the undivided profit fund.”

These words do not suggest either the realisation of the works and plant in which the funds had been invested, or the creation of new shares for the purpose of raising moneys for distribution among the shareholders. What they do suggest is the permanent appropriation of the moneys to the capital purposes to which they had already been temporarily appropriated. In order to attain that object, the directors proposed that the reserve fund and £38,000 of undivided profits, together amounting to £138,000,

“shall be distributed as a bonus dividend of £2 10s. per share, equalling £7 10s. in respect of every three existing shares, but as the company's operations render it desirable to raise an equal amount on capital account, your directors propose that there be created 18,400 new shares of £10 with £7 10s. per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10s. on each such new share.”

The directors further proposed that the bonus dividend and the call of £7 10s. per new share should be made payable on the same day; that the shareholders whose names appeared in the register on Sept. 25, 1880, should be entitled to the dividend and to the allotment of new shares; and that the new shares should stand on an equal footing with the old as from July 1, 1880.

The report of the directors was received and adopted without reservation at the ordinary annual meeting of the company, held upon Sept. 4, 1880. Various resolutions were passed by the company at that and also at subsequent meetings, but I do not consider the terms of these resolutions as of material importance, because they merely provide the requisite machinery for enabling the directors to carry into effect the scheme suggested in their report. For the same reason, I do not think any importance can be attached to the form of the dividend warrant and allotment of new shares, which was subsequently issued to the shareholders by the officers of the company. None of these documents can, in my opinion, affect the substance of the scheme, which was recommended in the

- A report of the directors and adopted by the company. At the time when that scheme was submitted, the capital of the company consisted of 55,200 shares of £10 each with £7 10s. paid up per share. Before the proposal to issue new shares was made, the old shares were selling at a premium of £21 per share, but after the allotment of new shares the premium fell to £14. The executor of William Bouch held 600 old shares which belonged to the remainderman. The selling value of these shares was in consequence of the adoption of the new scheme diminished by £4,200. The bonus on the shares was only £1,500; but the value of the 200 new shares, with that sum imputed as paid upon them, was £4,300. If the company had offered to its members a choice between the bonus dividend and new shares with £7 10s. paid on each, no sane shareholder would have elected to take the dividend. If William Bouch's executors had done so, the life tenant would have benefited to the extent of £1,500, but the estate of the remainderman would have been depreciated in value to the extent of £4,200. I doubt whether, in the case supposed, it would be the duty of an executor to choose the bonus and reject the shares; but I am satisfied that in the present case no such option was given by the company.
- D I am unable to resist the conclusion that, in adopting the scheme recommended by the directors, the company must have intended that each shareholder should get an allotment of new shares, and that the money declared to be payable as dividend, which was not in the coffers of the company, and did not exist in a form available for distribution, should not be paid to the shareholder, but should simply, by means of an entry in the company's books, be imputed in payment of the call of £7 10s. upon each new share. That is plainly indicated in the report as the necessary result of the shareholders agreeing to the proposals therein made. It states expressly that, if the shareholders sanctioned these proposals

- F "every member of the company, on Sept. 25 would consequently receive one new share in respect of every three shares he then holds, such new shares having, like the existing shares, £7 10s. paid thereon, and leaving £2 10s. uncalled."

- G If I am right in my conclusion, the substantial bonus which was meant to be given to each shareholder was not a money payment, but a proportional share of the increased capital of the company. In that view of the facts, it does not, in my opinion, admit of doubt that the benefit must accrue to the remainderman, and not to the tenant for life. I am, accordingly, of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of Kay, J., restored.

- LORD BRAMWELL.**—The authorities bearing on the question in this case are, to my mind, very unsatisfactory. I can deduce no principle from them.
- H Cases have been decided differently where the facts were the same, because different words had been used. This, in my opinion, can never or very rarely be right. There seems to have been a confused notion that undivided profits at some time and somehow became capital. The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money which he has got, let him have got it how he may. A sole trader with a capital of £10,000, who makes in a year a profit of £2,000, and spends £1,000 only, leaving the other £1,000 in his business, may well in the next year be said to have a capital of £11,000—not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership, or some agreement by all the partners, makes them capital. They do not become capital by effluxion of time, or by their being used in the trading. For example, a company makes a profit of £10,500 in a year. Suppose its capital to be £200,000, it divides the £10,000

giving 5 per cent. to its shareholders, trading with the £500 as with its other funds. It does this for four years with the same result of profit and dividend. At the end of the fourth year its undivided profits, including those brought forward, are £12,000, and it can and does pay 6 per cent. to its shareholders. Can there be a doubt of its right to do so? Is it not the fair and just thing as between a tenant for life and remainderman? I say yes, and if true for four years, it is true for forty.

I think the right rule would be that contended for by counsel for the respondent. Make the date of the division the date for considering the rights. All profits made up to that date, unless by the articles of partnership or subsequent agreement by the shareholders, are profits to which the tenant for life is entitled, though they have been used in the business. I think that is the opinion of the Court of Appeal. To apply such a principle to this case, had the company simply divided their profits and reserve fund to the extent they disposed of them, and created no new shares, Mrs. Bouch would have been entitled to £2 10s. on each of the 600 shares, that is £1,500. The 600 shares would have been less in value £2 10s. each, and would have been worth each £26, or in all £15,600 instead of £17,100 as they were at the time of the arrangement. By doing what they did, that is creating the new shares and paying the £7 10s. on each new share, every share new and old, became worth three-fourths only of what a share was worth before, and the total value of the 800 shares was the same as of the 600 before, viz., £17,100. But applying the above reasoning to the facts that took place, it seems to me impossible to say that in reason, or on any legal consideration, Mrs. Bouch could be entitled to the 200 new shares. For, if so, the remainderman's right would be only to the 600 shares remaining, which at three-fourths of the £28 10s. would make them worth only £12,825, the new 200 being worth £4,275. The tenant for life cannot have a right to the new shares. But it may be said that this reasoning shows she had a right to the £1,500.

To this I think there are two answers, not that it would not have been a reasonable thing to have given the £1,500 to her, and to have made some different arrangement for the new shares, but there are, I say, two answers. First, the authorities are against her. But, secondly, I think it must be taken that there was an agreement by all parties, the company and its shareholders, and, if necessary, I should say by the tenant for life and the remainderman, certainly by those whose case we are considering, that new shares should be created, and that undivided profits should be applied to the payment of £7 10s. on each new share. If I am asked what Mrs. Bouch gained by consenting to this I cannot say. Perhaps her consent was no more than non-dissent. Perhaps, if she thought about it at all, she did not think she could help it. Perhaps she could not. For it was the offer made by the company to the shareholders, which was to be accepted or refused as a whole. I agree with the first answer of the Court of Appeal, "that the bonus of £2 10s. was income of the estate of William Bouch" to this extent, that in reason and in right it should have been so treated. But I differ from the second answer, which is a sort of conclusion from the first. It is an erroneous conclusion in my opinion. It assumes that £7 10s. bought a new share. It did not. For the price of the new share was that sum and the diminished value of the other shares. On these considerations, and agreeing with the noble and learned Lords who have already spoken in their reasoning and their view of the authorities, I am of opinion that this judgment should be reversed.

LORD FITZGERALD.—I concur with my noble and learned friends, and am of opinion that, for the reasons given, the judgment of the Court of Appeal should be reversed. At the close of the argument at your Lordships' Bar, I had

A arrived at the conclusion that the directors of the Consett Iron Co., acting within their powers, had so dealt with the extra allowance or bonus made to the shareholders out of accumulated profits and reserve fund as to make that "bonus" capital and not income. I differ from the Court of Appeal, not in its able exposition of the law, but as to the proper inferences to be deduced from the admitted facts. FRY, L.J., puts the question thus :

B "There remains another question, namely, whether the way in which the declaration of this bonus or dividend was coupled with the creation of new capital did or did not amount to a capitalisation of the bonus."

Upon this question I have felt myself unable to follow the Court of Appeal, and I adopt the view of KAY, J. The reasoning and the decision of WOOD, V.-C. in *Barton's Trusts* (11) then directly apply. The proceedings at the ordinary general meeting of Sept. 4, 1880, and the documents which emanated from it, together with the resolutions of confirmation, have been so carefully and critically examined by KAY, J., and by your Lordships, that I can add nothing. I adopt the view of the facts already expressed and the proper inferences to be drawn from them. The opinion which I had formed at the close of the case, to which D I now adhere, renders it unnecessary for me to criticise any of the endless chain of decisions by which the argument was supposed to be illustrated.

Appeal allowed.

Solicitors: G. H. Barber & Son; R. T. Jarvis, for Hutchinson & Lucas, Darlington.

E [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

F

CAVENDISH-BENTINCK v. FENN

[HOUSE OF LORDS (Lord Watson, Lord FitzGerald, Lord Herschell and Lord Macnaghten), May 2, 17, June 28, July 5, 1887]

G [Reported 12 App. Cas. 652; 57 L.J.Ch. 552;
57 L.T. 773; 36 W.R. 641]

Company—Director—Misfeasance—Purchase of property in which director interested—Need to prove excessive price, secret profit, and loss to company—H Charges of breach of trust, deceit, fraud—Onus of proof—Charges to be made unequivocally—Need for plaintiff to have pecuniary interest in proceedings.

In an action brought under s. 165 of the Companies Act, 1862 [see now Companies Act, 1948, s. 333] for a declaration that the director of a company had been guilty of misfeasance and breach of trust in connection with the purchase by the company of certain coal-yielding properties in which he was interested and for the repayment to the company by the director of the price I paid for the properties,

I **Held:** the essence of such an action was proof that the price at which the properties had been purchased by the company was in excess of their true value, that the director had made a secret profit from the transaction, and that in consequence the company had suffered pecuniary loss; where rescission was claimed in an action under the section and it was shown that a person taking part in the purchase was himself one of the vendors the onus was on him to show that he had made a full disclosure of his interest at the time of the

sale, or, if he had failed to do so, that the interest became known to the purchaser at a subsequent date, and that the purchaser either expressly or by plain implication elected to uphold the transaction; but when the plaintiff charged a director with misfeasance, deceit, or fraudulent concealment of facts which led to a loss on the part of the purchasing company, the onus probandi was on the plaintiff; allegations of breach of duty, fraud or deceit must be unequivocally made in the summons or writ; a person who had no pecuniary interest in the result of the proceedings had no right of suit under the section.

Notes. Considered: *Re Liverpool Household Stores Association* (1890), 59 L.J.Ch. 616. Distinguished: *Re North Australian Territory Co., Archer's Case*, [1891-4] All E.R. Rep. 150; *Re Leeds and Handley Theatres of Varieties*, [1902] 2 Ch. 809. Considered: *Re Etic*, [1928] Ch. 861; *Re Lewis and Smart, Ltd.*, [1954] 2 All E.R. 19. Referred to: *Re Olympia*, [1898] 2 Ch. 153; *Grant v. Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233; *Re Lady Forrest (Murchison) Gold Mine*, [1901] 1 Ch. 582; *Re Brazilian Rubber Plantations and Estates*, [1911] 1 Ch. 425; *Kregor v. Hollins* (1913), 109 L.T. 225; *Re City Equitable Fire Insurance Co., Ltd.*, [1924] All E.R. Rep. 485; *Re Home and Colonial Insurance Co., Ltd.*, [1930] 1 Ch. 102; *Re B. Johnson & Co. (Builders), Ltd.*, [1955] 2 All E.R. 775.

As to misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 621-628; and for cases see 10 DIGEST (Repl.) 943-953. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to in argument:

- Lydney and Wiggoll Iron Ore Co. v. Bird* (1886), 33 Ch.D. 85; 55 L.J.Ch. 875; 55 L.T. 558; 34 W.R. 749; 2 T.L.R. 722, C.A.; 9 Digest (Repl.) 35, 43. **E**
- Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons* (1886), 34 Ch.D. 398; 56 L.J.Ch. 25; 55 L.T. 284; affirmed (1887), 35 Ch.D. 400; 56 L.J.Ch. 684; 56 L.T. 677; 35 W.R. 785; 3 T.L.R. 546, C.A.; 9 Digest (Repl.) 38, 55.
- Re British Seamless Paper Box Co.* (1881), 17 Ch.D. 467; 50 L.J.Ch. 497; 44 L.T. 498; 29 W.R. 690, C.A.; 9 Digest (Repl.) 515, 3390. **F**
- Rothschild v. Brookman* (1831), 5 Bli. N.S. 165; 2 Dow. & Cl. 188; 5 E.R. 273; 1 Digest (Repl.) 535, 1640.
- Gillett v. Peppercorne* (1840), 3 Beav. 78; 49 E.R. 31; 1 Digest (Repl.) 531, 1609.
- Robinson v. Mollett* (1875), L.R. 7 H.L. 802; 44 L.J.C.P. 362; 33 L.T. 544, H.L.; 1 Digest (Repl.) 531, 1613. **G**
- McPherson v. Watt* (1877), 3 App. Cas. 254, H.L.; 1 Digest (Repl.) 536, 1646.
- Waddell v. Blockey* (1879), 4 Q.B.D. 678; 48 L.J.Q.B. 517; 41 L.T. 458; 27 W.R. 931, C.A.; 1 Digest (Repl.) 554, 1749.
- Brownlie v. Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, 24.
- Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, 1631. **H**
- Massey v. Davies* (1794), 2 Ves. 317; 30 E.R. 651; 1 Digest (Repl.) 533, 1622.
- Erlanger v. New Sombrero Phosphate Co.* (1876), 5 Ch.D. 73; 35 L.T. 309; 25 W.R. 18; reversed (1877), 5 Ch.D. 73; 46 L.J.Ch. 425; 36 L.T. 222; 25 W.R. 436, C.A.; affirmed (1878), 3 App. Cas. 1218; 39 L.T. 269; 27 W.R. 65; sub nom. *New Sombrero Phosphate Co. v. Erlanger*, 48 L.J.Ch. 73, H.L.; 9 Digest (Repl.) 41, 75. **I**
- Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch.D. 390; 49 L.J.Ch. 457; 42 L.T. 604; 28 W.R. 783, C.A.; 9 Digest (Repl.) 54, 168.
- Lord Hardwicke v. Vernon (No. 2)* (1798-9), 4 Ves. 411; 31 E.R. 209; 1 Digest (Repl.) 508, 1436.
- Burton v. Wookey* (1822), 6 Madd. 367; 56 E.R. 1131; 36 Digest (Repl.) 527, 909.

- A** *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; 22 W.R. 492, P.C.; 9 Digest (Repl.) 41, 73.
- Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 10 Digest (Repl.) 950, 6521.
- Re Alexandra Palace Co.* (1882), 21 Ch.D. 149; 46 L.T. 730; 30 W.R. 771; sub nom. *Re Alexandra Palace Co., Goodson's Case*, 51 L.J.Ch. 655; 10 Digest (Repl.) 945, 6489.
- B** *Hichens v. Congreve* (1828), 4 Russ. 562; 1 Russ. & M. 150; 6 L.J.O.S.Ch. 167; 38 E.R. 917, L.C.; 10 Digest (Repl.) 1269, 8964.
- Re Cameron's Coalbrook Steam Coal and Swansea and Lougher Rail. Co., Bennett's Case* (1854), 18 Beav. 339; affirmed, 5 De G.M. & G. 284; 2 Eq. Rep. 973; 24 L.J.Ch. 130; 23 L.T.O.S. 122; 2 W.R. 448; 43 E.R. 879, L.J.J.; 9 Digest (Repl.) 385, 2482.
- C** *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L.R. 6 H.L. 189; 42 L.J.Ch. 644; 29 L.T. 1; 21 W.R. 696, H.L.; 9 Digest (Repl.) 516, 3399.
- Morison (Morrison) v. Thompson* (1874), L.R. 9 Q.B. 480; 43 L.J.Q.B. 215; 30 L.T. 869; 38 J.P. 695; 22 W.R. 859; 1 Digest (Repl.) 548, 1712.
- D** *Dunn v. English* (1874), L.R. 18 Eq. 524; 31 L.T. 75; 1 Digest (Repl.) 536, 1645.
- Bagnall v. Carlton* (1877), 6 Ch.D. 371; 47 L.J.Ch. 30; 37 L.T. 481; 26 W.R. 243, C.A.; 9 Digest (Repl.) 43, 88.
- Emma Silver Mining Co. v. Lewis* (1879), 4 C.P.D. 396; 40 L.T. 749; 27 W.R. 836; 9 Digest (Repl.) 34, 37.
- E** *Whaley Bridge Calico Printing Co. v. Green* (1880), 5 Q.B.D. 109; 49 L.J.Q.B. 326; 41 L.T. 674; 44 J.P. 185; 28 W.R. 351; 9 Digest (Repl.) 34, 39.
- Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case* (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 10 Digest (Repl.) 943, 6479.
- Bentley v. Craven* (1853), 18 Beav. 75; 52 E.R. 29; 1 Digest (Repl.) 531, 1608.
- F** *Benson v. Heathorn* (1842), 1 Y. & C. Ch.Cas. 326; 9 L.T. 118; 62 E.R. 909; 9 Digest (Repl.) 519, 3424.
- Tyrrell v. Bank of London* (1862), 10 H.L.Cas. 26; 31 L.J.Ch. 369; 6 L.T. 1; 8 Jur.N.S. 849; 10 W.R. 359; 11 E.R. 934, H.L.; 9 Digest (Repl.) 35, 40.
- Great Luxembourg Rail. Co. v. Magnay (No. 2)* (1858), 25 Beav. 586; 31 L.T.O.S. 293; 4 Jur.N.S. 839; 6 W.R. 711; 53 E.R. 761; 9 Digest (Repl.) 516, 3398.
- G**

Appeal from a decision of the Court of Appeal (COTTON and FRY, L.J.J., BOWEN, L.J., dissenting), reported 29 Ch.D. 795, sub nom. *Re Cape Breton Coal Co.*, affirming a decision of PEARSON, J., reported 26 Ch.D. 221.

The appellant was a holder of fully paid-up shares in the Cape Breton Coal Co., Ltd., which was formed for the purpose of acquiring certain coal areas in Cape Breton. The respondent was a director of that company. In 1871 the respondent was a member of an association called the Coal Area Association, which had been formed for the purpose of acquiring land, mines, and mining rights in Nova Scotia, and to promote companies for the acquisition and working of such land, mines, and mining rights. In that year the Coal Area Association acquired the three areas in question for the sum of £5,500. In 1873 the Cape Breton Coal Co. was formed, of which the respondent was a director, and that company purchased the three coal areas in question for the sum of £42,000. In July, 1875, the Cape Breton company was ordered to be wound-up compulsorily. It was admitted that at the time of the original contract for the purchase of the coal areas in question the position of the respondent was not fully disclosed to the Cape Breton company, but after the facts had become fully known it was resolved at a meeting of the company to confirm the purchase, and to sell the property for what it would fetch. The property was ultimately sold for £15,000. The appellant, as a shareholder in the company, brought the present action, asking

for a declaration that the respondent, as a director of the company, was guilty of misfeasance and breach of trust in being a party to the affixing of the seal of the company to the agreements for the purchase of the coal areas and in paying the sum of £42,000 for the properties, and for a declaration that the respondent should repay to the company the sum of £42,000. PEARSON, J., held that the only remedy which the plaintiff could have against the respondent was a rescission of the contract which had been rendered impossible through the action of the company in having determined to adopt the purchase, and to sell the property for what it would fetch. This decision was affirmed by the Court of Appeal, and the plaintiff appealed.

Cookson, Q.C., and Butcher (Sir Richard Webster, Q.C., with them) for the appellant.

Sir Horace Davey, Q.C., and Farwell for the respondent.

LORD HERSCHELL.—This case arises upon an application made in the winding-up of the Cape Breton Coal Co. under s. 165 of the Companies Act, 1862, the appellant claiming, under that section, that the respondent, who was a director of that company, should be held liable for misfeasance or breach of trust, he having been an agent of the company. The evidence before your Lordships is very meagre; and in the arguments of the learned counsel which have been addressed to your Lordships a great many suggestions have been made which receive but little support from the evidence which has been adduced.

It appears that in the year 1871 certain persons associated themselves together under the name of "the Coal Area Association," and acquired three areas of coal, known as the Haven, Lake, and Balmoral areas. There has been some controversy as to the price at which they acquired those areas, but I think we may take it that the price was £5,500. Among the persons associated under that title was the present respondent, Mr. Fenn. There were also his partner, Mr. Crosthwaite, an engineer named Baker, and a Mr. Gisborne. At the commencement of the year 1872 the persons who were thus associated as the Coal Area Association formed a limited company, bearing the same name with the addition of the word "Limited," and Mr. Gisborne, who resided in Nova Scotia, and by whom apparently these areas had been originally owned, or at all events in whose name they stood, assigned his interest in the coal areas to Coal Area Association, Ltd., giving them the right to use his name for all purposes necessary to give them the full benefit of that assignment. In 1873 negotiations were entered into for the amalgamation of three other coal companies—the Lorway Coal Co., the Glasgow and Cape Breton Coal Co., and the Schooner Pond Coal Co.—and an agreement was entered into for the amalgamation of those three companies and the transfer of their properties to a new company which was to be incorporated. The new company was to undertake all the liabilities, debenture and otherwise, of those three companies, and was to acquire all their property.

This amalgamation was made the subject of an agreement of Oct. 24, 1873, which was made between the three companies that I have named, and a Mr. Blunt on behalf of the intended new company, and by that agreement not only were the properties of the three existing companies to be acquired by the new company, but it was made a condition of the entire arrangement that the new company should also acquire by agreement of sale and purchase the three coal areas, the Haven, the Lake, and the Balmoral, which were the property of Coal Area Association, Ltd., at a price not exceeding £42,000, and on the terms that the vendors should take not less than two-thirds of the money in paid-up shares of the new company. The arrangement contemplated by that agreement was afterwards carried into effect; the new company, the Cape Breton Coal Co., Ltd., was incorporated in November of the same year, and of that new company Mr. Fenn, the present respondent, and Mr. Baker

A became directors. In the following month the purchase of the three coal areas, which was contemplated by the agreement of October, 1873,* was carried into effect. The price given was the maximum price permitted by the agreement, namely, £42,000, but instead of a third of it being in cash and the remainder in shares, £12,000 only was paid in cash, and the remaining £30,000 was paid in shares of the new company. At the time when that agreement was
B come to by the directors of the new company and the owners of those three areas, Mr. Fenn and Mr. Baker were present; they were parties to the agreement and parties to putting the seal of the company to it.

It is in respect of that transaction that the present claim is advanced under s. 165 of the Companies Act, 1862. The question which your Lordships have to consider is whether there was a misfeasance in relation to that transaction within
C the meaning of the section. There can be no doubt that, inasmuch as Mr. Fenn was interested with his partner, Mr. Crosthwaite, to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in Coal Area Association, Ltd., he was bound to disclose that interest to the other directors of the new company, who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company,
D upon discovering his interest, to rescind the sale. About that there can be no manner of doubt. But at the present time rescission has become impossible. It is said, however, on the part of the appellant: "Although rescission has become impossible and that remedy is no longer available, I am nevertheless entitled to claim against the respondent that he shall make good to the company the loss they have sustained owing to his misfeasance in failing to make that
E disclosure."

The case has been put on behalf of the appellant in various ways. First, it is said to be a case of a secret profit made by an agent, which profit he is, therefore, bound to hand over to his principal. It cannot be doubted that Mr. Fenn, as a director of the company, was in the position of an agent, and,
F undoubtedly, if he filled any fiduciary position towards the company at the time when he purchased this property, he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company. But here it is beyond question that, at the time when the purchase was made, Mr. Fenn and his co-adventurers were none of them in any sort of fiduciary relation to the company, the existence of which was at
G that time not even contemplated. Again, there probably is little doubt that, if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description, which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave
H their purchase, as it ought to have been, at the market price, according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of a specific property; it was that specific property alone which the agent, the director, was authorised to purchase. It was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description; but his agency, so far as it existed
I at all, was an agency to purchase this specific property in which it is proved he had an interest.

I am by no means prepared to say that the argument of the appellant is well founded, that such a case as this is a parallel to the cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what

has been called the real price or the true value. What evidence is there here, upon which your Lordships would be entitled to act, that the property in question was sold to the company at a price in excess of its real value, or market value, or true value, or whichever way you put it? I admit that there may be considerable ground for suspicion that the price was excessive, but obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving a secret profit improperly made.

What are the only facts before us? The appellant relies upon the fact that this property, purchased in 1871, at £5,500, was sold in the autumn of 1873 at the price of £12,000 in cash, with an addition of £30,000 in shares in this new company. No doubt that is a fact of importance. But that is not the only fact, and it is impossible for us to shut our eyes to information, which is matter of common knowledge, that subsequently to 1871 coal properties did rise very considerably in value, whether to this extent or not to this extent it matters not; that fact at all events prevents our coming to the conclusion that the price given in the early part of 1871 is any real guide to the value of the same property in 1873. But that is not all, because in October, 1873, an agreement was entered into between the representatives of the three companies as well as a person acting on behalf of the intended new company. The representatives of the companies, the Glasgow, the Schooner Pond, and the Lornway, considered it worth their while to give up to £42,000, £14,000 of that sum to be in cash, for the purchase of this very property. These three companies were entirely independent, as far as appears, of the persons who owned the coal areas in question. It is said that these three companies had originally been promoted by the same persons, but it is impossible to shut one's eyes to the fact that such an agreement was come to as affording evidence that this was considered in October, 1873, as the value of the property.

It is not necessary to inquire what the real value of the property exactly was, or for your Lordships to come to any determination upon it. As I have said, you may have reason to suspect that the price given was excessive; but how is it possible, in the face of the evidence to which I have called attention, for your Lordships to come to the conclusion that any such case is established as is alleged on behalf of the appellant, namely, that a sum in excess of the real value was, in 1873, agreed to be given by the directors of the Cape Breton Coal Co. for these three coal areas? I think it is impossible to arrive at any such conclusion and to say that, therefore, there has been misfeasance on the part of Mr. Fenn, the respondent, which would warrant your Lordships coming to the conclusion that he should be compelled to return a part of the money received in respect of this purchase, on the ground that he was making improperly a considerable profit. I entertain very great doubt whether there is any evidence establishing that there was a misfeasance on the part of the respondent in concealing his interest in the property. No doubt, where rescission is claimed, if it is shown that a person taking part in the transaction of purchase was himself one of the vendors, the onus would be on him of showing that he made full disclosure. But when an applicant seeks under s. 165 to establish a case of misfeasance, I think it is necessary for him to give evidence of all the elements that go to make up that misfeasance. There is no misfeasance in a person, who has an interest in property by being a shareholder in the company which is selling it, nevertheless acting as a director of another company in the purchase of that property. The misfeasance, if it exists at all, must be because he enters into such a transaction without communicating to his co-directors the fact that he has such an interest. It seems to me that it must rest with those who allege the misfeasance to prove that element, which is an essential element in proving the offence.

What is the evidence here? I cannot see the slightest evidence to show

A that disclosure was not made in the present case, or that the other directors were not perfectly well aware of Mr. Fenn's position. One may speculate about it, one may imagine that they were not; but, as I have said, those who undertake to make out a case of misfeasance must establish that case before they can claim the relief to which it is suggested they are entitled.

B It is said that the case may be put in another way, that there was here, at all events, a breach of duty, and that in respect of that breach of duty a claim may be made under s. 165, the breach of duty being the omission to make full disclosure. There, again, I have only to repeat that I fail to see the evidence that there was any such breach of duty committed. I think that, in order to establish a claim of relief, it would be necessary, not only to show a breach of duty, but to show a breach of duty which resulted in pecuniary loss to the company. It may be perfectly true that where there is a duty, whether arising out of a contract or otherwise, by one person to another, an action will lie in respect of a breach of that duty, although no substantial damage has been suffered. In an action nominal damages may be recovered wherever a breach of duty is shown. But I certainly do not think that any such doctrine can be applied to s. 165. The right which that section gives is not given to the company or the representative of the company with whom there is a contract, or towards whom there is a duty, or against whom there is a breach of duty; the right under s. 165 is given to "any liquidator or any creditor or contributory of the company." A creditor or contributory has no duty owing to him; there is no duty or breach of duty in respect of which he can maintain an action; but he has a right to the extent that if, owing to a misfeasance or breach of duty, the funds of the company in which he is interested have been diminished, those funds shall be made good, and the assets of the company shall be recouped the loss which they have sustained. Therefore, I think that, assuming that a breach of duty such as is suggested would be a misfeasance, giving rise to an application under s. 165 such an application could only succeed where it could be shown that the breach of duty had resulted in loss to the funds and assets of the company.

F The only other way in which the case has been put is that there has been deceit or fraud, which would give ground for this application. With reference to the last two claims to which I have alluded, namely, the claim for breach of duty and the claim in respect of deceit or fraud, I think that it would be a very grave question whether it would be proper to give the relief applied for upon a summons such as we find in the present case. I think that, where it is intended to allege such a breach of duty, and where it is intended to allege fraud or deceit, these allegations should be clearly, satisfactorily, unequivocally made in the summons, so that those against whom they are made should have their attention directed to them, and should have an opportunity of meeting them. In the present case I entertain a strong impression that it never was intended, at the time when the summons was issued, to make any such allegations. In my opinion, there was an idea that the respondent Mr. Fenn could be made responsible for the difference between what he gave for the property and the price at which he sold it, and the claim was based on his having been a party to putting the seals on the two purchase agreements, but I do not find anywhere an allegation either that there was misfeasance in respect of a breach of duty to disclose, or that there was misfeasance in respect of fraud or deceit in making a false representation to the company or to his co-directors. I see no ground whatsoever for alleging fraud. I have come to the conclusion that the appellant has not established, on any of the grounds suggested, that there has been misfeasance on the part of the respondent resulting in loss to the company in respect of which compensation can be claimed.

One other point remains, namely, the question whether the appellant has a right, though having no interest, to invoke the assistance of the court under sec. 165. Of course, in the view which I take, it is not necessary to pronounce an opinion upon that point; but, the point having been raised and argued before your Lordships, it may be expedient that it should not be passed over without some expression of opinion upon it. I cannot help entertaining the gravest doubt whether the appellant has any *locus standi*. I think it clear that he is not a creditor. His only claim, therefore, to the assistance of the court must be on the grounds that he is a contributory. He is a contributory whose shares are fully paid up. He would be interested, therefore, as a contributory, if any funds could be brought into the coffers of the company out of which it would be possible that any return could be made to him. But I cannot think that in passing this section it was contemplated by the legislature that a contributory who could have no possible interest in the result of the application, and could obtain no benefit whatsoever as a contributory, even if to the fullest extent to which the claim was advanced it proved good, should have a right to apply under this section. True, "contributory" is mentioned without any sort of limitation, but so it is in s. 82 of the Act, which allows a contributory to petition for winding-up [see now Companies Act, 1948, s. 224], and it has been held that, a shareholder with fully paid-up shares of the company, although a contributory within the words of the section, may, nevertheless, not be entitled to invoke the assistance of the court if he be a person having no real interest in the company. For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs, and the judgment of the Court of Appeal affirmed, and I so move your Lordships.

LORD WATSON.—I am of the same opinion. I do not desire to rest my judgment in this case upon the reasons which were assigned for the decision of the learned judges in the Court of Appeal. It is not, to my mind, at all clear that, because rescission has become impossible through the impossibility of giving restitution in intergum to the seller, a claim under either of the two heads embraced in s. 165 of the Companies Act, 1862, is thereby excluded. I think it is very material, in considering this case, to attend to the specific nature of the claims which are sanctioned by that section. They are of a twofold character. They sanction the recovery, at the instance of a liquidator, a creditor, or a contributory of the company in liquidation, first, of moneys for which the defendant has become accountable to the company, the company's moneys; and the second head of claim is for pecuniary loss sustained by the company and its funds through the misfeasance or breach of duty of the defendant. It does not include any claim against a seller to the company, such as would be comprised in the remedy of offering back the property and seeking restitution of the price.

In the present case, I think the appellant, if he had a title under the section (a matter to which I shall shortly allude hereafter), was entitled to have an action against the respondent Mr. Fenn under s. 165 upon two grounds. In the first place, he might show, as he has endeavoured to show, that Mr. Fenn, by the transaction in question, and his concealment of his true position in reference to it, has made a secret profit when acting as agent for the company. The second ground is that, having originally concealed his true position, he, by deliberate acts, prevented the knowledge of that position reaching the company. The latter, I need hardly say, is a case of deliberate and intentional deceit: in other words, it is fraud. But the very basis upon which each of these claims rests is that the company have, through his conduct, whether in making a profit or in fraudulently acting, suffered pecuniary loss. In a case where rescission is asked and it is not denied that at the time when the sale was made the seller failed, through breach of duty, to disclose his interest,

A the onus rests upon him to show, if he desires to maintain the transaction, that that interest became known to the purchaser at a subsequent period, and that the purchaser by his acts either expressly or by plain implication elected to uphold the transaction. But the case is very different when you come to charge a defendant with making undue profits in the dark at the expense of the purchaser, or with fraudulent concealment of facts which has led to loss on the part of the purchaser. The onus probandi there is upon the plaintiff; the usual rule of law must apply. I know of no case where by implication of law the duty of clearing himself from a fraud imputed rests wholly on the defendant without any obligation on the plaintiff to prove fraud.

C I do not intend to enter into the facts of this case, which have been fully, and to my mind most satisfactorily, criticised by LORD HERSCHELL. I can only say that the proof in this case seems to fail at the very outset. There is no trustworthy evidence, upon which a court can act, of pecuniary loss to the company, whatever may have been the conduct or the character of the actings of this respondent Mr. Fenn. But I am bound to go further, and to say that for the imputation of fraud, which is not necessarily expressly made upon the first of the suggested grounds of action but which certainly is involved in the second, I can see no foundation whatever. While concurring in all that LORD HERSCHELL has said, I do very strongly concur in his concluding observations. It appears to me that it was not the intention of the legislature to give a right of suit under s. 165 of the Companies Act to any person who had not a pecuniary interest in the result. I think the inference of law is that the legislature always expects that there shall be an interest, and intends to confine the leave and licence which it gives to those who are possessed of it. In this case, although it appears to be otherwise upon the face of these papers, it has been explained at the Bar that the appellant is not a creditor of this company, but a creditor of another company which has a claim of indemnity against the Cape Breton Coal Co. He is a contributory, not in the sense of being liable if called upon to pay money into the coffers of the company at the instance of the liquidator, but he simply stands in the position of a possible recipient of a share in the balance of the assets after payment of the debts. There is no suggestion that any such fund will ever exist, or that that it would be called into existence by his success in that action. It is not necessary to rest the judgment upon that ground, because, on the merits of the case, I am of opinion that he has entirely failed. But, even if he had made out a case which would involve a right, I should have thought it my duty, as a member of this House, to support a judgment to the effect that he could not recover, not having an interest which would entitle him to sue.

H LORD FITZGERALD.—Concurring as I do in the motion proposed by LORD HERSCHELL, and in the reasons of LORD WATSON, it will be sufficient for me to say that it appears clearly to me that the appellant here has not a particle of interest in the litigation which he has instituted, and could never possibly derive any benefit from it. The Court of Appeal, as well as PEARSON, J., in the court below, dismissed the claim of the appellant upon the ground that the company had put itself in a position in which this contract could not be rescinded. I There is no doubt that Mr. Fenn, who had become a director of the Cape Breton company, was guilty of a breach of duty if he did not disclose the fact that he himself had a large pecuniary interest in the purchase by that company at the stipulated price of these three coal areas to those with whom he was dealing. But I am not by any means satisfied that that serious proposition has been made out. Moreover, there is not, to my mind, a shred of proof as to what, at the time when that purchase was made, was the real value of these three coal areas. It is true that they had been purchased some years before at a much less sum; but have we any element of proof before us upon which

we can come to the conclusion at the present moment that the true value, if means had been taken to ascertain the true value, of the coal areas was not equal to the price that was later put upon them? There is no such evidence, and the inference is the other way, for you have three independent companies, converted into one by the amalgamation, agreeing by the amalgamation agreement to purchase these three coal areas at a sum not exceeding £12,000 in cash and £30,000 in shares, and you have that same company, when formed into a new company, ratifying and adopting that agreement. The inference, to my mind, would be that the price was not an unreasonable one, but, without drawing such an inference, it is only necessary to say that we have no proof that the sum stipulated for exceeded a fair and reasonable price for the coal areas at that time. For these reasons I concur in the judgment which has been announced.

LORD MACNAGHTEN.—I agree. When the case was first opened I was under the impression that the appellant had an interest in the result of the application apart from any question of costs, and I was also inclined to think that, although the evidence was meagre in the extreme, and the case was presented in a fragmentary and unsatisfactory manner, yet there was something which the respondent ought to be called upon to answer. But I am bound to say that, after the discussion which the case has received, and after the very able argument of counsel for the respondent, I am convinced that there is no ground for disturbing the order of the court below.

The application which has given rise to this appeal is made under s. 165 of the Companies Act, 1862. Mr. Cavendish-Bentinck, describing himself as a creditor and contributory of the company, charges Mr. Fenn with misfeasance, or breach of trust. The act complained of is the affixing the seal of the company, or causing the seal of the company to be affixed, to two agreements, by which certain coal areas in which Mr. Fenn was interested were conveyed to the company, they paying a stipulated price for those coal areas. The remedy which was asked for by the summons was payment to the official liquidator of the whole of the purchase money, or at any rate of that portion of the purchase money which went into Mr. Fenn's pocket. At your Lordships' Bar, and, as I understand it, in the court below, the remedy was put on somewhat different grounds, and it was suggested that Mr. Fenn was liable for the difference, whatever it might be, between the sum of money which was given for the property and that which the appellant called the real value of the property.

Section 165 of the Companies Act, 1862, has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence and gives no new rights, but that it only provides a summary and efficient remedy for rights which, apart from that section, might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not a misfeasance in the abstract, but a misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been hitherto judicially determined that the appellant is bound to show that he is interested in the result of the application, but I certainly think that it must be so. I cannot think that Parliament intended that a person coming under the description of a creditor, or a contributory, should take upon himself the novel position and the important functions of a public prosecutor in a matter in which he had no concern. It was, therefore, in my opinion, necessary for the appellant to show first that Mr. Fenn had committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton company; secondly, it was necessary for him to show that by reason of that misfeasance the company had sustained loss; and it was also necessary for him to show that he had an interest in the result of the application. I am of

A opinion that the appellant has failed to establish any one of those propositions. [His LORDSHIP referred to the evidence.] He has really no interest in the subject-matter of the application. I do not think that he is a creditor, and as a contributory it appears to me that it is utterly impossible, upon the facts as stated by himself, that he could ever derive any benefit from this litigation.

B I, therefore, entirely concur in the motion which has been proposed.

Appeal dismissed.

Solicitors: *Harper & Battcock; Dollman & Pritchard.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

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MELLOR v. DAINTREE

[CHANCERY DIVISION (North, J.), June 29, 1886]

[*Reported 33 Ch.D. 198; 56 L.J.Ch. 33; 55 L.T. 175*]

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Will—Omission—Omission of gift clearly intended by testator on construction of will—Implication of intended gift—"Surviving"—Survival of one person by another—Survival of specified point of time.

Where it is clear from the language of a will that words creating an interest which the testator intended to give have been omitted, the court will imply in the will the words necessary to give effect to the intention of the testator.

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The word "surviving" in a will may refer to one person surviving another, but it may also be used as surviving a specified point of time.

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D. devised all his real and personal estate to trustees, as to his Needingworth and Colne estates and a moiety of his residuary personal estates, upon trust to accumulate until A. E. B. attained the age of twenty-five years, or died, if either event should happen within twenty-one years from the testator's death, but in case that period should expire before either of such events should happen, upon trust to pay the income and dividends of his said Needingworth and Colne estates and moiety of his residuary personal estate, to A. E. B. from the expiration of such period until he should attain the age of twenty-five years or die, whichever should first happen [and subject as aforesaid he directed that his said Needingworth and Colne estates and a moiety or equal half part of his said residuary personal estate should be held in trust for the said A. E. B. absolutely in case he should attain the age of twenty-five years, and in case the said A. E. B. should die under the age of twenty-five years, leaving a son or sons him surviving, or who or any one of whom should attain the age of twenty-one years], his said Needingworth and Colne estates, and a moiety of his residuary personal estate should, subject as aforesaid, be held in trust for the only or, if more than one, the first surviving son of the said A. E. B. who should attain the age of twenty-one years. Then the testator declared that all his real estate other than the said Needingworth and Colne estates and the other moiety of his residuary personal estate should be held upon trusts in favour of Alfred Daintree, which were expressed in almost exactly the same words as those above set out, but omitting all the words in brackets, so that Alfred Daintree would in effect take no interest after he was twenty-five. The will contained some other obvious verbal inaccuracies, and also a power of maintenance of infants, commencing only after A. Daintree's death, and a power for the trustees to apply the

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rents till some person should become absolutely entitled to the testator's respective real estates in keeping down interest on incumbrances, which the court held could only refer to a possibility of A. Daintree's becoming absolutely entitled. A. E. B. was legally no relation of the testator. A Daintree was his nephew.

Held: on the construction of the will as a whole the words in brackets in the declaration of the first set of trusts must be supplied as accidentally omitted in the second set of trusts.

Notes. Referred to: *Re Haygarth, Wickham v. Haygarth*, [1913] 2 Ch. 9; *Re Lane's Estate, Meagher v. National Gallery of Ireland (Governors and Guardians) and Heaven*, [1946] 1 All E.R. 735.

As to survivorship and gifts by implication in wills, see 39 HALSBURY'S LAWS (3rd Edn.) 1044-1048, 1161-1170; and for cases see 44 DIGEST 1183 et seq., 1250 et seq.

Cases referred to:

- (1) *Sweeting v. Prideaux* (1876), 2 Ch.D. 413; 45 L.J.Ch. 378; 34 L.T. 240; 24 W.R. 776; 44 Digest 1258, 10864.
- (2) *Key v. Key* (1853), 4 De G.M. & G. 73; 1 Eq. Rep. 82; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 17 Jur. 769; 43 E.R. 435; 44 Digest 580, 3999.
- (3) *Towns v. Wentworth* (1858), 11 Moo. P.C.C. 526; 31 L.T.O.S. 274; 6 W.R. 397; 14 E.R. 794, P.C.; 44 Digest 553, 3706.
- (4) *Re Redfern, Redfern v. Bryning* (1877), 6 Ch.D. 133; 47 L.J.Ch. 17; 25 W.R. 902; sub nom. *Redfern v. Hall*, 37 L.T. 241; 44 Digest 564, 3816.

Also referred to in argument:

Re Daniel's Settlement Trust (1875), 1 Ch.D. 375; 45 L.J.Ch. 105; 34 L.T. 308; 24 W.R. 227, C.A.; 40 Digest (Repl.) 496, 92.

Greenwood v. Greenwood (1877), 5 Ch.D. 954; 47 L.J.Ch. 298; 37 L.T. 304.

Re Northern's Estate, Salt v. Pym (1884), 28 Ch.D. 153; 54 L.J.Ch. 273; 52 L.T. 173; 33 W.R. 336; 44 Digest 602, 4287.

Petition presented in an administration action.

By his will, dated Sept. 27, 1871, the testator Simon Alfred Daintree, after giving certain legacies, devised and bequeathed all his real and residuary personal estate to trustees upon trust to pay an annuity of £400 a year to his wife and an annuity of £100 to an uncle, and subject thereto upon trusts declared in the following words:

"And upon further trust, as to my Needingworth and Colne estates, and a moiety or equal half part of my residuary personal estate, to accumulate the rents and profits, income and dividends thereof, by way of compound interest, by means of any one or more of the modes of investment herein authorised, until Alfred Ernest Bagley (the son of Harriet Bagley, now or late of Eye, near Peterborough, in the county of Northampton, spinster, and which said Harriet Bagley is the daughter of James Bagley, deceased, and Mary his wife, of Eye, aforesaid) shall attain the age of twenty-five years or die, which shall first happen, in case either of such events shall happen within the period of twenty-one years from my death, but in case that period shall expire before either of such events shall happen, upon trust to pay to or permit the said Alfred Ernest Bagley, if living, to receive the income and dividends of my said Needingworth and Colne estates, and a moiety or equal half part of my residual personal estate, from the expiration of such period until he attain the age of twenty-five years or die, whichever shall first happen; and subject as aforesaid, I direct my said Needingworth and Colne estates, and a moiety or equal half part of my said residuary personal estate, shall be held in trust for the said Alfred Ernest Bagley absolutely, in case he shall attain the age of

A twenty-five years. And in case the said Alfred Ernest Bagley shall die under the age of twenty-five years leaving a son or sons him surviving, or who or any one of whom shall attain the age of twenty-one years, my said Needingworth and Colne estates and a moiety or equal half part of my said residuary personal estates shall, subject as aforesaid, be held in trust for the only or, if more than one, the first surviving son of the said Alfred Ernest Bagley who shall B attain the age of twenty-one years. And I declare that my Bluntisham estates, and all other my real estate (other than my Needingworth and Colne estates), and the remaining moiety or half part of my residuary personal estate also C subject in like manner aforesaid, shall be held upon trust to accumulate the rents, profits, income, and dividends thereof by way of compound interest, by means of any one or more of the modes of investment herein authorised, until Alfred Daintree, the son of my brother the said Richard Daintree, shall D attain the age of twenty-five years or die, whichever shall first happen within the period of twenty-one years from my death, and in case that period shall expire before either of such events shall happen, then upon trust to pay to or permit the said Alfred Daintree, if living, to receive the income and dividends of my said estates from the expiration of such period until he attain the age E of twenty-five years or die, whichever shall first happen, and subject as aforesaid all my said real estates and my said residuary personal estate shall be held in trust for such only surviving son or, if more than one surviving son, for the eldest of such surviving sons absolutely, but in case the said Alfred Daintree shall leave no son him surviving, then all my said real estate and residuary personal estate shall be held in trust for, but nevertheless subject to and on failure of the trusts hereinbefore declared concerning the same, my brother Richard Daintree, his heirs and assigns for ever."

The will further contained a bequest of £2,000 to the trustees upon trust to apply the income for the maintenance and education of the said A. E. Bagley "until he attained twenty-one, whichever should first happen," and the testator F empowered his trustees or trustee, after the respective deaths of the said A. E. Bagley and A. Daintree during the suspense of the indefeasibly vesting of his residuary personal estate, to apply the income of such estate for the maintenance and education of the person presumptively entitled thereto, and he directed his trustees or trustee, until some person should, under the trusts of his will, become entitled to his said real estate respectively, and also during the G minority of any son of the said A. Daintree who should become entitled to his real estate, or any part thereof, out of the rents and profits of such portion thereof as might be incumbered, to keep down the interest of all charges affecting the same respectively.

The testator died on April 27, 1872, his widow died on Oct. 13, 1874, and an action was commenced for the administration of his estate on Mar. 8, 1875. H Alfred Ernest Bagley and Alfred Daintree, named in the will, both survived the testator, and attained the age of twenty-five years. This was a petition presented in the administration action by Alfred Daintree, his wife, and the trustees of his marriage settlement, asking for a declaration that, on attaining twenty-five, Alfred Daintree became absolutely entitled to a moiety of the testator's personal estate, and to all his real estate other than his Needingworth and Colne estates, and for I consequential directions.

Higgins, Q.C., and Rashleigh for the petitioners: It is clear from the whole scheme of the will that the testator, when practically dividing his property between Alfred Ernest Bagley and his nephew, Alfred Daintree, intended to provide for them both and their families in the same way. Where such an intention is clear, and the court can gather from the rest of the will what was the way in which the testator intended to carry it out, omitted words will be supplied: *Re Redfern* (4); *Re Daniels' Settlement Trusts*; *Sweeting v. Prideaux* (1); *Greenwood v. Greenwood*:

Re Northern's Estate. Here the power of maintenance and education is only given after the death of Alfred Daintree. Unless, therefore, some words are supplied, neither Alfred Daintree nor his children can get any benefit under the testator's will from the time he attains twenty-five until his death. Looking at the words of the will, no one can doubt that the two sets of trusts were intended to be the same, and that words giving A. Daintree an absolute interest on attaining twenty-five, similar to those giving an absolute interest to A. E. Bagley, were omitted.

Abraham for the infant son of Alfred Daintree.

Wilkinson for the trustees of the will.

NORTH, J.—I have formed an opinion upon the construction of the will, and the conclusion I have come to is that the will must be read as if it had contained expressly the terms which it is suggested by counsel for the petitioners it ought to contain. I come to that conclusion upon the ground that, in my opinion, I find it in the will itself—not in so many words, but according to the meaning of the words which I find there, and I decline altogether to decide this case on the ground of any mere conjecture of what the testator probably intended. It is unnecessary for me to refer to further authorities than two which have been mentioned. The first is *Sweeting v. Prideaux* (1), which contains a full citation of the authority to which I refer. HALL, V.-C., says (2 Ch.D. at p. 415, 416):

“Several cases have been referred to, but the principle which will guide me is to be found in the case of *Key v. Key* (2), where KNIGHT BRUCE, L.J., said:

‘In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being upon a careful perusal of an instrument not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly.’

And the same principle is to be found in the case of *Towns v. Wentworth* (3), where the Right Hon. PEMBERTON LEIGH, afterwards LORD KINGSDOWN, said:

‘Where the main purpose and intention of the testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect, so far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared’.

Those are the principles which I conceive to be the law of the court, and upon which HALL, V.-C., acted then, and upon which I propose to act now. In addition to that, I refer to the observations of BACON, V.-C., in *Re Redfern* (4). Towards the end of his judgment he says, in speaking of the construction which he put upon the document in that case, into which I do not go, as it is not material now (6 Ch.D. at p. 137):

A "I think, upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be used as if they were inserted in the will. If I were to do otherwise I should be going against the course of construction that I am to gather the meaning of the testator from the words in which he has expressed his meaning. I am not to be deterred by any accidental expression from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator."

B Before referring to the particular portions of this will which are material, I have to remark upon the will as a whole that it is very clumsily and incor-
C rectly expressed. In the gift of £2,000 upon trust, there is a direction that the income is to be applied for the maintenance of Alfred Ernest Bagley till he attained twenty-one years "whichever shall first happen." It is quite clear there that there were two alternatives referred to and only one is mentioned. Then again in the same gift there is another point which may some day call for serious consideration. The testator gives a power to the trustees to advance
D certain sums in favour of Alfred, and then come these words,

"Subject, as aforesaid, the said trust fund, or so much thereof as shall not have been applied by way of advancement, shall be held upon trust for the said A. E. Bagley in case he shall attain the age of twenty-five years; but in case the said A. E. Bagley shall die under the age of twenty-five years without leaving a son him surviving who shall attain the age of twenty-one years, then the said trust fund shall sink into the residuary estate."

E Those two gifts clearly do not correspond, and whatever the true construction may be, I see clearly that the will does not express in terms everything intended to be provided for. Therefore, I have two obvious blunders in the way in which the will has been framed. That being so, I approach the consideration of the
F will without being at all sure of finding in it what the testator intended to express, expressed in the accurate terms one would desire to find.

Look at the disposition made in this particular case. The general scheme of the will I take to be this: there are two persons whom the testator intends to provide for substantially equally. He does not divide the whole estate into
G moieties and give exactly half to each, but he gives certain estates to one, to Alfred Ernest and his other real estate to Alfred Daintree, and he gives each a moiety of the personal estate. He sets apart—I think, because the estates specifically given to Alfred Ernest were somewhat less than the other—a trust fund of £2,000, which he appropriates for the benefit of Alfred Ernest, though not in precisely the same words as the other gifts. It seems to me that he was doing
H here what was substantially dividing his property into moieties, or something like moieties, between Alfred Ernest and his nephew Alfred Daintree. That being the general scheme of the will, I find the provisions as expressed are substantially identical; but there is the omission in the case of the gifts in favour of Alfred Daintree which has led to the argument before me. Looking at the words used, we find first of all, as regards the first moiety of the real estate, as I
I will call it for brevity, and the first moiety of the residuary personal estate, it is to be accumulated until Alfred Ernest attains twenty-five, or dies, whichever first happens; if either of those events happen, then upon trust during the interval—the expiration of the twenty-one years and the happening of the first event—to pay to him, if living, or permit him to receive, the income of the first moiety of the real and residuary personal estate until he attains twenty-five or dies; and, subject as aforesaid, then the devise is, in case he attains twenty-five, that those estates and the moiety of the personal estate are to be held in trust for him absolutely. But, in case he dies under twenty-five, leaving a son or sons him

surviving, who or any one of whom shall attain twenty-one then the same estates are given in trust for the only, and, if more than one, the first surviving son of Alfred Ernest who shall attain twenty-one. That is the complete disposition made down to that time of the first moiety of the real and personal estate. It is not exhaustive. It does not provide for every event which could possibly happen, but it deals with the case of either Alfred Ernest taking absolutely by attaining twenty-five or his son taking absolutely if Alfred Ernest dies under twenty-five leaving a son who attains twenty-one. In case Alfred Ernest died under twenty-five without leaving any son who attained twenty-one, there is not as yet any disposition of those estates.

Then the testator takes up the rest of the real estate, and the rest of the personal estate; and he gives that in words which correspond. There are one or two very slight differences, but they correspond substantially with the previous gift of the first moiety of each in favour of Alfred Ernest. The gift of the second moiety is to accumulate till Alfred Daintree, the nephew, attains twenty-five, or dies, whichever first happens. If that period expires before either of those events shall happen, then to pay Alfred Daintree till he attains twenty-one all the income, and subject as aforesaid (and now we reach the point at which there is the serious divergence in terms from what is found in the first gift), "all my said real estates and my said residuary personal estate shall be held," not for Albert Daintree absolutely if he attains twenty-five, or, if he dies under twenty-five leaving a son who attains twenty-one for that son; but

"for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely."

Then we come to a full stop. Pausing there we have got an absolute entire and final gift, if there is a person who takes under it. But at that point it is impossible to attach any meaning to the will. There is nothing from which one can say who such only surviving son, or if more than one surviving son, the eldest of such surviving sons is. There is nothing to which the word "such" can be referred. In my opinion, the word "such," as used there, clearly points to something having been omitted, or something being wanting before to which that word is intended to refer.

Then we have also the word "surviving." That word may be used either as surviving a particular person, or as surviving a specified point of time, e.g., the time at which the person referred to, or someone else, attains the age of twenty-one. Therefore, the word "survive" does not seem to me in itself as strong as the word "such." But, in the next line, the gift over to Richard Daintree is, "in case Alfred shall leave no son him surviving." Looking at the whole passage it seems to me that the word "survive" can only have one meaning throughout, and "such only surviving son" must mean such son of Alfred Daintree as shall survive him. That being so, we have not only the word "such," but the word "survive" referring to something which has gone before, while there is nothing in the will to which either can refer. It seems to me clear from these words that something is omitted, and the first branch of the subject one has to consider, namely, whether there is any omission or not, is answered by saying that these words of reference clearly show something is omitted. Then the question is: What is omitted? I do not say that is all in the will which shows something is omitted, because there are other passages which point the same way. On this point it is convenient to consider the question what is omitted. The gift over is in case Alfred Daintree shall leave no son him surviving. Then the estates (real and personal estate) are to be held in trust for Richard. I do not think it necessary to consider at present whether that refers to the whole estate or the last-mentioned moiety of the estate. For present purposes it seems to me that, if it is held to be the whole estate, and not the last-mentioned

A moiety only, and that consequently the words "all my said real estate and my residuary personal estate" mean the whole also, there is nothing inconsistent in that with the construction I put upon the will. There is the gift over in case Alfred Daintree leaves no son surviving him; it is clear, therefore, that the gift over is not to take effect until after Alfred's death. Why is it not to take effect until after that time? Who is to take it in the meantime? Either it must go to whoever B is meant by the phrase "a surviving son of Alfred," or there must be an intestacy. In my opinion, it would not go to the person meant by the words "surviving son," and there would be an intestacy. That fact is a reason, not a conclusive reason by any means, but a reason why, if it can be reasonably avoided, one should not put that construction upon the will. The fact that the estate is only given over in favour of Richard in case no son of Alfred is left surviving at his death seems C to me to point very strongly to the gift being postponed in order to give Alfred some interest before Richard can take anything. Then the question is: What interest? and as far as the gift over at the time of Alfred's death throws a light upon it, it would not be necessary to say that what he took by implication was more than a life estate.

D I think there are two other passages which seem to me very important. There is a provision giving the trustees a power of maintenance and education. Here again there is a provision in favour of the person who was to take after Alfred's death postponed until the death of Alfred, and here again it is very hard to believe that that can be done for any reason excepting for the purpose of giving Alfred a previous interest. Again, this does not show conclusively whether it need be more than an estate for his life, or what the extent of Alfred Daintree's immediate E interest is to be; but it does show very strongly that he was to take something, and is deemed to have taken something under the will, and that the provision is only made for the maintenance of his son after his death because he himself was intended to take in the meantime. That I say would leave it open to question whether the interest Alfred took was a life estate or some other estate. But then we go to the final words which seem to me conclusive in the matter. In F considering what the words which are introduced ought to be, the mere fact that the testator has given one moiety of the estate in favour of one person is not conclusive to show that he meant to give the other moiety in favour of another person in the same way. But looking at the similarity of the clauses throughout in every respect except in the omission of these words, we would expect to find the same G limitation as to the second moiety as one finds with respect to the first. Whether that would be enough to act upon would certainly be open to question, but I think that is a circumstance not to be overlooked.

Looking at the clause now before me, it seems to me conclusive to show that the testator considered there were certain events contemplated by him and referred to in his will, in which Alfred Daintree on attaining twenty-five would take an absolute indefeasible interest. He says:

H "I direct my trustees, until some person shall under the trusts of my will become absolutely and indefeasibly entitled to my said real estates respectively, and also during the minority of any son of Alfred who shall become entitled to my said real estate or any part thereof . . . to pay the rents and income as therein mentioned,"

I and interest and charges are to be kept down. The only persons whom he could contemplate as taking any interest in the second moiety are, first of all, Alfred Daintree, the nephew; after him any son of the nephew, any great-nephew who might attain twenty-one; and, thirdly, if neither of those two persons take, then the only person contemplated as taking is Richard. Therefore, the nephew takes some interest first, the great-nephew second, and Richard the third. The testator first of all provides for what, in my opinion, is the first of those persons, namely, Alfred Daintree. He says,

interest is to be payable "until some person shall under the trusts of my will become absolutely and indefeasibly entitled to my real estate." In my opinion, as regards this moiety, he there referred to Alfred Daintree and nobody else. It is said he might have referred also to the persons who took second and third. In my opinion, he clearly did not refer to the person who took second, because he immediately afterwards goes on to provide for him in the words, "and also during the minority of any son of Alfred Daintree."

Therefore the first alternative does not deal with the case of the son of Alfred. In my opinion, it does not deal with Richard Daintree either, because there was nothing whatever to postpone the absolute and indefeasible vesting of Richard's share at all if the other two persons were out of the way. It seems to me, therefore, that under this clause he clearly is dealing with the payment of interest, first of all until, as regards this moiety, Alfred attains twenty-five. If he attains twenty-five he contemplates he will be absolutely and indefeasibly entitled. If, on the other hand, he does not attain such interest, but dies under that age leaving a son, then the second part of the clause provides for payment of interest during that time. In case they both disappear, then Richard comes in and takes absolutely; his share is finally vested, and there is nothing whatever for this clause to apply to. The clause appears to me to point out to demonstration that Alfred was in a given event to take an interest under the will; and that in the given event of his attaining twenty-five, what was intended was that he should take absolutely. Looking, therefore, to the whole will, I come to the conclusion that the words which it is said are omitted by mistake are in reality to be gathered from the terms of the will as expressed.

Solicitors: *F. C. Greenfield; W. Elgood.*

[*Reported by J. R. BROOKE, Esq., Barrister-at-Law.*]

MILNES v. HUDDERSFIELD CORPORATION

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson, Lord Bramwell, Lord FitzGerald, Lord Halsbury and Lord Ashbourne), February 18, 19, 22, 24, May 25, 27, July 16, 1886]

[Reported 11 App. Cas. 511; 56 L.J.Q.B. 1; 55 L.T. 617; 50 J.P. 676; 34 W.R. 761; 2 T.L.R. 821]

Water Supply—Duties and liabilities of undertakers—Duty to provide supply of pure and wholesome water—Water in mains pure and wholesome—Contamination in consumer's service pipes.

By the Waterworks Clauses Act, 1847, s. 35, it was provided: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act. . . ." Water undertakers supplied to the plaintiff water which, while in their mains, was pure and wholesome, but, while passing through lead service pipes, the property of the plaintiff, connecting the mains with the plaintiff's house, became contaminated with lead, with the result that the plaintiff contracted lead poisoning. In an action by the plaintiff against the undertakers for damages for breach of their statutory duty,

- A** **Held:** the "pipes" mentioned in s. 35 were the undertakers' mains and did not include the plaintiff's service pipes; the duty imposed by the section on the undertakers was to take all reasonable care to ensure that the water in those mains was pure and wholesome; in the circumstances they had discharged that obligation; and, therefore, the plaintiff's action failed.
- B** **Notes.** The Waterworks Clauses Act, 1847, was repealed by the Water Act, 1945 (see Sched. 5). The duty of undertakers to provide a water supply to houses and schools is now to be found in s. 111 of the Public Health Act, 1936, as substituted by s. 28 of the Water Act, 1945: see particularly para. (b) of the substituted s. 111 (1).
- Considered: *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650.
- C** Referred to: *Clegg, Parkinson v. Earby Gas Co.*, [1896] 1 Q.B. 592; *Gale v. Rhymney and Aber Valleys Gas & Water Co.* (1903), 67 J.P. 430; *Simpson v. South Oxfordshire Water and Gas Co.*, [1908] 1 K.B. 917; *Whittington Gas Light and Coke Co. v. Chesterfield Gas and Water Board*, [1914] 1 Ch. 270; *Stevens v. Aldershot Gas, Water and District Lighting Co. (now Mid-Southern District Utility Co.)* (1932), 102 L.J.K.B. 12; *Read v. Croydon Corpn.*, [1938] 4 All E.R. 631.
- D** As to the duty to supply wholesome water, see 39 HALSBURY'S LAWS (3rd Edn.) 370; and for cases see 43 DIGEST 1077-1082. For the Waterworks Clauses Acts, 1847 and 1863, see 26 HALSBURY'S STATUTES (2nd Edn.) 729, 766; and for the Water Act, 1945, see *ibid.* p. 786.

Case referred to:

- E** (1) *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 5 Digest (Repl.) 809, 6839.

Also referred to in argument:

Hammond v. St. Pancras Vestry (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 38 Digest (Repl.) 15, 62.

- F** **Appeal** from a decision of the Court of Appeal (LORD COLERIDGE, C.J., SIR BALIOL BRETT, M.R., and BOWEN, L.J.), reported 12 Q.B.D. 443, affirming a decision of MATHEW, J., on further consideration of the action (10 Q.B.D. 124).

Lumley Smith, Q.C., C. Dodd, and R. W. Harper for the appellant.

Sir Richard Webster, Q.C., Forbes, Q.C., and Vaughan Williams for the

- G** respondent corporation.

Their Lordships took time for consideration.

July 16, 1886. The following opinions were read.

- H** **THE EARL OF SELBORNE.**—After the first argument of this important, and, to my mind, difficult, case, I had formed an opinion different from that which is, I believe, entertained by a majority of those who heard the second argument. But I thought it desirable that the case should be further argued before a greater number of your Lordships, and I am very glad that this has been done. Four very learned judges had concurred in the view taken by both the courts below; and the questions raised might concern, on the one hand, all consumers of water supplied in the usual way by public bodies to inhabitants of large towns where lead pipes are used and the water may be of a quality likely to take up lead, and, on the other hand, all the public bodies supplying such water. It is not often that it can be matter of satisfaction to a judge that a case should be determined against his opinion; but, in the present case, I should not have wished my opinion to prevail against so considerable a preponderance of judicial authority. I nevertheless think it my duty (especially as the subject is one which may deserve and receive attention from the legislature) to state the view which I have taken, and which (if it depended on my judgment) I should still take of this case; but I do not consider it necessary to do so in that detail or with that particular examination

of all the clauses of the Acts of Parliament and other documents, or of the state of the evidence, which might under other circumstances have been proper.

By the general Waterworks Clauses Acts, and the special Act relating to Huddersfield, the respondents, being undertakers for the supply of the town of Huddersfield with water, are bound (on certain conditions) to cause pipes to be laid down and water to be brought to every part of the town, and to provide and keep in the pipes to be laid down by them—that is, as I agree, in their mains—“a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants,” and to furnish to every inhabitant demanding it on the terms of the Act “a sufficient supply of water for his domestic purposes.” For this they are to receive payment; and if their surveyor or officer of health reports any house within the borough to be without a proper supply of water they may compel the owner to take and pay for such a supply. The cause of action stated in his pleadings by the appellant against the respondents was that the water supplied to him [from the Blackmoorfoot reservoir] was “impure and unwholesome,” “contaminated with deleterious substances,” which in his particulars he explained to be “lead, or some poisonous compounds of lead and acids, which acted upon the surface of the lead pipes through which the water was conveyed to him” and rendered the water “unfit for drinking and other domestic uses,” and that his health had suffered thereby. That his health did suffer, and that seriously, by lead poisoning through the use of the water supplied to him by the respondents from their Blackmoorfoot reservoir was not contested; and the jury at the trial found £2,000 as the proper amount of damages, if he was entitled to damages at all.

Some embarrassment has arisen out of the manner in which the questions of fact were withdrawn from the jury; but (except on one point which the plaintiff's counsel treated as immaterial, waiving his right to have the opinion of the jury taken upon it) it must have been the intention and understanding of both parties that the court, when deciding the questions of law, should also look at the whole evidence in order to see upon what state of facts those questions arose. The only substantial difference, as it appears to me, between the witnesses for the plaintiff and those for the defendants was as to the exact chemical cause of effects which were really not in dispute, and particularly as to the exact chemical operation of the sulphuric acid, which was proved, beyond controversy, to be present in the water as supplied by the defendants. The question treated as immaterial, and, therefore, withdrawn from the jury by the plaintiff's counsel, was this only—not whether there was or was not present in the water supplied by the defendants some peculiar and special solvent of lead, but whether it was or was not of the particular nature and character deposed to by the plaintiff's witnesses. It is, perhaps, to be regretted that this latter question should not have been put to the jury, because there appears to be, even among your Lordships, some difference of opinion about it, and it was certainly a question not of law, but of fact. I cannot, for my part, regard the plaintiff's counsel as having done anything at the trial at all equivalent to an admission that there was no such special or peculiar solvent of lead in the water as brought from the reservoir into the respondents' mains; and, feeling obliged to consider for myself what is the true result of the evidence on that point, I do not hesitate to say that I take it to be one of the facts of the case which were (to my mind without much, if any, controversy) made out at the trial. If there had been no mixture of any foreign or adventitious matter whatever in the water, making its effects upon lead different from those which would necessarily and always be produced by rain water or other quite pure soft water, the case would be different. I do not believe that in that case the plaintiff and others who suffered in like manner would have been poisoned.

But there seems to me to be clear, and indeed uncontradicted, evidence (i) that, although all soft waters do for a time take up some lead, they do not all take it up to an extent or in a manner which is noxious to health in the way in which the water drunk by the plaintiff is proved to have been; (ii) that they usually

A (and especially when they contain some proportion of sulphuric acid added to pure water) produce a protective coating in the interior of lead pipes, which in this case was not produced; (iii) that in this case the quantity of lead taken up and held in solution went on continually increasing so as to become more and more dangerous, which would not have happened in the same way without the presence in the water of some peculiar and unusually powerful solvent of lead;

B and (iv) that although the persons proved to have actually suffered as the plaintiff did were but few out of a large population (lead being what is called an "elective" poison, and not affecting all persons alike), they were sufficient to prove the existence in the water of some special and increasingly noxious quality. Nor can I regard as unimportant the uncontradicted evidence of the report, made to the respondents some time before the plaintiff began to suffer, by their own public

C analyst, that the water supplied, under similar natural conditions, from another of their reservoirs (Deerhill) had in 1880 got into such a condition as to make its continued use dangerous, which was not yet (at that time) the case with the Blackmoorfoot reservoir, and that in the analyst's opinion the Blackmoorfoot water also would be liable eventually to get into the same condition unless certain ochrey springs and coalpit waters were kept out of it, which was not done.

D I have thought it necessary to state at the outset my view of these facts, because the questions in the case are two: the first one of law: What was the statutory obligation of the respondents in respect of the supply of water to the inhabitants of Huddersfield; the second one of the fact: Whether the statutory obligation was duly performed? Upon the question of law I cannot for a moment doubt that the object with which the general and special Acts were passed ought

E throughout to be borne in mind. That object was that the consumers should be supplied with water—a prime necessity of life—for drinking, not indeed the only purpose, but a primary one, which must be and which alone need be here regarded. To be fit for drinking, the water must be wholesome and not poisonous to those who drink it. It is a paradox little short of absurdity to suppose that water not fulfilling that condition could be such as the legislature intended to be supplied.

F Next, it appears plainly from many provisions of the Acts (even if it were not self-evident) that the legislature contemplated the introduction and supply of water into the houses of the consumers by the usual and indeed necessary means—that is, by mains bringing the water into the streets from the sources of supply by communication pipes conducting it from those mains into the consumers' houses, and by service pipes carrying it to those places within each house from

G which it was ultimately to be drawn. The water to be drunk must pass through all those means of supply before it could practically reach any consumer. Whatever could not so reach him without becoming poisonous could not safely be drunk, and would, therefore, not fulfil the primary objects for which the whole supply was required.

H Whatever else the legislature may have intended, it certainly did not intend the water to be drunk directly out of the undertakers' mains; and when the obligation was imposed upon them to keep in their mains "a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants," and to give to every inhabitant demanding and paying for it "a sufficient supply of water for his domestic purposes," I cannot think it reasonable to understand this in any

I abstract unpractical sense irrelevant to the consumer and independent of the proper means and necessary conditions of his consumption. If the legislature had expressly required all communication and service pipes to be of lead, it is inconceivable to me that the fitness of the water for drinking while in the undertakers' mains (from which it never could or would be drunk) could have been held to satisfy the respondents' obligation if it were unfit to pass through lead and to be afterwards drunk, by reason of the presence in it of a special solvent of lead, although that solvent might be absolutely inoperative and innocuous to anyone who might drink the water before it came in contact with lead. It is true

that this is a case of statutory obligation, not properly of contract; although LORD ELDON and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them and are to receive remuneration in money for what under these powers they supply, as Parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them. But I fail to see why it should be less necessary or reasonable (unless the words of the statutes exclude it) to regard the fitness of the things supplied for the purpose of the statutory obligation as an element of that obligation itself than it is to do so when the obligation results properly from contract. I can, indeed, conceive a possible, though most improbable case, in which the legislature might have absolved the undertakers from all responsibility for the quality of the water supplied by them; not only authorising them (as here) to collect the springs within a certain area for the purposes of the supply, but requiring or authorising them to supply those particular waters in their actual state and condition, as they might be collected in certain reservoirs, without any obligation either to reject or to find the means of purifying them, if they should become contaminated with adventitious matter rendering them unfit for their intended purpose. In that case, however improvident such legislation might be, the consumer would have to take care of himself as best he could; the undertakers would have a statutory indemnity, whatever might happen.

But it seems to me that there is no ground for so construing those Acts of Parliament with which we have here to deal. Another case might have been possible; and, indeed, unless I misunderstand the opinions from which I differ, the learned judges in the Court of Appeal, and some of your Lordships also, think that the present is really such a case. A clear line of separation might have been drawn between the works of the undertakers, beginning with their conduits and reservoirs, and ending in their mains; and everything else—the choice of material for the communication and service pipes, and the whole system and means of supply from the mains to the consumer's premises—might have been placed entirely within the power and under the control of the consumer, at his sole risk, and on his sole responsibility. In that case, I should have agreed that, if the water was pure and wholesome at the point where all the duties, powers, and responsibilities of the undertakers terminated, the consumer, and not the undertakers, might be solely answerable for whatever might afterwards happen to it while passing through pipes constructed at his own option, and in his own way, of a material chosen by himself.

I cannot agree with those who think that your Lordships have here to deal with anything like that state of things, and the reason why you have not is obvious. It would be quite inconsistent with the interest of the undertakers, and would place in great hazard the profits of their undertaking, if the powers of interference and control were to terminate at the mains. The hypothesis is an unreal one, inconsistent with the nature and the indispensable conditions of such an undertaking. It is of very little importance, in my judgment, to this question, that the legal property in the communication and service pipes may be (as, indeed, I think it is) in the consumer, after he has paid for them, unless he was free to determine for himself of what material they should be made, and to exercise, both when they were laid down and afterwards, the substantial control over them, independent of the undertakers; and this (as I read and understood the Acts and the byelaws made by the respondents) he was not. Under the general Act of 1847 the communication pipes might, indeed, be laid down by the consumer, but they were to be of a strength and material approved by the undertakers, and to be laid down under the superintendence of their officers, with an appeal, in case of difference, to justices. Such restricted powers differ widely from that freedom which may involve sole responsibility.

By s. 19 of the Waterworks Clauses Act, 1863, these restrictions were largely extended. Every consumer was prohibited, under penalties, from affixing, or

A causing or permitting to be affixed, any pipe or apparatus to a pipe belonging to the undertakers, or to a communication or service pipe belonging to the consumer, and from making any alteration in any such communication or service pipe, or in any apparatus connected therewith, "without the consent in every such case, of the undertakers." By the special Act for Huddersfield, absolute power was given to the respondents to make byelaws, directing the use, and
B prescribing the size, nature, strength, and materials, and the mode of arrangement, alteration, and repair of (among other things) all the consumer's pipes. The respondents exercised that power by prescribing lead as the necessary material for every consumer's pipe, "not being of cast iron." That a practical option was given to the consumer to use cast iron for all his pipes does not appear to me to be the true effect of this byelaw, having regard to the immediately
C antecedent context; but on this I do not dwell, because the respondents, by another byelaw, took upon themselves (as under s. 70 of their special Act they certainly might, with the consumer's assent) the office of providing and executing, in all cases, the whole service pipes and works for the supply of water from the mains into the houses of the consumers; and they also reserved to themselves the sole and exclusive control and management over the "connecting pipes and
D works from the street main to the consumer's premises." All the leaden communication and service pipes were in the present case (and, as I recollect, from the evidence, in Huddersfield generally), laid down by the respondents themselves under these byelaws, pursuant to written applications founded upon them, which were signed by the consumers.

E I cannot be persuaded, under these circumstances, that any such line has been drawn by the legislature between that part of the means of supply which ends in the mains belonging to the respondents and that which is continued from those mains into the consumer's house by pipes, of which the legal property is in the consumer, as to throw upon the consumer the sole responsibility for all contamination which may occur in those pipes by reason of the action of anything
F contained in the water upon the material of which they are composed. I cannot be persuaded that the statutory obligation of the respondents is fulfilled if they deliver from their mains into those pipes water containing foreign or adventitious matter (whatever may be its exact nature, or the exact chemical conditions under which it has such a noxious effect) which, in passing through those pipes, will cause the water to take up lead, and so become poisonous, in a way
G which otherwise would not have happened, although the water containing that matter might have been absolutely innocuous, if it could have been drunk from the mains without passing through lead.

Taking this view, I should have arrived at a conclusion in the appellant's favour, not on the ground of negligence (as to which no question was open upon the pleadings), but on that of non-fulfilment of the statutory obligation. Not only
H was no question of negligence raised, but I think it right to say that I am unable to see how it could possibly have been raised (consistently with the views of the statutory obligation on which I understand the opinions from which I differ to be founded), even if the potency of the special solvent of lead contained in this water (continuing to be innocuous until brought into contact with lead) had increased and accumulated to such a degree as to poison the whole population
I of Huddersfield. This, happily (as lead is an "elective" poison, and as the respondents may be expected to use the best means in their power to counteract the mischief, whether legally obliged to do so or not, and I am not convinced that no such means are possible), is not likely to happen; but, if it did happen, the logical result of the views from which I differ seems to me to be that the legislature only would be to blame. Although I do not myself think so, I recognise, as I have already said, the weight of the authority opposed to my opinion, in accordance with which your Lordships' judgment will now settle the law.

LORD BLACKBURN.—This case was heard before the House, consisting on A that occasion of the EARL OF SELBORNE, LORD WATSON, and LORD FITZGERALD, and those noble and learned Lords, when considering the case, did not altogether agree in their views, and it was, therefore, directed that there should be a second argument. I have had the advantage, besides hearing the second argument, of being furnished with opinions of the EARL OF SELBORNE and LORD B Watson, printed confidentially, and circulated while the case was under consideration after the former argument.

Since the conclusion of this argument, I have read again these opinions with great care. I have come to the conclusion that the judgment of MATHEW, J., which has been affirmed by the Court of Appeal, ought to be affirmed. But I feel that it is a hard case that the appellant should, without any fault even imputed to him, suffer a damage so great without redress. And I also feel that not only C the inhabitants of Huddersfield, but also the inhabitants of many other districts who are supplied with water from such sources as produce what is commonly called "soft" water may be in a similar position. There was evidence which, I think, would have justified the conclusion that the quantity of lead which could be taken up by this water from so short a length of lead pipe as that which led from the mains to the tap which supplied the appellant with drinking water would D not have produced any noxious effect on most people. The appellant's family, consisting of his wife and servants and six children, the eldest of whom was ten years old, all drank it with impunity. I do not think it would have been a fatal objection to his right to recover, if in other respects made out, that he was a person of a very peculiar constitution, and that none but persons of that very peculiar constitution would suffer. But it was also proved that other persons had suffered E from the same water passing through similar lead pipes. The general mischief from the use of lead pipes is much less serious if the percentage of those who suffer from it is small. It may be important to ascertain how that is on some other occasion, but no question as to that was raised in this case.

I take it to be a matter of general knowledge that water collected from the fall of rain on a particular district derives its character from the nature of the strata F over which it flows when collected on the surface or through which it filters when flowing out in springs, which are generally in the superficial strata. There are sometimes springs so deep-seated as to derive their character from other strata. To take an extreme instance, no one, I think, can doubt that the hot mineral waters at Bath derive their peculiar qualities, which certainly render them very unfit for domestic use, from passing through deep-seated strata very different G from those adjoining Bath. I have no doubt that those hot springs are ultimately fed by rain which has fallen somewhere and filtered down into those hot strata; but I think it probable that the rainfall which feeds them has fallen at a distance, and has been filtering far, perhaps for hundreds of miles, and for a long time, perhaps for years, before it comes to the surface at Bath. But there is no evidence here of there being any such deep-seated springs in this district. I think that the H evidence shows that the Blackmoorfoot district is one of those, the water collected from which is what is commonly called soft, the nature of the strata with which it comes in contact being such as to contain but little of those minerals, the absorption of which gives water the character of "hardness." There is, however, in the district found some iron pyrites—an ore of sulphur and iron, which, when exposed to air and water, undergoes a chemical change, resulting in the I production of sulphuric acid. And the evidence is that there was some (not very much) sulphuric acid in the water collected in the Blackmoorfoot reservoir. I do not think we need embarrass ourselves by thinking of the other reservoirs, for the water from the drinking of which the appellant has suffered came exclusively from Blackmoorfoot reservoir. I think it must, for the purposes of this case, be considered as established that the water as brought down to and in the mains was soft water, with some sulphuric acid in it—excellent in that state for drinking.

A But I think it must also be considered as established that this water was such as, when brought in contact with lead, was capable of dissolving it, and producing some salt of lead, which, if taken in sufficient quantity for a sufficient length of time, is noxious.

HIS LORDSHIP referred to the expert evidence given at the trial, and continued :
I think that the question, what remedy there is, must depend on the true construction of the Act in each case. It may well be that, on the true construction of one Act, it would appear that the legislature intended to allow the use of water of such a degree of softness as will produce some injurious corrosion of lead pipes, and to allow it to be supplied through lead pipes, thinking that the quantity of lead taken up would be so small that, though it might injure a few persons, it was better on the balance that this should be, rather than that the district should be deprived of water altogether, or put to the expense and inconvenience which would be caused by preventing the use of lead pipes, which are certainly very generally used; and yet that may not be the intention appearing on the construction of another Act.

The Act in the present case is the Huddersfield Water Act, 1869 (32 & 33 Vict., c. cx). It provides that the corporation of Huddersfield may take over the old waterworks erected by commissioners under a private Act of 1827 (7 & 8 Geo. 4, c. lxxxiv). With those waterworks we are not in the present case concerned. But the Act also provides for getting a further supply of water and making a further reservoir, and, when that supply is obtained, enlarging the districts within which the corporation may supply water. The appellant's house is in that new district. The Act of 1869 incorporates the Waterworks Clauses Acts, 1847 and 1863, except the provisions with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their own profit. Section 17 of the Act of 1869 defines the district from which the new supply is to be derived. The reservoir from which the water is brought down to the main to which the service pipes supplying the appellant's house is attached is Blackmoor-foot, and with that only are your Lordships now concerned.

It was, not very strongly, argued that the undertakers were in the position of persons selling water to the inhabitants of the district, and, therefore, that they were under an obligation to supply water fit to be used in lead supply pipes, that being the ordinary mode in which water is used. But I think that the duty imposed on the corporation does not extend so far. It may be that it imposes on them a duty to take all reasonable care and skill, and, if there had been a claim for damages on the ground that they had been guilty of neglect of that duty, it would have been necessary to consider this. The judge, in the exercise of his very wide powers of amendment, might have allowed an amendment raising this question; but after the objection of the defendants' counsel that he was not prepared with evidence to meet such a case, he would not have made such an amendment, except on the terms that the trial should be postponed, and he was not asked to make it. I do not think this a mere technical objection. Both MATHEW, J., on further consideration, and the Court of Appeal, treated the case as if it depended exclusively on the Act, and, viewing it in that light, held, I think correctly, that the only absolute duty imposed on the corporation was to provide and keep, in the pipes to be laid down by them, which I think is correctly construed as the mains, "a supply of pure and wholesome water sufficient for the domestic use" of the inhabitants. The supply kept in the mains was pure and wholesome, if it was taken as it there was.

The only doubt I have had as to this is whether (as it was known that the supply pipes were likely to be made to some extent of lead, and after the making of the byelaws it was known that they would certainly be made of lead) the water which, when passed through the lead pipes, would take up some poisonous salts of lead can properly be said to be "pure and wholesome." I think, however, it was so, and that the fault, if there was any, was in having lead pipes at all. Section

66 of the Act of 1869 empowers the corporation, for the purpose of preventing waste, misuse, undue consumption, or contamination of the water, to make byelaws. Under these actually made, they deprive the inhabitant, at whose expense they do the actual plumber's work, of all discretion as to the materials of which his service pipes are to be made. They prescribe that they shall be lead. I do not see that there is any reason to think that, if the discretion had been left to the inhabitants, there would have been any difference in the mode in or the material of which these service pipes would have been constructed. Even now the only change which can be suggested is that the half-inch pipe of the length of thirty-eight feet might be made of iron, which would no doubt diminish the chance of mischief by diminishing the quantity of lead. But while lead is the material from which internal service pipes are made, that would only diminish it. I do not know what hope there may be of cheapening the cost of production of aluminium, or in some other way giving the consumers a practical mode of getting service pipes of a material as tough and flexible as lead, and not having this dangerous quality of poisoning water, or at least soft water when not so devoid of oxygen as to be exceedingly insipid. If there is such a discovery ever made, the byelaw which stands in the way of the use of it may be repealed. But now I am not able to see in what way any claim can be made against the corporation on account of these byelaws. I do not say none can, but I certainly think none has been made. And I think that, till such a claim is made in such a way as to give the corporation an opportunity to answer it, your Lordships cannot decide it.

LORD WATSON.—I concur in the opinion delivered by the EARL OF SELBORNE.

LORD BRAMWELL.—I am of opinion that this judgment should be affirmed. The plaintiff's charge in his statement of claim is that he, being entitled to a supply of pure and wholesome water from the defendants, they supplied him with water not pure and wholesome, but which was contaminated with deleterious ingredients. This complaint is not only unproved, but the contrary is proved. The supply of the defendants is from the main to the service pipes of the plaintiff. The water supplied at the point of supply was pure and wholesome, with no deleterious, foreign, or adventitious ingredient. In its passage along the plaintiff's service pipes it became otherwise. It is impossible to say that water is pure and wholesome, and free from deleterious ingredients if passed through iron pipes, but not if passed through lead pipes. The pipe is bad, but the water good. The plaintiff, therefore, has failed to make out his case. It was asked what would be the result if, under their powers of compelling persons to take a supply of water, the defendant corporation supplied it through service pipes of lead, with the injurious consequences that have followed in the plaintiff's case. I decline to give an opinion on this till I hear the case, and will content myself with saying that, if the defendants would be liable, it would be precisely for the reason which does not exist here—viz., that the water they supplied was not pure and wholesome. I will only add that, in the case put, they are not bound, only entitled, to force a supply.

This opinion is a short one. If that is a defect, I can only say I am sorry, for I cannot remedy it. I do not know which of the matters I affirm is denied. There is no doubt that, to recover, the plaintiff must prove the presence of deleterious matter in the water supplied. I can see no evidence that the water in the main had deleterious matter in it. The scientific witnesses seem to be, or to have been, in a state of some uncertainty as to the effect of pure water upon lead; or rather, perhaps, they seem to have once thought, but to have changed their opinion, that pure water did indeed corrode lead, but not so as to hold lead in solution. But I repeat, whatever may have been or may be their opinion or that of any of them on this, I cannot see any evidence that there were deleterious ingredients in the

A water in the mains. It is true that the water was not to be drunk there, but in the houses of the consumers. It was, however, to be conveyed to those houses in the pipes of those consumers. It was in them in the course of that conveyance, and by them that the water was made unwholesome. If, indeed, the defendants, having notice that lead pipes were unfit to convey such water, insisted on the consumer using no other, it may be that there would be a refusal to supply, and so
B a cause of action. But that is not the cause of action here.

I repeat, first, the complaint is that the water supplied contained deleterious ingredients; secondly, the water was supplied to the plaintiff's pipes; and, thirdly, at the point of supply it contained no deleterious ingredient. I decline to consider any question of negligence or misfeasance in the use of lead pipes. No such
C case is before us. So, also, I decline to consider what would be the result if the legislature had directed that lead pipes should be used, merely observing that if the water and the pipes were fixed by the statute it might plausibly be contended that the "pure and wholesome" supply meant as pure and wholesome as, under such circumstances, it could be. Therefore, in my opinion, the plaintiff fails. It may be said this is deciding the case on technical grounds. WILLES, J., said
D that law without technicality was impossible. I content myself with saying that, as long as our law says that a plaintiff to succeed must do so on the *allegata et probata*, the decision must be governed by them, and them alone.

LORD FITZGERALD.—Before reaching the conclusion at which I have finally arrived, I thought it essential to examine the pleadings and ascertain the exact
E issue. The action was preceded by a notice, the substance of which was that the mayor, aldermen, and burgesses of Huddersfield supplied, sold, and delivered to the said John Jessop Milnes certain water, which, according to the provisions of the Huddersfield Water Act, 1869, they were bound and required to supply of a pure and wholesome nature, and sufficient for his domestic use, whereas the same water was not of such pure and wholesome nature, but contained lead, free acid,
F and other substances likely to injure the health of the said John Jessop Milnes. Nothing now turns on the word "sold." The paragraph of the statement of claim which alleged a sale was struck out by amendment. The notice it will, however, be observed rests entirely on s. 35 of the general Waterworks Clauses Act, 1847, and on the duty or obligation created by that section.

The statement of claim alleges, in conformity with that notice, that the
G plaintiff

"was entitled as such inhabitant, by virtue of the said statutes, to demand and have a supply from the defendants of pure and wholesome water sufficient for his domestic use. In or about March, 1875, the defendants laid down their water mains near the plaintiff's house, and for reward then paid to them by the plaintiff put down leaden service pipes to conduct the water to the
H plaintiff's said house, and connected such pipes with their said mains. From the time of making such connection of the said pipes with their mains, the defendants have for reward continuously supplied the plaintiff with water from such mains through the said service pipes for his domestic use. In or about August, 1881, and for many years previously thereto, the water which the defendants thus supplied to the plaintiff was impure and unwholesome.
I It was contaminated with deleterious substances. It has from that time been, from time to time or continuously, impure and unwholesome, and contaminated as above stated."

The statement of claim further alleges that

"the deleterious substances with which the said water as supplied by the defendants to the plaintiff was contaminated [were] lead or some poisonous compounds of lead and acids which acted upon the surface of the lead pipes through which the water was conveyed to the plaintiff."

The statement of defence is in substance :

"The defendants admit that, in or about October, 1874, they laid down their water mains near the said house now occupied by the plaintiff. The defendants put down leaden service pipes to conduct the water to the said house at the request of and for reward then paid to them by the plaintiff's landlord, or other his predecessor in title. The said service pipes so put down were forthwith connected with their said mains. The defendants have continuously supplied the said house with water from the said mains through the said service pipes since October, 1874, and have thus supplied the plaintiff since he became an inhabitant as aforesaid. The water so supplied by the defendants to the plaintiff was pure and wholesome water, and was supplied in its natural condition, uncontaminated and pure, just as derived from the springs and sources authorised by the said special Acts in that behalf."

And on that defence the plaintiff joined issue.

It will be perceived that the matter which the plaintiff undertook to establish was that the defendants, in violation of their duty under s. 35 of the Act of 1847,

"supplied the plaintiff with water from such mains through the service pipes which was impure, being contaminated with deleterious substances."

The requisition on which the water was supplied to the plaintiff's premises was as follows :

"To the corporation of the borough of Huddersfield, Oct. 19, 1874, Gentlemen,—Please supply with water the under-mentioned property in accordance with your rules and regulations. Description and situation of property : 1, House, Grove-place, Dalton, occupied by J. J. Milnes. I hereby agree to pay for the pipe to supply water in accordance with the above description.—I am, gentlemen, yours respectfully, WILLIAM MARSDEN."

I understand by "the pipe," the 39 feet of $\frac{1}{2}$ -inch pipe from the defendants' main to the plaintiff's premises, to which at a subsequent period 53 feet of $\frac{3}{8}$ -inch pipe was added at the plaintiff's request, to conduct the water to a tap at the rear. In the view which I take of this case, it is not necessary for me to examine minutely or to criticise the evidence of the professional experts which, as was to be anticipated, exhibits considerable divergences of opinion. There is a statement in the appellant's case that "it was admitted at the trial that the water supplied to the appellant was wholesome if drunk at the mains," and MATHEW, J., in his judgment states, and no doubt with entire correctness, that it was not contended that there had been any want of care or skill on the part of the defendants or their agents, and it was admitted that the water, while in the mains from which the plaintiff's supply was taken, was pure and wholesome, and in its natural condition as it was drawn from the sources specified in the Act of 1869. It was further admitted that the material used for the service pipes was that which was best adapted for the purpose, and that it had been used with perfect safety for the supply of a great number of large towns.

At the close of the trial, after some skirmishing as to whether some and what questions should be sent for the decision of the jury as to the alleged impurity of the water, and whether or not it was due to sulphuric acid, the judge finally says : "The only question as it seems to me for the jury, is the question of the amount of damages." Counsel for the plaintiff : "I think so. I think the specific nature of the impurity, if I am right in the general result of the evidence, is proved." MATHEW, J. : "That this water became unwholesome on being delivered from the service pipe, and the defendants are responsible for the delivery from the service pipe—that is your position." Counsel : "Yes; I think the particular cause seems to be immaterial. That has been my view throughout." Damages were thereupon assessed by the jury, all questions being reserved for argument.

A The practice of this House now is to eliminate the case from mere technicalities, and let the decision rest on principle, and on the substantial merits. The final object of our system of pleading, so far as it has been suffered to continue, is to develop a certain and material issue on which the rights and liabilities of the parties may be determined; and, should your Lordships confine the plaintiff to the issue which he has tendered to his adversary, you will decide on the reality and substance of this case. The plaintiff has alleged the nature and extent of the defendants' obligation and assigned a breach of it. The onus lies on the plaintiff. The obligation of s. 35 of the general Act of 1847 is that which we have first to deal with. It is not disputed that the word "pipes" in that section is to be interpreted as meaning "the mains to be laid down by the company," and the obligation cast on the defendants by that section is

C "to provide and keep in their mains a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the district,"

who, as thereafter provided, "shall be entitled to demand a supply." The water should be pure and wholesome in the mains, but the statute does not add that it shall continue to be pure and wholesome under all circumstances. I have been D unable to find in the Act of 1847 any provision that would add to or increase that obligation in any point material in the present action. The special Act by its s. 27 incorporates the provisions of the Act of 1847, and enacts that it "shall apply to the whole of the waterworks undertaking of the corporation;" but it does not increase the obligation of s. 35. I have come to the same conclusion as E LORDS BLACKBURN and BRAMWELL, but with some and not inconsiderable hesitation—that the plaintiff has failed to establish any breach of the statutory duty or obligation on which alone he rests his action, and that judgment should, therefore, be given for the respondents.

It is sometimes very desirable that your Lordships, dealing with cases where several questions fairly arise, any one of which may be sufficient in itself to dispose of the action, should nevertheless proceed to express the decision of this F House on all or more than one of the questions in the cause. As, for example, in *Colonial Bank v. Whinney* (1), where two questions arose on the interpretation of a section of the Bankruptcy Act, 1883, the decision of either of those questions against the respondent rendered it necessary to reverse the decision of the courts below, and give judgment for the appellant. Your Lordships, however, G decided both questions, and adversely to the respondent. Those questions, though distinct, were fairly and properly raised on the pleadings, there was an issue on each, the courts below dealt with and expressed their decision on each, and it was expedient for the public good that your Lordships should do likewise. In the case now before the House, it seems to me to be inexpedient to express an opinion on the several other questions which have been raised only in argument, and which affect the interests of undertakers for supply of water, and of water H companies as well as consumers throughout the United Kingdom. The EARL OF SELBORNE refers principally to one view of the case, which is by far the most important of all, but which it seems to me can be properly settled on a firm and just basis by legislation only. The Waterworks Clauses Act, 1847, became law on April 23 of that year, and in the thirty-nine years which have since elapsed, I experience has taught many lessons, and among others the necessity of binding water undertakers and water companies with strict and rigid fetters, and of defining very clearly their liabilities towards the public. The provisions of that Act are scarcely adequate to the exigencies of the present day, and it may be desirable to reconsider them. It has been already observed that there is no count for negligence, nor any allegation of want of due and reasonable care on the part of the corporation, and a large question has been raised whether an action lies against the undertaking corporation in the absence of these averments, and on that question I refrain from indicating any opinion. Referring now to the Act of

1869, and to the byelaws framed under s. 66 of that Act, though entertaining the opinion that the entire length of lead pipe from the main to the tap at the rear of the plaintiff's house, with the exception of the stop-tap by which the corporation regulates the supply, is the property of the plaintiff, though under the control and management of the corporation, yet I forbear to express any opinion whether the material was, on the whole, improper to be used, or whether the byelaws which prescribed its use were ultra vires, or whether an action lies against the corporation in any shape for the consequences of thus prescribing "lead" or for the mode of supply after the water leaves the mains. It will be seen thus that the conclusion which I have arrived at is that the water to be so supplied was to be supplied from the mains. As it came from the mains it was pure and wholesome. It was conducted from the mains through the pipes of the consumer to the consumer for his use, and it was in those pipes that it took up lead. In my opinion, the plaintiff has failed to sustain this action, and as to whether he can maintain any other and what action I offer no opinion.

LORD HALSBURY.—The plaintiff must, in order to succeed in this case, show a breach of the duty created by s. 35 of the Waterworks Clauses Act, 1847. None of your Lordships has entertained any doubt that, upon the mere construction of the words of the section, the pipes referred to therein are the main pipes, and it is not suggested as a matter of fact that the water in the pipes was not pure and wholesome, but it must be admitted that the section does imply that the water is to be there collected for domestic use, and to be distributed for domestic use according to the process and ordinary method by which water is and was distributed for domestic use at the time of the passing of the Act. I think it is proved that the water was rendered otherwise than pure and wholesome by its passage along the supply pipes, which, with the assent, if not the direction, of the defendants, were connected with the defendants' main pipes. I think it was found that the plaintiff has suffered grievously from the effect of drinking water thus rendered unwholesome, but I am unable to see that the section intended to deal with any such condition of things. It may be that the legislature erroneously assumed that, if the water was pure in the main pipes, it would either continue to be pure for domestic use, or that the contract relations between the company or corporation to supply and the customer to receive might safely be left to themselves; or, what is, I think, still more likely, the idea of impurity resulting in the act of supply to the houses by the chemical quality of the water never occurred to the legislature at all. At all events, I am unable so to construe the section that it shall impose an obligation that, after the water has left their mains, it shall be of such a chemical quality that it shall be incapable of acquiring any unwholesome quality, whatever may be the medium through which it may be conveyed. This, it appears to me, disposes of the plaintiff's cause of action, as set forth in his statement of claim, and as sought to be found at the trial. I decline to consider any other form of action, or any other liability, under which the defendants might be sued.

LORD ASHBOURNE.—Everyone who has heard this case must sympathise with the plaintiff, and anyone who holds the view opposed to his claim must do so with some hesitation after the very powerful reasoning of the EARL OF SELBORNE. After the best consideration that I can possibly give to this case, I have arrived at the conclusion that the judgment appealed from should be affirmed, and for the reasons which have already been given by such of my noble and learned friends as have arrived at the same conclusion.

Appeal dismissed.

Solicitors: *C. Fitch*, for *Milnes & Marshall*, Huddersfield; *Van Sandau & Co.*, for *G. L. Batley*, Huddersfield.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

SCOTT (FALSELY CALLED SEBRIGHT) v. SEBRIGHT

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Butt, J.), November 12, 13, 16, 1886]

[Reported 12 P.D. 21; 56 L.J.P. 11; 57 L.T. 421;
35 W.R. 258; 3 T.L.R. 79]

Marriage — Avoidance — Consent of spouse obtained by fraud or duress — Evidence—Mental incompetence to resist improper pressure.

Courts of law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress. The validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract although in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which a marriage contract, like any other contract, may be avoided.

It has sometimes been said that to avoid a contract on the ground that it was entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. That is not an accurate statement of the law. Whenever, from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.

Circumstances in which a decree of nullity granted on the ground that the petitioner had been reduced by mental and bodily suffering to a state in which she was incapable of resisting the coercion and threats of the respondent as a result of which she consented to enter into the marriage.

Notes. Considered: *Moss v. Moss*, [1897] P. 263; *Hussein (otherwise Blitz) v. Hussein*, [1938] 2 All E.R. 344; *H. (otherwise D.) v. H.*, [1953] 2 All E.R. 1229. Applied: *Parojcic (otherwise Ivetic) v. Parojcic*, [1959] 1 All E.R. 1. Referred to: *Cooper v. Crane*, [1891] P. 369.

As to the requisites of a valid marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 775 et seq.; and for cases see 27 DIGEST (Repl.) 36 et seq.

Cases referred to in argument:

Turner v. Meyers (1808), 1 Hag. Con. 414; 161 E.R. 600; 27 Digest (Repl.) 35, 127.

Harford v. Morris (1776), 2 Hag. Con. 423; 161 E.R. 792; 27 Digest (Repl.) 38, 150.

Portsmouth v. Portsmouth (1828), 1 Hag. Ecc. 355; 162 E.R. 611; 27 Digest (Repl.) 39, 158.

Wilkinson v. Wilkinson (1845), 4 Notes of Cases 295; 27 Digest (Repl.) 39, 163. *Re Field's Marriage Bill* (1848), 2 H.L. Cas. 48; 9 E.R. 1010; 27 Digest (Repl.) 38, 154.

Hull v. Hull (1851), 17 L.T.O.S. 235; 15 Jur. 710; 27 Digest (Repl.) 39, 159. *Harrod v. Harrod* (1854), 1 K. & J. 4; 23 L.T.O.S. 243; 18 Jur. 853; 2 W.R. 612; 69 E.R. 344; 27 Digest (Repl.) 67, 456.

Hancock v. Peaty (1867), L.R. 1 P. & D. 335; 36 L.J.P. & M. 57; 16 L.T. 182; 15 W.R. 719; 27 Digest (Repl.) 577, 5355.

Petition by the wife for nullity of the marriage on the ground that it was procured **A**
by fraud and duress, and **Cross-Petition** by the husband for a decree of
restitution of conjugal rights.

Sir Richard Webster, Q.C., Dr. Tristram, Q.C., Pollard and Statham for the wife.

*Sir Edward Clarke, Q.C., Inderwick, Q.C., Searle and Rose-Innes for the
husband.*

Cur. adv. vult. **B**

Nov. 16, 1886. **BUTT, J.**, read the following judgment.—The petitioner seeks a
declaration of the nullity of her marriage alleged to have been solemnised at the
registry office in South Audley Street, London, on Jan. 30, 1886, on the ground of
fraud and duress. The petitioner also alleges that the marriage was never consum-
mated. The respondent in his answer denies the charges made in the petition, **C**
and, by way of counterclaim, asks for a decree for the enforcement of his conjugal
rights.

The claim of the petitioner to the relief prayed is based on the allegation that,
owing to the circumstances in which she was placed by the conduct and acts of
the respondent, by the deceit practised upon her, and by the fear with which she
was inspired, the petitioner was not a free agent when she went through the cere-
mony in question, and there was consequently, no valid consent on her part to the
contract of marriage. The courts of law have always refused to recognise as bind-
ing contracts to which the consent of either party has been obtained by fraud or
duress, and the validity of a contract of marriage must be tested and determined
in precisely the same manner as that of any other contract. True it is, that in con-
tracts of marriage there is an interest involved above and beyond that of the imme-
diate parties. Public policy requires that marriages should not be lightly set aside,
and there is, in some cases, the strongest temptation to the parties more immediately
interested to act in collusion in obtaining a dissolution of the marriage tie. These
reasons necessitate great care and circumspection on the part of the tribunal, but
they in no wise alter the principle or the grounds on which this, like any other con-
tract, may be avoided. It has sometimes been said that, in order to avoid a
contract entered into through fear, the fear must be such as would impel a person
of ordinary courage and resolution to yield to it. I do not think that is an accurate
statement of the law. Whenever from natural weakness of intellect or from fear—
whether reasonably entertained or not—either party is actually in a state of mental
incompetence to resist pressure improperly brought to bear, there is no more con-
sent than in the case of a person of stronger intellect and more robust courage yield-
ing to a more serious danger. The difficulty consists, not in any uncertainty of the
law on the subject, but in its application to the facts of each individual case. **E**

The question here is whether the facts disclosed in evidence bring this case within
the rule. The petitioner is a young lady, who attained the age of twenty-one in
February, 1885. It is not suggested that she is what is called a person of weak mind,
but it is alleged that circumstances to which I am about to advert had, in the latter
end of 1885 and the beginning of 1886, so affected her health as to produce a mental
condition wholly abnormal. Five or six years ago she made the acquaintance of
the respondent, a man some few years older than herself. Soon after the
acquaintance began he made her a proposal of marriage, which was refused. Sub-
sequently, however, they did become engaged, and although there were periods
during which there was an interruption of the relations which her acceptance of
his offer had created, the engagement was never actually broken off. The young
lady, on coming of age, was entitled to a sum of £26,000, and she had a reversionary
interest in a considerable sum beyond that amount. Acting on her mother's advice,
in the month of June, 1885, she made a settlement of her property upon trustees
for her own benefit. In March, 1885, a month after the petitioner came of age,
the respondent, who was in pecuniary difficulties, induced her to put her name to a
bill of exchange for £500 for his accommodation. Needless to say this was con-
H
I

A cealed from her mother and her friends. Other transactions of a similar nature followed in the summer and autumn of the same year, until, in the month of December, she had incurred liabilities on the respondent's behalf, and entirely for his accommodation, to the amount of £3,325. The bills of exchange appear to have been discounted for the respondent by two persons of the names of Williams and Lee. As is commonly the case with men in the respondent's circumstances, he
B was profuse in his assurances that these transactions were little more than matters of form, and that the petitioner would never hear more of the matter. As is also common in such cases, he never provided one sixpence to meet his liability on the bills, and in the result the petitioner was pressed for payment by Lee and Williams, by one or both of whom writs were issued against her and bankruptcy proceedings threatened. It is not matter of surprise that a young and inexperienced girl so
C situated should undergo mental suffering sufficiently acute to impair her bodily health. To such a person writs and bankruptcy summonses may well appear endued with unknown terrors.

In the present instance, it is alleged that the worry and distress to which the petitioner was subjected resulted in such a degree of prostration, bodily and mental, as to render her, if not incapable of exercising her reason, at all events unable to
D resist constraint and pressure brought to bear on her by others for their own ends. There is certainly abundant testimony to the condition to which the petitioner had gradually been brought by the end of the year 1885. Nurses, friends, doctors, concur in describing the marked alteration that had taken place, and Dr. Izod, the medical adviser of the family, appears to have entertained the most serious apprehensions, for he told her mother that unless the petitioner's condition improved
E melancholia would ensue. Probably the most conclusive evidence of this young lady's condition is furnished by three letters, which she wrote to a friend—Mr. Guedalla, a solicitor. [His LORDSHIP read passages from the letters.] No one, I think, could hear those letters read without asking himself whether there was not something weighing on the mind of the writer beyond the mere pecuniary difficulty.
F On turning to the particulars delivered in this action, I find the following allegation :

"That the respondent frequently threatened the petitioner that unless she would marry him he would accuse her to her mother, and in every drawing-room in London, of having been seduced by him."

On this part of the case, by an arrangement, as I understand, between counsel, no
G evidence had been offered. I do not complain of the course taken, but it appeared to me that to decide the question of the validity of this marriage in ignorance of the real state of the case on this point would be to proceed in the dark, and I felt it my duty to call for some explanation. The respondent thereupon went into the witness-box and stated, on his oath, that no impropriety between himself and Miss Scott had ever occurred. That is the only evidence he has given in this case. Assuming
H this to be true, he is entitled to the credit of having exhibited one solitary spark of good feeling in the course of a long series of misdeeds perpetrated upon a defenceless girl—misconduct for which it would not be easy to find language of adequate reprobation.

The matter is set at rest by other evidence. At the end of March, when Lady Scott first knew of the marriage, she insisted on an examination of the petitioner
I by Dr. Izod, who found her to be virgo intacta. Eliminate this matter from the case, and the contents of the letters, parts of which I have read, become all the more inexplicable on any theory other than that they were the production of a mind enfeebled by disease. Whether the cause assigned for this condition of the petitioner is adequate or not, is immaterial. The fact exists. The mental and bodily prostration is clearly established, and it is all important when we come to consider the events which followed. It appears that the holder of one of the bills, amounting to £1,000, had agreed to give the petitioner until Jan. 30 to pay it, intimating that he would wait no longer, but would make her a bankrupt if she did not pay

then. The respondent had told her that the only way out of her difficulty was to marry him; that the marriage would enable him to make arrangements with Lee and Williams which would free her from further molestation; but that, if she refused to marry him, he would not even try to make such an arrangement. He added that, if she did so refuse, he would ruin her. On one of the last days of January, and, therefore, very shortly before the day the marriage ceremony was performed, the respondent sent the petitioner to the office of one Arthur Burr, who is described as an insurance agent. Burr told her that he would "settle the bills" if she would marry Sebright, but, unless she did so, he would not help her. On Jan. 29 the petitioner, at the respondent's request, visited him at his office in Great George Street on the subject of the bills. In the course of that interview, Williams came in and told the petitioner that, unless the bills were paid, he would make her a bankrupt the next week. That same evening the respondent wrote to the petitioner, asking her to meet him next day at the corner of Mount Street, about the bills. She went, accompanied as far as Bond Street by Mrs. Butler, who had been engaged to nurse her mother in her illness.

The following is the petitioner's evidence of what occurred on that occasion :

"I met him at the corner of Mount Street next morning. Emma Butler was with me. I left her in a shop in Bond Street, and met respondent there. I went in a cab. Respondent stopped the cab and got in. He asked me to shake hands with him, and I would not. He had told the cabman where to go, when he got in. The cab stopped in South Audley Street at the registry-office. He took me upstairs by the arm. He grasped my arm. I was nearly mad. I had no notion I was going into a marriage office. Count Valhermay was there. I had seen him before. I did not like him. Respondent said to me he had brought me there to marry me that morning. I said I wished to go out of the room. Count Valhermay stood at the door, and said I should not leave. Respondent said, if I did anything to show that I was not acting of my own free will, he would shoot me. He had pointed a pistol at me before, in May, 1885. Some people then came into the room. They spoke to me, but I don't know what they said. I was standing with my back to respondent. The ring was put on my finger by respondent, and I threw it away. It never was over my knuckle. They asked me to take off my glove. I refused. They ordered me to, and I did. I was going out of the room. Respondent called me back, and said I was to sign my name. He said if I did not come back and behave properly, he would ruin me. I think he took hold of my arm and brought me back. I would not speak to Count Valhermay. I was afraid of respondent; he used to threaten me dreadfully. It was certainly not my wish to go through the ceremony of marriage with respondent. I would not have done so but for what he said. I signed the book. He was knocking my arm the whole time to make me sign. I went downstairs. Respondent accompanied me. At the bottom of the stairs he told me to go, he had got all he wanted out of me. I got into a cab, and went back to the nurse. I don't know what state I was in. I have only seen the respondent twice since. I have never lived with him. The marriage has never been consummated."

The superintendent registrar of marriages was next called. It appears that he did not enter the room until after they were all there, and, of course, he heard no threats uttered; but his evidence, which is not in entire accord with that of the petitioner, is strongly corroborative of her statement on some material points. With regard to the petitioner's appearance and demeanour, he says :

"She undoubtedly showed that she had some difference with the respondent. She seemed rather excited. She was tapping her foot in a temper, or as if she was annoyed. . . . She had her head half averted from the respondent all the time, like a lady who was annoyed. She took the ring off, and threw it on the ground in a violent manner."

A Mrs. Butler was afterwards called, and stated as follows :

B "On Jan. 29 the petitioner asked me to go for a walk with her. I went, and in Bond Street she told me she had to see a man about money just at the corner of the street, that she would not be absent more than five minutes. She was absent about twenty minutes or half-an-hour. She came back very excited, and crying very much. She refused to tell me what was the matter, but said : 'If you hear of my doing anything dreadful, you will know I was not in my right mind.' "

C These are the facts of the case as sworn to by the petitioner and the witnesses on her behalf, and no evidence was offered in contradiction. The respondent's counsel explained the non-appearance of the respondent in the witness-box (except for the purpose of making the one statement I have mentioned) by saying that, whatever his desire to establish the validity of the marriage and to retain this lady as his wife may at one time have been, her evidence in court and the dislike she has manifested for him, have naturally made the respondent indifferent on the subject now. No doubt there is force in these observations. On the other hand, there is much in the evidence which no man possessed of one particle of self-respect D would allow to pass uncontradicted, if he were able to contradict it. He is charged with conspiring with others to force this young lady into a marriage with himself, which he knew to be repugnant to her feelings, for the sole purpose of enabling him to raise money. He is charged, in furtherance of that scheme, with allowing her to be harassed and persecuted to the verge of despair to the serious palpable injury to her health, with inveigling her into the registry-office, and with having in E that office threatened her life if she showed the least sign of opposition to his wishes. Yet, in answer to this, he offers not one word of contradiction, of explanation, or of excuse.

F This, in the course of an ordinary contention between the two parties to a suit, would be conclusive. In the present instance I feel that it places me in some difficulty. Of the existence of collusion between the parties to this suit—collusion to obtain the annulling of their marriage by misleading the court—I have no suspicion; but I am in some doubt whether I am in possession of all the facts which should be made known to me before I am asked to decide the question of the validity of that marriage. Nevertheless, I must act on the evidence before me. On that evidence I have come to a clear conclusion. It is that, long before the ceremony G of marriage was gone through, the feelings of this young lady towards the respondent were such that, of her free and unconstrained will, she never would have married him; that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats, which, in her normal condition, she would have treated with the contempt she must have felt for the man who made use of them; and that, therefore, there never was any H such consent on her part as the law requires for the making of a contract of marriage. Such being the case, I know of no consideration consistent with justice, or with common sense, which should induce me to hold this marriage binding. I declare the ceremony performed at the registry-office null. I pronounce in favour of the prayer of the petition. I dismiss the respondent's counterclaim for the enforcement of conjugal rights, and I order him to pay the costs of the suit.

I Solicitors : *Tidy & Tidy ; T. D. Dutton.*

[*Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

REPUBLIC OF PERU v. PERUVIAN GUANO CO., LTD.

[CHANCERY DIVISION (Chitty, J.), August 2, 10, 1887]

[Reported 36 Ch.D. 489; 56 L.J.Ch. 1081; 57 L.T. 337;
36 W.R. 217; 3 T.L.R. 848]

Pleading—Striking out—Statement of claim—Court satisfied that case disclosed will not succeed—R.S.C., Ord. 25, r. 4.

By R.S.C., Ord. 25, r. 4: "The court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Under this rule a pleading should not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading which would have been fatal on a demurrer, the court sees that a substantial case is presented, the court should decline to strike out the pleading, but where the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

Circumstances in which a statement of claim struck out and an action dismissed.

Pleading—Striking out—Statement of claim—Evidence in support of application—Admissibility.

On an application to strike out a pleading under R.S.C. 25, r. 4, evidence in support of the application is not admissible. Under the second branch of the rule relating to the stay of frivolous or vexatious actions, however, the inherent jurisdiction of the court remains unaffected, and on an application to stay a frivolous or vexatious action affidavits are admissible by virtue of the general jurisdiction of the court.

Notes. Referred to: *Peru Republic v. Dreyfus* (1888), 36 W.R. 492; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K.B. 391.

As to striking out pleadings, see 30 HALSBURY'S LAWS (3rd Edn.) 36-39; and for cases see DIGEST (Pleading) 55 et seq.

Cases referred to:

(1) *Wilson v. Poulter* (1730), 2 Stra. 859; 1 Barn. K.B. 118; 93 E.R. 898; 1 Digest (Repl.) 470, 1164.

(2) *Smith v. Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, 3875.

(3) *Prince v. Clark* (1823), 1 B. & C. 186; 2 Dow. & Ry. K.B. 266; 1 L.J.O.S.K.B. 69; 107 E.R. 70; 1 Digest (Repl.) 470, 1162.

Also referred to in argument:

Metropolitan Bank v. Pooley (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, 613.

Emperor of Austria v. Day and Kossuth (1861), 3 De G.F. & J. 217; 30 L.J.Ch. 690; 4 L.T. 494; 7 Jur.N.S. 639; 9 W.R. 712; 45 E.R. 861, C.A.; 1 Digest (Repl.) 51, 379.

Prioleau v. U.S.A. and Johnson (1866), L.R. 2 Eq. 659; sub nom. *U.S.A. v. Prioleau*, *Prioleau v. U.S.A.*, 36 L.J.Ch. 36; 14 L.T. 700; 12 Jur.N.S. 724; 14 W.R. 1012; 1 Digest (Repl.) 54, 401.

The Eliza Ann (1813), 1 Dods. 244; 11 Digest (Repl.) 638, 617.

Action to have set aside an agreement for the compromise of a dispute between the parties, and for an account and injunctions.

A By a contract dated June 7, 1876, between the Republic of Peru and the defendants, the Peruvian Guano Co., Ltd., it was agreed that the Republic should consign to the company 1,900,000 English tons of guano, and that the company as consignees should, without prejudice to the existing contracts between the Republic and Messrs. Dreyfus Bros. & Co., and others, having during the continuance of the contract the exclusive right and privilege of selling in European markets

B Peruvian guano. On Nov. 4, 1879, in consequence of the alleged breaches of the contract by the company, the Republic declined further to carry out and be bound by the contract. In November, 1879, one Pierola assumed dictatorial power in Peru, and he, and subsequently a person named Iglesias, on the resignation and flight of Pierola, acted as *de facto* rulers of the Republic, and between November, 1879, and June, 1886, no *de jure* government existed in Peru, but at the latter date a *de jure*

C government was duly constituted according to the laws and usage of Peru. In May, 1883, the defendant company went into voluntary liquidation, and Rodrick Mackay, as liquidator, was authorised, in conjunction with a consultative committee, to compromise all claims by or against the company. In January, 1884, Iglesias sent to London, as special financial commissioner, Señor Don G. Bogardus, to make inquiries and claim balances due from the company under the contract. Negotiations for settlements of claims ensued, and Bogardus, being replaced by one De Izcue as financial agent, on May 29, 1885, an agreement of compromise was entered into between the Republic and the company, being executed by De Izcue on behalf of the Republic, by the terms of which agreement De Izcue, on behalf of the Republic, acknowledged the receipt of £260,000 from Mackay as liquidator of the company, and released the company from all claims on behalf of the Republic.

E He further agreed, on behalf of and in the name of the Republic, to uphold the company in litigation instituted against it by Messrs. Dreyfus and others in respect of claims to guano, and to cede to the company all the rights and interests of the Republic in respect to the subject-matters of such litigation. It was also agreed that neither the payment of the £260,000 nor anything contained in the agreement

F was to be deemed to imply the inaccuracy or insufficiency of any accounts rendered by the defendants or any right on the part of the Republic to further or better accounts or any acknowledgement of indebtedness on the part of the company to the Republic, but was to be deemed, in the first place, as the price of perpetual peace between the Republic and the company, and, in the second place, as the price of the rights and interests of the Republic in the subject-matters of the litigation

G against the company and of the engagement of the Republic to endeavour to induce the settlement of such litigations in favour of the company. In June, 1886, the *de facto* government of Iglesias came to an end, and a *de jure* government of the Republic, according to the laws and constitution of Peru, was instituted. Shortly before the constitution of such *de jure* government investigations were made by the direction of a provisional government into the circumstances under which the agree-

H ment of compromise had been entered into, and a *de jure* government for the first time ascertained the facts stated and charged in the statement of claim. Upon making such discoveries De Izcue was removed from office and Don Jose A. M. Quesada was appointed Financial Agent-General for Peru in Europe in his stead. In further consequence of the discoveries a resolution of the duly constituted government of the Republic was passed in July, 1886, declaring (i) that the government

I did not accept the payment of the £260,000, except as part payment, and on account of the moneys owing by the company to the government; and, (ii) that the government accepted the agreement of compromise only in that sense, and that in the event of an attempt to give it the meaning of a final settlement, in full payment or final liquidation, the government declared such agreement of compromise void and without any effect whatever according to the laws of Peru. On October 24, 1886, an Act of Congress of the Republic of Peru was passed declaring all the internal acts of the *de facto* governments of Pierola and Iglesias null and void.

The Republic alleged that under and by virtue of the provisions of the contract

of 1876 the company became and were agents and consignees of the Republic for the guano, and became and were in a fiduciary capacity; that upon an examination of the accounts rendered by the company to Bogardus there appeared grave errors and inaccuracies, and fraudulent overcharges to the extent of nearly £2,000,000; that the agreement of compromise was to the knowledge of the company an improper and improvident one, and was, with the like knowledge, entered into by De Izcue negligently and in breach of his duty to the Republic; that the company did not furnish De Izcue with information relative to the litigation, and the Republic's interest therein, although it was the company's duty so to do, and that De Izcue entered into the compromise upon insufficient materials and with inadequate information to the knowledge and with the connivance of the company; that the agreement of compromise required confirmation by the Republic before the same acquired any binding effect, and that the same had not been duly confirmed or ratified by any de jure government of the Republic, and that although the £260,000, or the greater part thereof, was paid to Iglesias, the de facto governor of Peru, and, although a resolution of the council of the de facto government was passed on Aug. 6, 1885, approving the compromise, yet such resolution, even if valid and binding (which, however, was denied), was passed upon insufficient materials and without any knowledge or information as to the actual mode in which the compromise was arrived at, or of other material facts. The Republic claimed to have the agreement of compromise set aside; an account of all the company's dealings and transactions under the contract of 1876; payment of the amount found due, less the £260,000; and injunctions restraining the company from distributing its assets until the claims of the Republic should be provided for. The defendants moved, under R.S.C., Ord. 25, r. 4, that the statement of claim might be struck out on the ground that it disclosed no reasonable cause of action and was embarrassing and tending to prejudice, embarrass, and delay the fair trial of the action.

Sir Horace Davey, Q.C., Rigby, Q.C., and R. B. Haldane for the defendants.

Romer, Q.C., and Bramwell Davis for the plaintiffs.

Cur. adv. vult.

Aug. 10, 1887. **CHITTY, J.**, read the following judgment.—This motion is made under the first branch of R.S.C. Ord. 25, r. 4. There is some difficulty in affixing a precise meaning to the term "reasonable cause of action;" in point of law, and consequently in the view of a court of justice, every cause of action is a reasonable cause. But obviously some meaning must be assigned to "reasonable." By r. 1 of the Order demurrers are abolished. It could not be intended to abolish demurrers by the right hand and to restore them by the left. So far as method of procedure was concerned, demurrers, certainly in the Court of Chancery and in the Chancery Division, at the time when these Orders came into operation were a cheap and expeditious mode of obtaining a decision. The mere substitution of a motion or summons for the demurrer would not be an adequate explanation of Ord. 25. Having regard to the terms of r. 4, and to the decisions on it, I think that the rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule, the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading which would have been fatal on a demurrer, the court sees that a substantial case is presented, the court should, I think, decline to strike out the pleading. But where the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation. What I have just stated is not intended to be an exhaustive explanation of the rule, but merely an indication in the general way of the limits of its meaning. It was contended for the plaintiffs that the rule applies only to plain and simple cases, and that it does not embrace cases which are sus-

A ceptible of serious argument on points of law or otherwise, and reliance was placed on the length of time which was taken up by the statement and discussion of this case at the Bar. But I decline to accede to this contention so far as it was founded on the length of time occupied. By far the greater portion of it was consumed in reading the plaintiffs' statement of claim, which is a lengthy document occupying some sixteen pages of closely printed matter. The application of the rule cannot depend on the length of the pleadings. To hold that it does would be to hold out an encouragement to lengthy pleadings and prolixity of statement.

B With these preliminary observations I proceed to consider the plaintiffs' case as disclosed by their pleading. The object of the action is to set aside the agreement of May 29, 1885, which purports to be made on behalf of the Republic of Peru, of the one part, and by the defendants, of the other part. It is an agreement for the compromise of a dispute which had arisen between the Republic and the defendants in reference to matters of account under the contract of 1876. The first, and one of the principal, grounds relied on by the plaintiffs is that the agreement of compromise was made on behalf of the *de facto* government of the Republic which was not the *de jure* government. But the court is bound to take cognisance of the recognition of a *de facto* government by the government of this country, and it was admitted by the plaintiffs' counsel at the Bar that the *de facto* government was duly recognised by the Queen. So soon as it is shown that a *de facto* government of a foreign State has been recognised by the government of this country, no further inquiry is permitted in a court of justice here. The court declines to investigate, and indeed has no proper means of investigating, the title of the actual government of a foreign State which has been thus recognised. This attempted distinction between the *de facto* and the *de jure* government which runs through the statement of claim is untenable.

E The next point relied on by the plaintiffs relates to the circumstances under which the agreement was entered into. Without reading through the allegations in the statement of claim, I will shortly state the substance of them. The defendants, it is said, were fiduciary agents, and were bound to give information with regard to the accounts. There were several points on the accounts known to the agent which were in dispute, and with reference to these points information was asked for by him, and was evidently refused on the part of the defendants. It was said that this was contrary to their duty, being agents in a fiduciary capacity; and that may be accepted. But the parties here were at arm's length and this was one of the matters in dispute, and consequently it was one of the matters covered by the compromise. There is no imputation of fraud made against the defendants in inducing the agents of the government to enter into the agreement. No collusion is alleged between these defendants and the agent. There are some other circumstances alleged which, to my mind, are wholly immaterial. For instance, it is said that the agreement is inequitable, that the agreement is improvident. Those are matters, as between such parties as these, that are altogether immaterial. Then there are other immaterial allegations to the effect that the agent was ignorant of the English language, that he did not consult professional advisers, and that he acted negligently. Possibly those would be grounds for the Republic taking some proceedings against their agent, but it would be no ground for setting aside the agreement if it was honestly and properly entered into. I All these allegations, and indeed others to the like effect, have no bearing on such a case as that which is presented by the statement of claim.

The next point is that De Izcue, who entered into the compromise on behalf of the Republic, exceeded his authority. On this point the defendants tendered an affidavit to show what his authority was, and that it had not been exceeded. But under Ord. 25, r. 4, no affidavit is admissible. That is plain from the terms of the rule itself. In regard to the second branch of the rule relating to the stay of frivolous or vexatious actions, the inherent jurisdiction of the court over those actions remains unaffected, and on an application to stay a frivolous or vexatious

action affidavits are admissible, not by virtue of the rule, but by virtue of the general jurisdiction of the court. A

The claim also alleges that the agreement of compromise required confirmation by the Republic. That may mean that confirmation was required by the terms of the instrument conferring the authority or by the general law on the subject, which the plaintiffs' counsel urged required a ratification by the government itself. I must, I think, give the pleader the benefit of the first of these propositions, and consequently it is unnecessary for me to express any opinion on the second. But the want of authority on the part of the agent, and the necessity for ratification, are immaterial circumstances if the contract was in fact ratified by the Republic. The defendants say that on the facts stated there was such a ratification. It appears that the sum of £260,000, the consideration paid by the defendants for the compromise, was paid to the agent of the government on or about the date of the agreement, namely, May 29, 1885, and that this sum, or the greater part of it, was received by the government on or before Aug. 6 of the same year. On that day a resolution was passed by the government approving the agreement; but it is alleged that this resolution was passed in ignorance of the facts. Being bound to accept this allegation as true, I cannot hold that this resolution was a ratification. C

The statement of claim proceeds to allege that the de facto government came to an end in June, 1886, and that it was succeeded by a de jure Government, and that the de jure government ascertained the true facts, and that in consequence of the discovery of the facts the government of the Republic on July 31, 1886, passed the resolution which is thus stated in the statement of claim: D

"First, that the government did not accept or admit as received the said sum of £260,000 paid as aforesaid except as part payment and on account of the moneys owing by the defendants to the government; secondly, that the government accepted the said agreement only in that sense, and that, in the event of an attempt to give to it the meaning of a final settlement in full payment or final liquidation, the government declared such agreement of compromise void, and without any effect whatsoever according to the laws of Peru." E

The effect of this resolution is plain. It is an attempt to affirm in part and disaffirm in part. A principal must act consistently; he cannot, as stated by LORD KENYON, blow hot and cold; or, to use LORD CAIRNS' expression, derived from the Scottish legal phraseology, he cannot approbate and reprobate at the same time. He must adopt entirely or repudiate entirely. It is scarcely necessary to cite any authority for these propositions. I refer to *Wilson v. Poulter* (1), where the court were all clearly of opinion that the seizing of parts of certain bonds was an affirmance of the defendants' act in laying out the money, and the plaintiff could not avow the act as to part and disavow it as to the rest. I refer also to *Smith v. Hodson* (2), where LORD KENYON gave the judgment to which I have referred, and says (4 Term Rep. at p. 217): F

"Although the assignees may either affirm or disaffirm the contract of the bankrupt, yet, if they do affirm it, they must act consistently throughout; they cannot, as has been often observed in cases of this kind, blow hot and cold. As the assignees in this case treated the transaction as a contract of sale, it must be pursued through all its consequences." I

I refer also to *Prince v. Clark* (3), where ABBOTT, C.J., said it was the duty of the principal to notify his objection to the goods within a reasonable time after he received intelligence of the purchase which had been made not in accordance with the authority he had given the agent. The resolution in the present case is ambiguous, but the act of the Republic in retaining the £260,000 is plain and unambiguous. The resolution admits the receipt of the money by the government which passed it, although this is of no importance, because the

- A previous government, which I am bound to accept as the *de jure* government, had already received it. The Republic, then, with full knowledge of the facts, deliberately insists on retaining the money paid as the consideration for the release. A merchant who instructs his agent to buy goods cannot retain the goods where the goods are bought not in accordance with the authority. He must return them, or, at all events, offer to return them, within a reasonable time.
- B If he does not, he adopts the transaction. Here the £260,000 would not have been paid had it not been for the agreement. In the expressive and emphatic language of the agreement itself, it was paid "as the price of perpetual peace between the Republic and the defendants." The Republic retained the price with knowledge of the facts, at least, from July 31, 1886, to Oct. 7 following, when the writ was issued. By their statement of claim, delivered on Feb. 7 of this year, they, having
- C the money still in their treasury, or having spent it, do not even then offer to return it or even to bring it into court; all they do is to offer to bring it into account. Quite apart from the question of ratification by reason of their having retained the price for what appears to me to be an unreasonable period of time, they could not, it is plain, obtain any judgment except upon the terms of refunding or at least paying the money into court. Even upon the argument in the case at the
- D Bar the Republic did not offer by their counsel to bring the £260,000, or any part, into court.

The result, in my opinion, is they are within the meaning of Ord. 25, r. 4. The plaintiffs do not show any reasonable cause of action, and the statement of claim ought to be struck out. Then comes the question whether the action should be dismissed. The notice of motion does not ask in terms the dismissal of the action,

E but it does ask for such other order as may be proper, and there seem to me to be two reasons why I should dismiss the action. The first is that the pleader, evidently after hearing the argument on the part of the plaintiffs at the Bar, has made the best of his case. I am satisfied he could not state it better than he has stated it. That is the first reason; and the other is that the plaintiffs still deliberately retain the price. It is one thing to offer to bring this large sum into

F account, to keep it in their treasury, or spend it for the purpose of the Republic, and it is a very different one to refund it or pay it into court. There is no offer even now made, as I am informed. I think, so far as I may draw any inference, that it is very unlikely that any such offer would be made. It is quite sufficient for me to say that there is no such offer and it is now deliberately refused. The result, therefore, I think is that no good can come of this lengthy litigation; and that,

G in accordance with the jurisdiction conferred upon me by the rule, I ought now summarily to put an end to the matter. I, therefore, strike out the claim, and dismiss the action with costs, including the costs of this motion.

Solicitors : *Barnes & Bernard; C. & S. Harrison & Co.*

[*Reported by A. C. SIM, Esq., Barrister-at-Law.*]

BADDELEY v. EARL GRANVILLE

[QUEEN'S BENCH DIVISION (Wills and Grantham, J.J.), July 12, 1887]

[Reported 19 Q.B.D. 423; 56 L.J.Q.B. 501; 57 L.T. 268;
51 J.P. 822; 36 W.R. 63; 3 T.L.R. 759]

Statutory Duty—Breach—Defence—Volenti non fit injuria—Master and servant.

Where a master is in breach of a statutory obligation and a servant who is injured by reason of this breach brings an action against him for damages, the master is not entitled to rely on the defence of *volenti non fit injuria*.

Dicta of BOWEN and FRY, L.J.J., in *Thomas v. Quartermaine* (1) (1887), 18 Q.B.D. 685, applied.

Notes. The Coal Mines Regulation Act, 1872, and the Employers' Liability Act, 1880, have both been repealed.

Applied: *Davies v. Owen*, [1919] 2 K.B. 39; *Wheeler v. New Merton Board Mills, Ltd.*, [1933] All E.R. Rep. 28. Referred to: *Youngman v. Pirelli General Cable Works, Ltd.*, [1940] 1 K.B. 1; *Bowmaker, Ltd. v. Tabor*, [1941] 2 All E.R. 72.

As to *volenti non fit injuria* in general, see 28 HALSBURY'S LAWS (3rd Edn.) 82 et seq.; and for cases see 36 DIGEST (Repl.) 150 et seq.

Cases referred to:

(1) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, 11.

(2) *Blamires v. Lancashire and Yorkshire Rail. Co.* (1873), L.R. 8 Exch. 283; 42 L.J.Ex. 182, Ex. Ch.; 8 Digest (Repl.) 81, 542.

Also referred to in argument:

Weir (or Wilson) v. Merry and Cunningham (1868), 6 M. (Ct. of Sess.) 84; L.R., 1 Sc. App. 326; 40 Sc. Jur. 486; 5 Sc. L.R. 568; 34 Digest 207, 1697 *xiv*.

Clarke v. Holmes (1862), 7 H. & N. 937; 31 L.J.Ex. 356; 9 L.T. 178; 8 Jur.N.S. 992; 158 E.R. 751; sub nom. *Holmes v. Clark*, 10 W.R. 405, Ex. Ch.; 36 Digest (Repl.) 157, 831.

Appeal by the defendant from an order made by the learned county court judge sitting in the county court of Staffordshire awarding £120 to the plaintiff in an action brought by the widow of a collier under the Employers' Liability Act, 1880, s. 1 (2) [repealed], against the owner of the colliery for compensation for the death of her husband which, she alleged, was due to the negligence or breach of statutory duty of the defendant or his servants.

At the colliery there were special rules made in accordance with the provisions of s. 52 of the Coal Mines Regulation Act, 1872 [repealed], and by r. 27 of these rules it was provided, *inter alia*, that "banksmen shall not leave the pit's mouth while men are going up or down." The deceased met with the accident which caused his death at about midnight, at which time there was no banksman at the pit's mouth, in accordance with r. 27, but only a boy, and it was by his carelessness that the accident happened. It appeared that, according to the usual practice of the mine, as the deceased knew, the banksman was never present during the night. The learned county court judge having, under these circumstances, given judgment for the plaintiff, the defendant appealed.

Aspland, Q.C. (*G. E. Tyrrell* with him) for the defendant.

C. A. Russell for the plaintiff.

WILLS, J.—In this case, which is one of considerable importance, it appears to me that, both on authority and on principle, the objections raised on behalf of the defendant must fail.

A It has been first of all contended that there has been no breach of any statutory duty on the part of the owner of the mine. The enactment under which the special rules regulating this mine are made is s. 52 of the Coal Mines Regulation Act, 1872 [repealed]. That section enacts that

B "there shall be established in every mine to which this Act applies, such rules . . . as . . . may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, . . . shall be observed in and about every such mine, in the same manner as if they were enacted in this Act."

C The section then goes on to state the penalty of failure to comply with these special rules. Therefore, whatever special rules there are have the force of a statute, and impose duties equivalent in measure of obligation to statutory duties. Under that section the special rules applicable to this mine were framed and founded. We must, therefore, first of all see whether there has been a breach of any of these special rules, and whether any of them have been violated.

D Rule 27 of the special rules applicable to the mine in question says (*inter alia*), that a banksman must be present whenever anyone goes up or down the mine. This is a pit at which there habitually is a banksman. It is true that he appears to leave the pit's mouth while a certain portion of the work is being done, but it seems to me that, whenever he is absent while the cage is being raised or lowered, on each such occasion there is a violation of the special rule. It is obvious that it can make no difference whether the particular journey performed by the cage is in the night or by day, or whether it is at the beginning or at the end of the day. The duties of the banksman are the same in the one case as in the other, the intention being to provide for the safety of the workmen. There was, therefore, in this case a breach of r. 27, which constituted negligence on the part of the person having superintendence, and therefore there has been a breach of a statutory duty. This case is, therefore, brought within the Employers' Liability Act, 1880, s. 1 (2) [repealed], establishing the liability of the defendant unless there is some other ground to absolve him. It cannot be maintained that the boy's carelessness was the primary cause of the death of the deceased, and that it was not caused by the absence of the banksman. I think that, if the banksman had been at his post, and if the mine had been properly managed by the observance of r. 27, the result of the boy's negligence would not have happened.

The more important question, however, and the more difficult one, is upon the question as to the application of the recent decision of the Court of Appeal in *Thomas v. Quartermaine* (1). That case has established the doctrine that, where an action lies *prima facie* under the Employers' Liability Act, 1880 [repealed], an answer is supplied if the servant has voluntarily undertaken the risks which proved fatal. It is a case which in all probability will give rise to much discussion, from the frequency with which similar questions arise in these courts, and, therefore, I shall not attempt to lay down any general rule, as it is desirable to confine oneself to the particular facts of the case under discussion. I do not propose to discuss the general meaning or limitations of the maxim *volenti non fit injuria*, the application of which is to be watched with great care in each individual case. But, assuming its general applicability in the widest sense, it is sufficient for the purposes of the present case that both the lords justices who in *Thomas v. Quartermaine* (1) formed the majority of the court thought that the maxim did not apply at all when the injury complained of arises from a direct breach of a statutory obligation. I agree with counsel for the plaintiff that the remarks of BOWEN, L.J., were not made in a casual manner. It is true that LORD ESHER, M.R., expressed a

different opinion, and that all the observations made were not necessary for the decision of the particular case, and, therefore, are not a binding authority on us. But we have the deliberately expressed opinions of BOWEN and FRY, L.JJ., in a case in which, as it is well known, the judgment was long in suspense. Therefore, I have there an expression of opinion which I should follow. A

But I think, further, that there is a great deal to be said on public grounds in favour of that view. In the first place an obligation imposed by statute ought to be capable of enforcement with respect to all future dealings affected by it. As far as the future is concerned, statutory obligations should be incapable of being got rid of. In respect of past breaches persons may come to what agreement they please. But there ought not to be any encouragement to a deliberate engagement between A. and B. that B. shall take no action for the breach of a law for the protection of A. I do not know whether that would be an illegal agreement, as being against public policy. But it seems to me that it would be contrary to public policy where the supposed agreement, in consequence of which the principle *volenti non fit injuria* arises and has to be applied, comes to anything like this, that the master agrees to employ the servant on the terms that the servant will waive breaches by the master of a statutory obligation, and will in that sense and to that extent connive at and encourage the breach of a statute, the obligations of which are imposed for the benefit of others as well as of the parties to the agreement. I am inclined to think that such an agreement would be in violation of public policy, and one which ought not to be countenanced. There is certainly much that could be said in favour of the proposition, that where an accident arises from the breach of a statutory obligation the maxim *volenti non fit injuria* ought not to apply. B

In the present case I follow that proposition, and hold that, there being a breach of a statutory obligation, the maxim *volenti non fit injuria* does not apply, and, therefore, this case is taken out of the rule laid down in *Thomas v. Quartermaine* (1). Therefore, this appeal must be dismissed with costs. C

GRANTHAM, J.—I am of the same opinion. It seems to me that the defendant is precluded by the peculiar character of the decision in *Thomas v. Quartermaine* (1) from arguing that, in consequence of the deceased being aware of the danger of going up and down the pit when he knew that the banksman was away, the plaintiff cannot recover. The learned lords justices who decided *Thomas v. Quartermaine* (1) expressly say that their decision in that case is not to apply where, as here, there is a statutory liability. If that is so, I agree with LORD ESHER, M.R., that in such a case as this the defendant would be liable. *Blamires v. Lancashire and Yorkshire Rail. Co.* (2) seems to me to be an important authority, and much in point. Here there has been a distinct breach of a statutory obligation, and I think that the plaintiff is entitled to the judgment she has obtained. D

Appeal dismissed. E

Solicitors : *Wedlake, Letts & Wedlake; H. Tyrrell.*

[Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.] F

A

PAPE v. PAPE

[QUEEN'S BENCH DIVISION (Stephen and A. L. Smith JJ.), November 15, 1887]

[Reported 20 Q.B.D. 76; 57 L.J.M.C. 3; 58 L.T. 399;
52 J.P. 181; 36 W.R. 125; 4 T.L.R. 76]

B

Husband and Wife—Summary proceedings—Desertion—Parties living apart under separation agreement—Failure of husband to pay allowance under agreement.

C

A husband and wife entered into a separation agreement, by the terms of which they agreed to live separately, the husband undertaking to allow his wife a weekly allowance for her support as long as she lived chastely and did not molest him. After making weekly payments for a period, the husband refused to make further payments on the grounds that his wife had committed adultery and had molested him contrary to the terms of the agreement. The wife took out a summons alleging desertion by the husband. At the hearing of the complaint, the justices found that the allegation of adultery had not been proved, but that the husband had deserted the wife by reason of his refusal to make his wife the weekly allowance under the agreement, and they made a maintenance order against him.

D

Held: as the husband and wife were not living together when the alleged desertion took place, the husband's refusal to pay to his wife the weekly allowance under the separation agreement did not constitute desertion, and the order would be quashed.

E

Notes. The Married Women (Maintenance in case of Desertion) Act, 1886, has been repealed. See now ss. 1 and 2 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 395, 399).

F

Distinguished, *R. v. Birwistle, etc. Justices* (1889), 58 L.J.M.C. 158. Approved: *R. v. Leresche*, [1891-4] All E.R. Rep. 181. Distinguished: *Chudley v. Chudley* (1893), 62 L.J.M.C. 97. Considered: *Pardy v. Pardy*, [1939] 3 All E.R. 779. Referred to: *Wilkinson v. Wilkinson* (1894), 58 J.P. 415.

As to deeds of separation in general, see 19 HALSBURY'S LAWS (3rd Edn.) 877 et seq.; and for cases see 27 DIGEST (Repl.) 353 et seq.

G

Cases referred to in argument:

Thompson v. Thompson (1858), 1 Sw. & Tr. 231; 27 L.J.P. & M. 65; 31 L.T.O.S. 302; 4 Jur.N.S. 717; 6 W.R. 867; 164 E.R. 706; 27 Digest (Repl.) 341, 2830.

R. v. Cookham Union (1882), 9 Q.B.D. 522; 47 J.P. 116; 37 Digest 320, 1184.

Fitzgerald v. Fitzgerald (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 375; 17 W.R. 264; 27 Digest (Repl.) 334, 2784.

H

Case Stated by justices.

On April 20, 1887, justices for the borough of Middlesborough on the hearing of a complaint by Mary Pape against her husband William Pape under the Married Women (Maintenance in case of Desertion) Act, 1886 [repealed], ordered the husband to pay a weekly sum of seven shillings towards the maintenance of his wife. At the hearing of the complaint it was proved that the parties had entered into a separation agreement, the material parts of which were as follows:

I

"Whereas unhappy differences have arisen and still exist between the said parties hereto, and in consequence thereof it has been agreed between them that they shall live separate and apart from each other upon the conditions and in manner herein contained. Now it is hereby agreed between the said parties that the said Mary Pape shall and may henceforth live separate and apart from the said William Pape as if she were a feme sole, and shall

henceforth be freed from the authority and control of the said William Pape . . . and neither of the said parties will at any time hereafter molest or annoy the other of them or require or attempt to compel each other to live together or cohabit, or take proceedings for the restitution of conjugal rights . . . and that the said William Pape shall and will pay or cause to be paid to the said Mary Pape the sum of six shillings weekly for her maintenance and support, lodging and clothing, so long as she shall live chastely and shall not molest or annoy the said William Pape."

It was proved that since June, 1886, the parties had not lived together, and that the husband had paid the weekly sum mentioned in the agreement up to about Mar. 15, 1887, when the payments were discontinued through the wife (as the husband alleged) having molested or annoyed him. This she admitted, alleging that she so acted because he had broken the agreement by refusing and neglecting to pay her the agreed amount. The husband alleged adultery against the wife, and for these reasons refused to support her. Witnesses were called by the husband to prove the adultery of the wife, which she denied, and the justices were of opinion and found, as a fact, that the adultery was not proved.

It was contended on behalf of the husband that, the parties having separated by mutual arrangement under the agreement, there could not be any desertion by the appellant and, therefore, the court had no jurisdiction to make an order upon him under the statute. The justices were of opinion that the agreement had been put to an end by the appellant refusing to continue to make the agreed weekly payments, and that such refusal by the appellant to perform the agreement was a desertion of the respondent by the appellant within the meaning of the statute, and gave their determination against the appellant.

The questions for the opinion of the court were (i) whether the husband had deserted the wife within the meaning of the statute by ceasing to make the payments required by the agreement of separation, and so leaving his wife wholly unprovided for; (ii) whether, the husband and wife having parted by mutual consent, there had been any desertion by the husband within the meaning of the said Act under the above circumstances.

By s. 1 of the Married Women (Maintenance in case of Desertion) Act, 1886 [repealed] :

"It shall be lawful for any married woman who shall have been deserted by her husband to summon her husband before any two justices in petty sessions or any stipendiary magistrate, and thereupon such justices or magistrate, if satisfied that the husband, being able wholly or in part to maintain his wife, or his wife and family, has wilfully refused or neglected so to do, and has deserted his wife, may order: (1.) That the husband shall pay to his wife such weekly sum not exceeding two pounds as the justices or magistrate may consider to be in accordance with his means and with any means the wife may have for her support and the support of her family, and the payment of any sum so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation. (2.) Provided always, that no order for payment of any such sum shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum may be discharged by the justices or magistrate . . . upon proof that the wife has since the making thereof been guilty of adultery."

McClymont for the husband.

No counsel appeared for the wife.

A **STEPHEN, J.**—I am of opinion that the argument of counsel for the husband is well founded; and I think it sufficient here to say that “desertion” has not taken place in the case before us. The interpretation of what is legal “desertion” has always required that the parties must be living together at the time when the desertion takes place, and not after they have come to any voluntary agreement to live apart. Here the husband and wife had agreed to live apart, and during their separation the husband, for reasons good or bad, ceased to pay the money in consideration for which they had so separated, but that is not desertion. The real complaint of the wife is that her husband has ceased to pay her the weekly allowance in consideration for which she agreed to live apart from him. The Married Women (Maintenance in case of Desertion) Act, 1886 [repealed], is one to facilitate the rights of those women who have been deserted by their husbands. Those rights existed before the Act and exist now. Here the husband may or may not take the wife back, or she may or may not obtain parish relief, through which process an order for contribution to her maintenance could be obtained. But at present there has been no such legal desertion as to enable the justices to deal with the case; and the order must therefore be quashed.

D **A. L. SMITH, J.**—I concur.

Order quashed.

Solicitors : *Belfrage & Co.*, for *Bainbridge & Barnley*, Middlesbrough.

[*Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.*]

F **R v. LONDON SCHOOL BOARD**

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), May 14, 17, 1886]

[Reported 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384;

G 50 J.P. 419; 2 T.L.R. 633; Ryde, Rat. App. (1886-90)
225; 34 W.R. 583]

Rates—Rateable occupation—School premises—Occupation by London School Board—Hypothetical yearly tenant—Valuation (Metropolis) Act, 1869 (32 & 33 Vict., c. 67), s. 4.

H In calculating the rateable value of schools occupied by a School Board, the School Board itself ought to be considered as a possible hypothetical yearly tenant of the premises, and the rateable value calculated by the rent which the board would be willing to pay for the premises for use as schools.

Notes. The definition of “gross value” in s. 4 of the Valuation (Metropolis) Act, 1869, has been repealed by the Rating and Valuation Act, 1957.

I Considered : *North and South Western Junction Rail. Co. v. Brentford Union Assessment Committee and Acton Overseers* (1887), 56 L.J.M.C. 101. Distinguished : *Owens College v. Chorlton-upon-Medlock Overseers* (1887), 18 Q.B.D. 403. Applied : *Burton-upon-Trent Union Assessment Committee* (1889), 24 Q.B.D. 197. Followed : *Middlesex County Lunatic Asylum v. Wandsworth and Clapham Union* (1891), Ryde, Rat. App. (1891-93) 115. Considered : *Royal Masonic Institution for Girls Trustees v. Wandsworth and Clapham Union* (1891), Ryde, Rat. App. (1891-93) 8. Approved : *L.C.C. v. Erith Churchwardens, West Ham Churchwardens v. L.C.C., St. George's Assessment Committee v. L.C.C.*, [1891-4] All

E.R. Rep. 577. Considered: *L.C.C. v. Lambeth Churchwardens*, [1896] 2 Q.B. 25. Referred to: *Re Christchurch Inclosure Act*, *Meyrick v. A.-G.* (1894), 71 L.T. 122; *Liverpool Corpn. v. Llanfyllin Assessment Committee*, [1899] 2 Q.B. 14; *Great Northern Rail. Co. v. Hitchin Union* (1906), 1 Konst. Rat. App. 116; *Davies v. Seisden Union*, [1908] A.C. 315; *Great Central Rail Co. v. Banbury Union*, *Sheffield Union v. Great Central Rail. Co.*, [1909] A.C. 78; *West Kent Main Sewerage Board v. Dartford Union*, *Darent Valley Main Drainage Board v. Dartford Union* (1911), Konst. & W. Rat. App. 168; *Liverpool Corpn. v. Chorley Assessment Committee*, [1912] 1 K.B. 270; *Port of London Authority v. Orsett Union*, [1920] All E.R. Rep. 545; *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] All E.R. Rep. 191; *Kingston Union Assessment Committee v. Metropolitan Water Board*, [1926] All E.R. Rep. 1; *St. James' and Pall Mall Electric Light Co. v. City of Westminster Assessment Committee* (1932), 147 L.T. 396; *Railway Assessment Authority v. Southern Rail. Co.*, *L.C.C. v. Southern Rail Co.*, [1936] 1 All E.R. 26; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee* [1936] 1 K.B. 585; *Mitcham Golf Course Trustees v. Ercaut*, [1937] 3 All E.R. 450; *Robinson Bros. (Brewers), Ltd., v. Houghton and Chester-Le-Street Assessment Committee*, [1937] 2 All E.R. 298; *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn. and Guisborough Assessment Committee*, [1942] 2 All E.R. 589.

As to capital value for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 83; and for cases see 38 DIGEST (Repl.) 624 et seq. For the Valuation (Metropolis) Act, 1869, see 20 HALSBURY'S STATUTES (2nd Edn.) 62.

Cases referred to in argument:

R. v. West Middlesex Waterworks (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; sub nom. *West Middlesex Waterworks Co. of Proprietors v. Hampton Overseers*, 5 Jur.N.S. 1159; 38 Digest (Repl.) 653, 1092.

Metropolitan Board of Works v. West Ham Overseers (1870), L.R. 6 Q.B. 193; 40 L.J.M.C. 30; 23 L.T. 490; 35 J.P. 230; 19 W.R. 246; 38 Digest (Repl.) 492, 117.

West Bromwich School Board v. West Bromwich Overseers (1884), 13 Q.B.D. 929; sub nom. *R. v. West Bromwich School Board*, 53 L.J.M.C. 153; 52 L.T. 164; 48 J.P. 808; 32 W.R. 866, C.A.; 38 Digest (Repl.) 551, 428.

Mersey Docks and Harbour Board v. Llaneilian Overseers (1884), 14 Q.B.D. 770; 51 L.T. 63; 48 J.P. 391; 5 Asp. M.L.C. 248, D.C.; on appeal, 14 Q.B.D. p. 783, C.A., 38 Digest (Repl.) 567, 539.

R. v. South Staffordshire Waterworks Co. (1885), 16 Q.B.D. 359; 55 L.J.M.C. 88; 54 L.T. 782; 50 J.P. 20; 34 W.R. 242; 2 T.L.R. 193, C.A.; 38 Digest (Repl.) 656, 1104.

Dewsbury Waterworks Board v. Penistone Union Assessment Committee (1886), 17 Q.B.D. 384; 55 L.J.M.C. 121; 54 L.T. 592; 50 J.P. 644; 34 W.R. 622, C.A.; 38 Digest (Repl.) 651, 1083.

Appeal by the London School Board from a decision of CAVE and WILLS, JJ., in favour of the respondents, the Assessment Committee of the parish of Saint Leonard's Shoreditch, on a Special Case stated by justices assembled in general assessment sessions.

The question on which the decision of the Court of Appeal turned was whether, in calculating the rateable value of the schools occupied by the School Board, the School Board itself ought to be treated as a possible hypothetical yearly tenant of the premises, and the rateable value calculated by the rent which the board would be willing to pay for the premises for use as schools.

Charles, Q.C., and *Marriott, Q.C.* (Ram with them) for the appellants.
Jelf, Q.C., and *Castle* for the respondents.

LORD ESHER, M.R.—The real question to be decided here is, whether in calculating the rateable value of the schools in question, the School Board itself ought to be taken into account as one of the possible hypothetical yearly tenants. The contention being that the School Board is not rateable was not seriously pressed. The building is not placed in such a position by statute that it could not profitably be occupied or owned by anyone; it is not what has been called struck with sterility; it is, therefore, rateable, and the School Board are liable to be rated in respect of it.

The real question for decision is how the value is to be ascertained. The inquiry is not as to what rent is paid by the actual occupier. The mode of ascertaining the value is laid down in the statute. It is to ascertain the rent which a tenant (not the tenant), taking one year with another, might reasonably be expected to pay, and where the owner occupies he is to be considered as if he were a tenant. The directions given by the Act are equivalent to saying that all possible tenants must be taken into account, and the phraseology does not exclude an owner who himself occupies the premises. Therefore, an owner who is in occupation of a premises is not excluded from consideration as a possible tenant. If by the terms of any statute the School Board could not legally be tenant, it would be excluded from the calculation.

It is contended that the School Board ought to be excluded because it can never obtain any beneficial interest from its tenancy; but it can be a tenant, for it has a duty to perform which may induce or force it to be a tenant. It follows, therefore, that it would be wrong to exclude the School Board from the list of possible hypothetical tenants, whether it is in the position of owner or that of occupier. That is the real question of principle in this case, and it is the question which was intended to be argued. The calculation is founded on this, that the court took the School Board as a possible tenant, and calculated the rent which could be expected from any tenant, including the School Board. That, in my opinion, is the correct view, and if this is so it follows that the judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am satisfied that the real, and indeed the only, question for our decision is whether the School Board is to be excluded from the list of possible hypothetical yearly tenants. In order to decide this it is necessary to refer to the Act of Parliament, and when the Act is looked at it seems to me that there is no difficulty. By the Parochial Assessments Act, 1836 [repealed], s. 1, the rate is to be made upon an estimate of the net annual value of the hereditaments, "that is to say, of the rent at which the same might reasonably be expected to let from year to year," and the Valuation (Metropolis) Act, 1869, s. 4, contains a similar provision. The meaning must be that the rate is to be made upon an estimate of the rent at which the premises might reasonably be expected to be let to someone who wanted to hire them. The question is whether, in making this calculation, the School Board itself is to be excluded from the list of possible occupiers. To an inquiry whether it might reasonably be expected that the premises would be let to the School Board, the answer must be in the affirmative, and, therefore, it seems impossible to exclude the School Board from the list of hypothetical tenants. Therefore, the language of the Act answers the question. The case cannot fairly be decided on the hypothesis that the one person that requires the premises most would not take them. It does not matter whether the School Board wants the premises for the purposes of profit, or will make any profit out of them, for the question is only whether the School Board wants and would take them. I am perfectly satisfied that the principle on which the value has been estimated is sound, and I, therefore, agree that the judgment of the Divisional Court ought to be affirmed.

FRY, L.J.—I am of the same opinion. It seems to me that the difficulty arises from referring, not to the Act itself, but to certain expressions which occur in the decisions. The Valuation Metropolis Act, 1869, in s. 4, defines "gross value" as meaning

"the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, . . . "[repealed].

These words refer to the annual rent which any person might reasonably be expected to pay to any landlord, and the actual owner and occupier are not excluded. The question has been asked, why the actual occupier is not to be treated as a possible tenant, and no answer has been given except that the School Board is not to be considered as a possible tenant, because, though it occupies the premises, it can make no profit out of them. It seems to me that a man who occupies a house for his own comfort might as well be excluded. The term "sterility" has been introduced into the cases, because, as a general rule, a profit is produced; but it does not, by any means, follow that because there is no profit there is no value. It would be impossible to find a better illustration of this than the present case. The only question is whether the person who is to be considered as a tenant could reasonably be expected to take the premises from any motive. It seems to me that the very words of the section answer the question, and that the argument for the appellants is founded upon a misapprehension of what has been said in the cases. I am of opinion that the right mode of calculating the value has been adopted, and that the judgment of the Divisional Court ought to be affirmed.

Appeal dismissed.

Solicitors: *Gedge, Kirby & Millett; Mills, Lockyer & Mills.*

[*Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.*]

BLAKEY v. LATHAM

[CHANCERY DIVISION (Kay, J.), May 10, 1889]

[Reported 41 Ch.D. 518; 60 L.T. 624; 37 W.R. 569]

Solicitor—Lien—Priority—Set-off of costs ordered in judgment between some parties in two actions.

The plaintiffs brought two separate actions against the defendants, the first in respect of a trade mark and the second in respect of an infringement of a patent. In the first action judgment was given for the plaintiffs with costs, but in the second action judgment was given for the defendants with costs. On the plaintiffs' motion in the second action an order was made restraining the defendants and each of them, their solicitor, and the former solicitor of one of the defendants, from issuing any execution or taking other proceedings to enforce payment of costs payable by the plaintiffs to them in the second action without setting off the amount of the costs payable by them to the plaintiffs in the first action in respect of the trial and appeal in that action. The plaintiffs appealed in the second action, but the appeal was dismissed with costs. The plaintiffs having brought a further motion in the second action to enforce a set-off of the costs incurred in the first action against those in the Court of

A Appeal, the defendants' solicitor contended that he had a lien on those costs which intercepted the right of set-off.

Held: the right of set-off was not intercepted as to all costs in the second action, but as to costs in the first action the right of set-off was not to prevail so as to interfere with any lien which the defendant's solicitor in the first action might be able to prove.

B **Notes.** Applied: *Hassell v. Stanley*, [1896] 1 Ch. 607. Considered: *Goodfellow v. Gray*, [1899] 2 Q.B. 498. Applied: *Bake v. French* (1907), 76 L.J.Ch. 299. Considered: *Reid v. Cupper*, [1915] 2 K.B. 147. Not Followed: *Puddephatt v. Leith* (No. 2), [1916-17] All E.R. Rep. 624. Referred to: *Re Bassett, Ex parte Lewis*, [1895-9] All E.R. Rep. 1052; *David v. Rees*, [1904] 2 K.B. 435.

C As to solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 42 DIGEST 259 et seq.

Cases referred to in argument:

(1) *Mercer v. Graves* (1872), L.R. 7 Q.B. 499; 41 L.J.Q.B. 212; 26 L.T. 551; 20 W.R. 605; 42 Digest 286, 3213.

(2) *Re Harrald, Wilde v. Walford* (1884), 53 L.J.Ch. 505; 51 L.T. 441, C.A.; 42 Digest 287, 3228.

(3) *Edwards v. Hope* (1885), 14 Q.B.D. 922; 54 L.J.Q.B. 379; 53 L.T. 69; 33 W.R. 672, C.A.; 42 Digest 284, 3192.

Also referred to in argument:

Collett v. Preston (1852), 15 Beav. 458; 51 E.R. 615; 42 Digest 285, 3208.

Throckmorton v. Crowley (1866), L.R. 3 Eq. 196; 40 Digest (Repl.) 435, 273.

E *Re Adams, Ex parte Griffin* (1879), 12 Ch.D. 480; 48 L.J. Bey. 107; 41 L.T. 515; 28 W.R. 208, C.A.; 4 Digest (Repl.) 192, 1748.

Bryon v. Metropolitan Saloon Omnibus Co. (1859), 4 Drew. 546; 28 L.J.Ch. 798; 33 L.T.O.S. 142; 7 W.R. 423; 62 E.R. 209; 21 Digest (Repl.) 508, 58.

Lee v. Pain (1844), 4 Hare, 201; 8 Jur. 705; 67 E.R. 619; 24 Digest (Repl.) 826, 8172.

F **Motion** by the plaintiffs to restrain the defendants and their solicitor from enforcing the payment of costs ordered against the plaintiffs and in favour of the defendants in respect of an action and appeal which was the second of two actions between the parties, without setting-off the cost due to them in an earlier action by the plaintiffs against the defendants.

G In February, 1888, in an action brought by the plaintiffs against the defendants in respect of a trade mark, judgment was given by CHITTY, J., in favour of the plaintiffs with costs. Subsequently, in April, 1888, in a second action brought by the plaintiffs against the defendants in respect of a patent, judgment was given by KAY, J., in favour of the defendants with costs. A subsequent motion by the plaintiffs to vary minutes of the order was also dismissed with costs. On Nov. 10, 1888, KAY, J., upon the plaintiffs' motion in the patent action, made an order restraining the defendants and each of them and their solicitor and the former solicitor of one of the defendants from issuing any execution or taking other proceedings to enforce payment of costs, payable under the order of April, 1888, without setting off the amount of the cost payable by them to the plaintiffs under the orders of CHITTY, J., and the Appeal Court in the trade mark action. The plaintiffs appealed in the patent action, but the appeal was dismissed with costs, which were taxed at £271 14s. 8d. On April 13, 1889, the defendants' solicitor issued execution for the amount of those costs, and on April 16, 1889, the plaintiffs paid the money to the sheriff, and at the same time gave him notice not to part with it. The defendants issued a writ against the sheriff, and the plaintiffs gave notice of the present motion. It was argued that the right to such set-off was intercepted by the lien of the defendants' solicitors for costs. It was admitted that the court could order a set-off of the costs in the same action, but the defendants urged that they

could not be ordered to set off the costs in one action against those in the other, if by so doing the lien for costs of the defendants' solicitor would be prejudiced. A

Sidney Woolf for the plaintiffs.

Fillan and Russell Biggs, Waddy, Q.C., and *C. E. Jenkins* for the defendants.

George Henderson for the Sheriff of Yorkshire. B

KAY, J.—The rule is now settled by one of the general orders R.S.C. Ord. 65, r. 14, that

"a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." C

That gives the court a complete discretion; but the doubt seems to have been whether that applied to costs in different actions. I do not know why it should not apply to costs in different actions. The set-off for damages must apply to different actions, because the damages cannot be given to the plaintiff and the defendant in the same action, and therefore that *prima facie* means different actions, and why in the case of costs it should not mean in different actions I do not know. D

If this case were absolutely free from authority, I confess it seems to me difficult to see why the solicitor's lien should intercept the right. Take the simplest case you can imagine. A. brings an action against B. and it is dismissed with costs. B. brings another action against A., and that is dismissed with costs. The order is B. to pay A. his costs in one action, A. to pay B. his costs in the other action. Well, when those costs are taxed and the master's allocatur is issued there is a judgment in each for a definite amount, and there is no doubt whatever that those judgments could be set off one against the other. That being so, just suppose the case (which is the only case in which the matter becomes the least material), that one of those parties (A.) was insolvent and unable to pay anything, then why B. should pay costs to A. for the sake of A.'s solicitor is what I cannot understand. I cannot see how there can be any equity for that. There is no connection whatever between A.'s solicitor and B. A.'s solicitor, by his diligence, has obtained this order for costs as against B. Very well, but suppose it is so, I turn to the language of COCKBURN, C.J., in his judgment in *Mercer v. Graves* (1) (L.R. 7 Q.B. at pp. 503, 504). E F G

"The attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf as trustee for him. In truth, Mr. Brown pointed out, there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in CHITTY'S ARCHIBOLD'S PRACTICE (12th Edn.), pp. 139, 140, that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him off his costs. But this is always on notice to the debtor. The judgment creditor may arrange with his debtor; and the obligation is not between the debtor and the attorney, but between the judgment creditor and the attorney whose client he is; but this does not make an action, brought to recover the amount of the judgment, an action brought on behalf of the attorney. It is an action brought by the client, by which he seeks to obtain funds with which he may satisfy his attorney; but he cannot, on that account, prevent the defendant meeting his claim with a legal set-off." H I

A That is reasonable enough, and that is an equity against his own client; but how can he have an equity against B. to make B. pay the costs which B. is ordered to pay A. when B. cannot recover from A. the costs which A. is ordered to pay B.? How can A.'s solicitor have an equity to make B. pay instead of setting them off? I confess at present—I dare say it is my own ignorance—that if this matter were free from authority, I should say that
B that is the most extraordinary equity I have ever heard of. However, I confess that the cases have made it very difficult to act upon that view, which seems to me the prima facie view of the justice of the case. There is the decision in *Re Harrald, Wilde v. Walford* (2), which was before R.S.C. Ord. 65, r. 14, came into operation, and, therefore, is not absolutely binding upon me. There, there was distinctly, according to the statement of the facts, an order to pay
C certain costs to one Walford, and then in another action Walford was ordered to pay other costs to the persons who were directed to pay him. Then the question was whether those costs could be set-off, and the objection was that the solicitor had a lien, and that his lien intercepted the right of set-off, and it was so decided by the Court of Appeal. In the Court of Appeal it was decided, without calling upon the other side, that the set-off was intercepted
D by the lien of the solicitor. That seems to me to be the only ground upon which that point was decided in the court below, and the counsel for the respondent was only called upon as to the right of set-off against B.; he was not called upon as to the other set-off. So that, before this rule, which gives the court discretion, there was a right acknowledged in the Court of Chancery that the solicitor who has a lien upon the costs recovered against the
E other side could by that lien intercept the costs ordered to be paid to the other party.

Has that been followed or not since these new rules came into operation? *Edwards v. Hope* (3) is directly in point. There the court held that if the new rules did apply to the costs of a different action the old equitable doctrine still prevailed that the lien of the solicitor intercepted the right. I am bound to follow
F that decision, and I must do so. It would be idle for an individual judge to set up his own opinion against a course of decisions which seems to have settled the matter. Therefore, the order in this case will be that there is the right of set-off which is not intercepted as to all costs in this action; but as to costs in the other action—which is in the court of CHITTY, J.—the right of set-off is not to prevail so as to interfere with any lien which the defendants' solicitor
G in that action may be able to prove, any right of lien I ought to say in this case. The costs in respect of which the set-off is claimed are the costs which have been ordered to be paid by the Court of Appeal in dismissing the appeal in this action. There was a suggestion made that this court has no jurisdiction in respect of set-off as to those costs; but that I do not follow. They are
H costs in the action although they are not costs directed to be paid by the High Court, but by the Court of Appeal. I think the order I have pronounced will be the proper order. Then it was said that the right of set-off was affected by the fact that there had been an actual execution put into the hands of the sheriff, and that the costs of the appeal had been paid to the sheriff so as to prevent that execution being carried out. But that is putting the matter upon
I a very low and technical basis indeed—that this court has no right to direct a set-off to take place until the costs reach the hands of the other side; or, if it thinks fit to prevent the set-off by allowing the right of the lien of the solicitor to intervene. Therefore, I do not think that point ought to affect the order I have to make.

The sheriff must take his costs, after they have been properly taxed, out of the fund. Then, subject to that, the costs will extend to the solicitor's lien in this action. With regard to that there will be no set-off except, of course, the costs in this action. Then each party must pay the costs of that part of the

case upon which he has failed, and those costs must again be set-off. Then the taxing master will have the means of solving a very interesting problem. The money must be paid into a joint account in the names of the two solicitors. A

Solicitors: *E. Salaman; A. V. Green; Bell, Brodrick & Gray, for Walker & Tweedale, Leeds.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.] B

R. v. LATIMER C

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Lord Esher, M.R., Bowen, L.J., Field and Manisty, JJ.), May 15, 1886]

[Reported 17 Q.B.D. 359, 55 L.J.M.C. 135; 54 L.T. 768; 51 J.P. 184; 2 T.L.R. 626; 16 Cox C.C. 70] D

Criminal Law—Unlawful wounding—General malicious intent—Intention to wound one person, but accidentally wounding another—Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 20.

The principle that, if a person has a malicious intent towards one person and in carrying into effect that malicious intent he injures another person, he is guilty of what the law considers malice against the person so injured because he is guilty of general malice, applies to the offence of unlawful wounding under s. 20 of the Offences against the Person Act, 1861. E

The appellant maliciously aimed a blow with his belt at a man, but instead struck and wounded the prosecutrix who was standing next to the man. He was indicted for unlawful wounding contrary to s. 20 of the Offences against the Person Act, 1861. The jury found, *inter alia*, that the striking of the prosecutrix was purely accidental. The appellant was convicted. F

Held: the case fell within the principle stated above and the conviction should be affirmed.

R. v. Pembrilton (1) (1874), L.R. 2 C.C.R. 119, distinguished. G

Notes. As to unlawful wounding in general, see 10 HALSBURY'S LAWS (3rd Edn.) 735 et seq.; and for cases see 15 DIGEST (Repl.) 999 et seq. For the Offences against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 795.

Cases referred to :

- (1) *R. v. Pembrilton* (1874), L.R. 2 C.C.R. 119; 43 L.J.M.C. 91; 30 L.T. 405; 38 J.P. 454; 22 W.R. 553; 12 Cox, C.C. 607; C.C.R.; 15 Digest (Repl.) 1205, 12, 247. H
- (2) *R. v. Hunt* (1825), 1 Mood. C.C. 93, C.C.R.; 15 Digest (Repl.) 988, 9681.

Also referred to in argument :

- R. v. Faulkner* (1877), 13 Cox, C.C. 550; 15 Digest (Repl.) 1206, *7181.
McPherson v. Daniels (1829), 10 B. & C. 263; 109 E.R. 448; 15 Digest (Repl.) 1205, 242. I
R. v. Hewlett (1858), 1 F. & F. 91; 15 Digest (Repl.) 988, 9690.

Case Stated by the recorder for the borough of Devonport.

At the quarter sessions for the borough of Devonport held on April 10, 1886, the prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. The evidence showed that the prosecutrix kept a public-house in Devonport; that on Sunday, Feb. 14, 1886, the prisoner, who was a soldier, and a man named

- A Horace Chapple were in the public-house, and a quarrel took place, and that eventually the prisoner was knocked down by the man Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting having in his hand his belt which he had taken off. As the prisoner passed he aimed a blow with his belt at Chapple and struck him slightly, but the
- B belt bounded off and struck the prosecutrix, who was talking to Chapple, cutting her face open and wounding her severely. At the close of the case the recorder left these questions to the jury: (i) Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? (ii) Did the blow so struck, in fact wound Ellen Rolston? (iii) Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple? The jury found: (i) That the blow was unlawful and malicious. (ii) That the blow did in fact wound Ellen Rolston. (iii) That the striking of Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. Upon these findings the recorder directed a verdict of Guilty to be entered to the first count, but resipid judgment and admitted the prisoner to bail to come up for judgment at the next sessions. The question for the consideration of the court was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted.

Croft for the appellant.

Helpman for the prosecution.

- E **LORD COLERIDGE, C.J.**—I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that, if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice, and is
- F guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were *res integra*; but it is not *res integra*, because, in *R. v. Hunt* (2), a man in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before.
- G But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for *R. v. Pembliton* (1). But I observe that, in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by s. 18 of
- H the Offences against the Person Act, 1861, it is enacted that:

“Whosoever shall unlawfully and maliciously by any means whatsoever wound . . . any person . . . with intent . . . to maim, disfigure, or disable any person . . . shall be guilty of felony;”

and then s. 20 enacts that

- I “whosoever shall unlawfully and maliciously wound . . . any other person . . . shall be guilty of a misdemeanour;”

and be liable to certain punishments. Therefore, the language of ss. 18 and 20 are perfectly different; and it must be remembered that this is a conviction for an offence under s. 20.

The Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute of 9 Geo. 4, c. 31, where it was necessary that the act should have been done with intent to maim, disfigure,

or disable "such person," showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, the Offences against the Person Act, 1861, and the words are "wound any other person." I cannot see that there could be any question, but for *R. v. Pembliton* (1). I think that that case was properly decided; but upon a ground which renders it clearly distinguishable from the present case. That is to say, the Malicious Damage Act, 1861, which was under discussion in *R. v. Pembliton* (1) makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offence to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case counsel for the appellant is out of court, and I, therefore, think that this conviction should be sustained.

LORD ESHER, M.R.—I am of the same opinion. It seems to me that *R. v. Pembliton* (1) is the only case which could be cited against a well-known principle of law. But that case shows that there was no intention to injure any property at all; therefore, there was no intent to commit the crime mentioned in the Act.

BOWEN, L.J.—I am also of opinion that this conviction should be affirmed. It is quite clear that this offence was committed without any malice in the mind of the prisoner, and that he had no intention of wounding Ellen Rolston. The only difficulty that arises is from *R. v. Pembliton* (1), which was a case under the Malicious Damage Act, 1861, which does not deal with all malice in general, but with malice towards property; and all that case holds is, that though the prisoner would have been guilty of acting maliciously within the common law meaning of the term, still he was not guilty of acting maliciously within the meaning of a statute which requires a malicious intent to injure property. Had the prisoner meant to strike a pane of glass, and without any reasonable expectation of doing so injured a person, it might be said that the malicious intent to injure property was not enough to sustain a prosecution under this statute. But, as the jury found that the prisoner intended to wound Chapple, I am of opinion that he acted maliciously within the meaning of the Offences against the Person Act, 1861.

FIELD, J.—I am also of opinion that this conviction must be affirmed. I think this a very important case and one of very wide application, and am very glad that it has come before this court, and has been carefully considered and decided so that there may be no doubt about the matter.

MANISTY, J.—I do not propose to add more than a few words. The facts in this case raise an exceedingly important question, because the man Chapple, who was intended to be struck, was standing close by the woman who was wounded, and who was talking to him; and the prisoner intending to strike Chapple with the belt did strike him, but the belt bounded off and struck Ellen Rolston. It seems to me that the first and second findings of the jury justify the conviction, because they are in these terms: "The jury found that the blow was unlawful and malicious, and that it did in fact wound Ellen Rolston;" and that being so, I think that the third finding does not entitle the prisoner to an acquittal. It is true he did not intend to strike Ellen Rolston, but he did intend to strike Chapple, and in doing so wounded Ellen Rolston; therefore, I think that the third finding is quite immaterial, and this conviction should be affirmed.

Conviction affirmed.

Solicitors: *H. Windybank*, for *Albert Gard*, Devonport; *Jas. Gilbard*, Devonport.

[Reported by *R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*]

A

MYTTON v. MYTTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Butt, J.), July 22, 1886]

B

[Reported 11 P.D. 141; 57 L.T. 92; 50 J.P. 488;
35 W.R. 368]*Judicial Separation—Cruelty—Revival—Acts of cruelty revived by less serious acts.*

C

Soon after marriage the husband began to show great want of consideration towards his wife. His general course of conduct towards her was passionate, irritable, tyrannical and intemperate. His language was offensive and insulting and he used to abuse and scold her. He would turn off the gas lighting to prevent her from reading, writing or working, and he repeatedly shook his fists at her and threatened her, but he always refrained from using actual physical violence because he said that he knew the law. By reason of her husband's conduct the wife's health suffered and she left the matrimonial home. After a few months she agreed to return to cohabit with her husband on his promise to behave more kindly towards her, and thereafter the parties lived together for five years until the wife finally left the husband. During this period of five years the husband's conduct was not so bad as it had been before although he continued to be unkind to her and she remained unhappy. The day before the wife left the matrimonial home for good the husband pushed her on the stairs when she was carrying their child upstairs and she was only prevented by the presence of a wall from falling down on the stairs with the child. On the day the wife left the husband had been drunk and disorderly, and she left the matrimonial home in terror and the parties' servant girl also ran out into the garden and stayed there for half-an-hour, too frightened to come in by reason of the husband's behaviour.

D

E

F

Held: to revive cruelty committed before condonation it was not necessary that the subsequent acts of cruelty should be exactly of the same extent as those which were committed on the earlier occasions, and in the present case there was sufficient evidence of cruelty to justify the granting of a decree of judicial separation.

G

Notes. Considered: *Lauder v. Lauder*, [1949] 1 All E.R. 76. Referred to: *Walmesley v. Walmesley* (1893), 69 L.T. 152; *Moss v. Moss*, [1916] P. 155; *Simpson v. Simpson*, [1951] 1 All E.R. 955; *Jamieson v. Jamieson*, [1952] 1 All E.R. 875.

H

As to conduct injurious to health constituting cruelty in general, see 12 HALSBURY'S LAWS (3rd Edn.) 272 et seq.; and for cases see 27 DIGEST (Repl.) 298 et seq.

Cases referred to in argument:

Greenway v. Greenway (1848), 6 Notes of Cases, 221; 27 Digest (Repl.) 302, 2475.
Evans v. Evans (1843), 2 Notes of Cases, 470; 7 Jur. 1046; 27 Digest (Repl.) 401, 3304.

I

Kelly v. Kelly (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 18 W.R. 767; 27 Digest (Repl.) 298, 2434.

Petition by a wife, Annie Elizabeth Mytton, for a decree of judicial separation from her husband, Robert Purrier Mytton. The marriage had taken place on Aug. 26, 1876.

Bayford, Q.C., and Searle for the petitioner.
Torr for the respondent.

BUTT, J.—This is a painful case, and it is quite evident, to my mind, that there is very little hope that these two persons can ever live together peacefully and comfortably. That, however, is in itself no ground for a judicial separation. A

It is equally clear, from the facts of the case, and from the respondent's own letters, both in the years 1880 and 1885, that his conduct has been wholly unjustifiable. That, again, is not sufficient ground, in itself, for granting the prayer of the wife's petition. In order to entitle me to decree that which is asked by the petitioner, I must be satisfied of two things: first, that there was what the law recognises as cruelty perpetrated by the husband upon the wife; secondly, that, assuming such cruelty to have existed and been committed in the year 1880, inasmuch as the parties lived together for several years since that time, there must be such further acts of violence as to preclude the husband from setting up condonation from subsequent cohabitation. B C

First, then, with regard to the incidents of 1880. It appears to me, from the evidence, that this lady was seriously ill in the months of February and March of that year. The medical gentleman who attended her has been called, and has said that, in addition to bodily illness, her nervous system was weak—that she was nervous and excited, and it was in these circumstances that certain conduct of her husband produced, according to the evidence of the petitioner, of her mother, and, above all, of the doctor—results which were serious. Dr. Lynch has said, in respect of that matter: D

“Among other causes rendering the illness of Mrs. Mytton serious, there was the difference between the husband and wife, which was clearly aggravating the case. After she got to her mother's house, I was compelled to give directions that the husband should not see her, because, after each of his visits, I found her condition much worse.” E

Dr. Lynch was then speaking of the year 1880. In February, 1882, he attended her in another confinement, and he says there was a nervousness and dread, when her husband was coming, that, to a certain extent, retarded her recovery. Having regard to the husband's conduct in 1880, to his own letters, and to the evidence of the medical man, I cannot help thinking that, if at that time or shortly thereafter an application had been made to this court, similar to that now made, it would have been granted. Although I am not aware that there were any blows, still, if the conduct of the husband be such as to endanger the life, or even the health, of his wife, that is cruelty in every sense of the word, whether we talk of “legal cruelty” or anything else. That is the state of things in 1880 and 1882. F G

The wife had gone back to her husband, and she lived with him until Nov. 26, 1885. During a part of that time he had been away. He went to Canada in 1884, and returned in March, 1885, soon after the birth of another child. How did he treat his wife during that time? Until we come to one occasion in the month of August, 1885, and two occasions in the month of November, 1885, there is no specific charge of cruelty; there is general evidence of his unkindness, but there is a letter, produced by him, from his wife to himself, written soon after his departure for Canada, and I must say that that letter, coming out from where it did, speaks volumes. It is an affectionate letter, and it expresses a hope that there is a possibility of future happiness, and it ends thus: H

“Your loving wife,—always, if only you would behave as you did in the last three or four days, and renew that period of happiness, all would be well. For the sake of those few days of happiness, how much I could forget.” I

What does that mean? To my mind, it means that there was constant unhappiness, and one very small oasis of happiness. What have we further? There is the matter in August, 1885, as to which there seems some conflict of evidence. No doubt Mr. Mytton was somewhat excited on that occasion. But, when we

A come to Nov. 25 and Nov. 26 (the latter being the day on which the petitioner finally left her husband) he admits that he was "drunk and disorderly" on the latter date; and, as to Nov. 25, the evidence is, that he pushed his wife in such a way, when she was carrying the child upstairs, that if the wall had not brought her up, she and the child would have fallen on the stairs. Whether that is an act which would warrant a decree such as is asked for, I am not prepared to say, and I do not care to inquire.

B According to the authorities, it is not necessary that the acts of cruelty should be exactly of the same extent as those which have been committed on the earlier occasions. Taking into account on the following day he was, according to his own expression given here in the witness-box, "drunk and disorderly;" that the wife left the house in terror; that the servant girl ran out into the garden, and remained there, afraid to come in, for half-an-hour; and that the wife left her home in consequence of those acts of his, never to return again, I think, not only that she left her home in bodily fear, but that she was justified in leaving it. On the whole, I think there is sufficient to justify me in granting a judicial separation, with costs against the husband, the wife to have the custody of the surviving child of the marriage, with the usual order as to access in favour of the husband.

Solicitors: *H. C. Greenfield; C. H. Hodgson.*

[*Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

E

METROPOLITAN RAIL. CO. v. WRIGHT

F [HOUSE OF LORDS (Lord Herschell L.C., Lord Watson, Lord FitzGerald and Lord Halsbury), April 15, 16, 1886]

[Reported 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658;
34 W.R. 746; 2 T.L.R. 553]

G *Court of Appeal—New trial—Verdict of jury against weight of evidence—Verdict not properly found on evidence viewed reasonably.*

A new trial ought not to be granted on the ground that the verdict was against the weight of evidence unless the verdict was one which the jury, viewing the whole of the evidence reasonably, could not properly find. If the verdict was one which reasonable men might find it ought not to be disturbed.

Solomon v. Bitton (1) (1881), 8 Q.B.D. 176, considered.

H

Notes. Referred to: *Dick v. Piller*, [1943] 1 All E.R. 627.

As to new trial by reason of verdict or misconduct of jury, see 30 HALSBURY'S LAWS (3rd Edn.) 474, 475; and for cases see DIGEST (Practice) 599 et seq.

Case referred to:

(1) *Solomon v. Bitton* (1881), 8 Q.B.D. 176, C.A.; Digest (Practice) 598, 2386.

I

Appeal from a decision of the Court of Appeal (the EARL OF SELBORNE, L.C., SIR BALIOL BRETT, M.R., and LINDLEY, L.J.), reversing a decision of the Divisional Court (LORD COLERIDGE, C.J., and STEPHEN, J.), ordering a new trial in an action in which the respondent was plaintiff and the appellants were defendants.

The action was brought to recover damages for personal injuries which the plaintiff had sustained in consequence of the alleged negligence of the defendants' servants in allowing a train, in which the plaintiff had been a passenger, to start

from the station while she was in the act of alighting from it, whereby she fell and was injured. The defendants alleged that the accident was caused by the negligence of the plaintiff herself in attempting to alight from the train while it was in motion. The case was tried before HUDDLESTON, B., and a special jury, and they found a verdict for the plaintiff for £300, but the Divisional Court ordered this verdict to be set aside, on the ground that it was against the weight of the evidence. The Court of Appeal reversed this decision on the ground that the verdict was not perverse or unreasonable, and ordered the verdict to stand. The defendants appealed.

Fletcher Moulton, Q.C., and J. Lawson Walton for the appellants.

Vaughan Williams, for the respondent, was not called upon to address the House.

LORD HERSCHELL, L.C.—This was an action brought by the plaintiff to recover damages from the Metropolitan Rail. Co. for the injuries sustained by her owing to an accident which occurred at the King's Cross station on the line of that company, whereby she suffered certain bodily harm. The case was tried before a jury, who found a verdict for the plaintiff for £300. Upon the motion of the defendants a Divisional Court of the Queen's Bench Division granted a new trial on the ground that the verdict was against the weight of evidence. From that judgment there was an appeal to the Court of Appeal, who reversed the decision of the court below, holding that the verdict ought to stand.

The question which we have to determine is, not what verdict we should have found, but whether the Court of Appeal were wrong in holding, as they have done, that the verdict was not against the weight of evidence. The case was one unquestionably within the province of a jury; and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find. [His LORDSHIP went through the details of the evidence, and concluded:] I am not prepared to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants. I, therefore, move your Lordships that the judgment under appeal be affirmed, and that the appeal be dismissed with costs.

LORD WATSON concurred.

LORD FITZGERALD.—I concur in the conclusion announced by the Lord Chancellor, and I should not add a word, but that it is very desirable that we should understand the grounds upon which the courts exercise a control over the verdict of a jury once found. In this case there was evidence given at the trial on both sides, and on all the issues proper to be submitted to and considered by the jury. Such appears to have been the opinion of the Divisional Court, and it was clearly that of the Court of Appeal. The judge who presided at the trial could not properly have withdrawn the case from the jury. The jury gave their verdict for the plaintiff. The judgment of the EARL OF SELBORNE, L.C., in the Court of Appeal, imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse, or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of "perversity," and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question then for your Lordships' consideration is, whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust. I am of opinion that the appellants, upon whom the onus lies, have failed to establish that this verdict was unreasonable or unjust, and, therefore, I think that it ought not to be disturbed.

LORD HALSBURY.—The facts of this case may, of course, be differently viewed by different minds. I am content with the view of the facts as stated

A by the Lord Chancellor, and I am disposed to think that I should have found the same verdict. But what I take to be of supreme importance, as defining the functions of judges and juries, is the principle upon which a new trial can be granted upon the ground that the verdict is against the weight of the evidence. I think that the principle laid down in *Solomon v. Bitton* (1) is erroneous, as reported, in the use of the word "ought." If a court—not a court of appeal in which the facts are open for original judgment, but a court which is not a court to review facts at all—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence, in their judgment, proves. That, I think, is not the law. If reasonable men might find (not "ought to find," as was said in *Solomon v. Bitton* (1)) the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. The Lord Chancellor has put the proposition in a form which is not open to objection, but one which perhaps leaves open for definition in what sense the word "properly" is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable a court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be, that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word "might" were substituted for "ought to" in *Solomon v. Bitton* (1) I think the principle would be accurately stated. I concur in the motion of the Lord Chancellor that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Fowler & Parks; W. T. Boydell, jun.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

R. v. FARRANT

[QUEEN'S BENCH DIVISION (Stephen and Charles, JJ.), November 19, 1887]

[Reported 20 Q.B.D. 58; 57 L.J.M.C. 17; 57 L.T. 880;
52 J.P. 116; 36 W.R. 184; 4 T.L.R. 87]

Magistrates—Bias—Interest in subject-matter of dispute—Advice previously given to party to proceedings by magistrate as his doctor—Subpœna of magistrate as witness.

It is a primary principle of English law that no man shall be judge in his own cause. A magistrate will, therefore, be disqualified from sitting as a judge if he has the slightest pecuniary interest in the subject-matter of the dispute, or if he is interested otherwise than pecuniarily to such an extent as to bias his judgment. The fact that a magistrate is called as a witness does not, however, disqualify him from sitting.

A magistrate, who was also a doctor, attended a patient professionally for injuries received in an assault. He advised the patient not to take the matter to court, but to consent to a settlement, and conveyed to him a message from the person who had committed the assault tendering an apology and expressing

a desire for an amicable settlement. However, a summons was later issued for assault, and the magistrate was subpoenaed to prove the nature of the injury. A rule absolute for a writ of prohibition having been obtained to prevent the magistrate from sitting on the Bench at the hearing of the summons, the magistrates applied to have the writ set aside.

Held: the evidence did not show that the magistrate had such a pecuniary or other interest in the case as to make it likely that he would be biased in his judgment, and so he was not disqualified from sitting, nor did the fact that he was subpoenaed as a witness disqualify him.

Notes. Referred to: *R. v. Cumberland Justices, Ex parte Midland Rail. Co.* (1888), 58 L.T. 491.

As to disqualification for acting as justice, see 25 HALSBURY'S LAWS (3rd Edn.) 131 et seq.; and for cases see 33 DIGEST (Repl.) 151 et seq.

Cases referred to:

- (1) *R. v. Recorder of Cambridge* (1857), 8 E. & B. 637; 27 L.J.M.C. 160; 30 L.T.O.S. 164; 4 Jur.N.S. 334; 6 W.R. 80; 21 J.P. Jo. 803; 120 E.R. 238; 33 Digest (Repl.) 153, 78.
- (2) *Dimes v. Proprietors of Grand Junction Canal* (1852), 3 H.L. Cas. 794, H.L.; 11 Digest (Repl.) 287, 1925.
- (3) *R. v. Rand* (1866), L.R. 1 Q.B. 230; 7 B. & S. 297; 35 L.J.M.C. 157; sub nom. *R. v. Rand, R. v. Bradford Justices*, 30 J.P. 293; 33 Digest (Repl.) 155, 89.
- (4) *R. v. Meyer* (1875), 1 Q.B.D. 173, 34 L.T. 247; 40 J.P. 645; sub nom. *R. v. Harrison*, 24 W.R. 392; 33 Digest (Repl.) 158, 109.
- (5) *R. v. Handsley* (1881), 8 Q.B.D. 383; 30 W.R. 368; sub nom. *R. v. Handsley, etc., Burnley Justices, Ex parte King*, 51 L.J.M.C. 137; 46 J.P. 119; D.C.; 33 Digest (Repl.) 162, 135.

Also referred to in argument:

R. v. Great Yarmouth Justices (1850), 8 Q.B.D. 525; 51 L.J.M.C. 39; 46 J.P. 518; 30 W.R. 460, D.C.; 33 Digest (Repl.) 154, 85.

Home v. Camden (Earl) (1795), 2 Hy. Bl. 533; 6 Bro. Parl. Cas. 203; 126 E.R. 687; H.L. 37 Digest 642, 941.

Brookes v. Earl of Rivers (1668), Hard. 503; 145 E.R. 569; 16 Digest (Repl.) 426, 2272.

Ex parte Medwin (1853), 1 E. & B. 609; 17 Jur. 1178; 118 E.R. 566; sub nom. *Rawlinson v. Medwin, Ex parte Medwin*, 22 L.J.Q.B. 169; 21 L.T.O.S. 5; 17 J.P. 166; 16 Digest (Repl.) 426, 2274.

Anon. (1698), 1 Salk. 306; 91 E.R. 343; 33 Digest (Repl.) 154, 81.

City of London v. Wood (1701), 12 Mod. Rep. 669; 88 E.R. 1592; sub nom. *Wood v. London Corpn.*, Holt, K.B. 396; 1 Salk. 397; 13 Digest (Repl.) 237, 612.

R. v. Alcock, Ex parte Chilton (1878), 37 L.T. 829; 42 J.P. 311, D.C.; 33 Digest (Repl.) 164, 153.

R. v. Tooke (1884), 48 J.P. 661; 32 W.R. 753, D.C.; 33 Digest (Repl.) 164, 151.

Application for a writ of supersedeas to set aside a rule absolute for a prohibition to restrain Dr. Farrant, the Mayor of Taunton, from sitting to hear and determine the matter of a certain summons against one Thomas Burch, for assaulting one Robert Mattock.

Two men named Mattock (the complainant) and Dyer had been assaulted by one Burch on leaving a public-house at Taunton, where they had all been drinking together. Dr. Farrant, the Mayor of Taunton, a medical practitioner, was the regular medical attendant of the two men who had been assaulted, and he knew Burch slightly. Dr. Farrant was sent for, and he professionally attended to Mattock's injuries caused by the assault. It was stated in an affidavit, sworn by Mattock, that Dr. Farrant had said to him, while they were discussing the matter, that he (Mattock) ought not to take proceedings

- A against Burch, as, if the matter went to court, it would appear in all the papers; and that on the next day Dr. Farrant has said that he had seen Burch and had recommended him to apologise and to do what was right in the matter. It was also stated in an affidavit by Dyer that Dr. Farrant had begged him not to take legal proceedings, as Burch would throw himself in his and Mattock's hands. A man named Bradbeer also stated on affidavit that Dr. Farrant had told him that the complainants would not succeed before the justices, and had offered to lay him five to one that such would be the result. Dr. Farrant, in his affidavit, expressly denied having said that the complainants would not succeed before the justices, or that he had offered to lay any sum on the result, or that he had made any bet concerning it. Dr. Farrant, as Mayor of Taunton, was chairman of the bench of magistrates. Summonses for assault having been taken out by Mattock and Dyer against Burch, before the cases came on, Dr. Farrant was subpoenaed by the solicitor who appeared for the prosecution in both cases as a witness to prove the nature of the injury. When the case came on, he took his seat on the bench in the ordinary course, but the solicitor for the prosecution protested against his sitting to hear the case on the grounds that he was subpoenaed as a witness in it, and that he had tried to prevent the matter from being brought into court. Dr. Farrant insisted upon his right to sit, but the case was adjourned. Meanwhile, an order for a rule absolute for a prohibition had been granted by KEKEKWICH, J., upon an ex parte application to prevent Dr. Farrant from sitting and adjudicating upon the summons in question. Dr. Farrant then obtained a rule nisi for a writ of supersedeas to set aside the prohibition.

Wheeler, Q.C., and *Bartley Denniss* showed cause against the rule.
Sir Henry James, Q.C., and *Blake Odgers* in support of the rule.

STEPHEN, J. The legal principles as to the right of magistrates to hear and adjudicate upon cases, as I understand them, are as follows.

- F The first and most important legal principle is, that no one shall be judge in his own cause; that means, where he has the least pecuniary interest in the matter. That no one shall sit as a judge when he has the smallest pecuniary interest in the subject-matter of the dispute before him is a doctrine that has been carried to great, but not to undue length. For instance, in *R. v. Recorder of Cambridge* (1), it was held that an order for costs made by the deputy-recorder was vitiated on the ground that he had a personal interest in the result, because the costs would have to be levied out of the common fund to which the parish where he was an occupier would contribute. Again, in *Dimes v. Proprietors of Grand Junction Canal* (2), it was held that the Lord Chancellor was disqualified, on the ground of interest, from sitting as a judge in an action brought by a public company in which he had an interest as a shareholder. A person sitting in the capacity of judge certainly should not have any pecuniary interest in the proceedings. That is a well-known principle, but it has no bearing upon this case, because it is not suggested that Dr. Farrant had any such interest in this matter. But the law does not stop there. It goes on to say that, though the judge or magistrate has no pecuniary interest in a cause, he may have another kind of interest in it having substantially the same effect, though not of the same nature; he may be interested otherwise than pecuniarily to such an extent as to bias his judgment, and then he ought not to sit as a judge.
- I I will read this further principle from three cases where the law is well and clearly laid down. In *R. v. Rand* (3), BLACKBURN, J., in giving judgment, says (L.R. 1 Q.B. at pp. 232, 233):

"Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that

where there is a real bias of this sort this court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly bona fide."

That principle is again found in *R. v. Meyer* (4) where BLACKBURN, J., in giving judgment, says (1 Q.B.D. at p. 177):

"In *R. v. Rand* (3), we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was, that though pecuniary interest in the subject-matter of dispute, however small disqualifies the justices, yet the mere possibility of bias did not ipso facto avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying, 'that we must not be understood to say that where there is a real bias this court would not interfere.' In the present case there is such a real bias."

Again, in 1881, in *R. v. Handsley* (5), the same principle is expressed, though in somewhat different words. CAVE, J., there said (8 Q.B.D. at pp. 386, 387),

"Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present . . . it is not enough to show merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate upon, but that, in order to disqualify the justice, it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

We adopt the language of those cases, and say that, there being here no question of pecuniary interest, what we have to decide is, whether it has been proved that such a substantial interest exists that it is probable that if Dr. Farrant heard the charges of assault he would be likely to have a real bias in favour of one of the parties.

The substance of the case is shortly this: After the assault had been committed, Dr. Farrant was called in to attend one of the two men who were hurt. He was a patient of Dr. Farrant, who treated him for certain injuries, and Dr. Farrant appears to have advised him that the case had better not be brought into court, but that it should be settled quietly, as the parties were respectable men. That advice seems to have been given by him as a friend. Afterwards, Dr. Farrant received a message that Burch was willing to apologise for what had happened, and that he thought the matter could be arranged. Dr. Farrant advised the prosecutor that this course should be adopted. The other side, however, had by this time put the matter into the hands of a solicitor. That is the substance of the case.

Can it be said that that conduct showed real bias, or was such as would make it likely that Dr. Farrant would not do justice between the parties if the case came before him? I am bound to say that, after having carefully considered the facts as alleged, I cannot see anything of the kind. We cannot say that he is likely to have a bias merely because he suggested a settlement, and advised the complainant not to go into a criminal court. We judges suggested, when this case first came before us, that it ought not to be fought out. Dr. Farrant refused to adopt that suggestion and is determined to assert his rights. Can it be said that we were influenced by any bias in giving this advice? We thought a settlement would save public time. I do not think that Dr. Farrant has more than we have.

- A** But then it is said that it will be necessary to call Dr. Farrant as a witness to give evidence in the case, as to the nature of the injuries and Burch's admission. It may be that this might be a ground for Dr. Farrant to say, as a matter of grace, that he did not intend to sit upon the bench in the case; but it appears to me that to hold, as a matter of law, that because a magistrate or judge is to be called as a witness, that disqualifies him from doing his duty,
- B** would be to create a precedent which, to say the least of it, would cause very great inconvenience; as, for instance, if a judge of assize were subpoenaed just before the trial, the effect might be to necessitate a postponement to the next assizes, and it would be in the power of either party, by so doing, to prevent any particular judge or magistrate from sitting. I feel that it would be a very serious thing to lay down that such objections against judges disqualified them
- C** from sitting in a case, and it might cause the greatest public inconvenience. It has also been suggested that Dr. Farrant offered to make a bet as to the result of the case if it came to trial, but this was flatly contradicted on affidavit. If he had in fact made a bet, he would be disqualified from sitting by pecuniary interest. If he had seriously offered to bet, although I do not say that it would have disqualified him, I think it would have shown very
- D** bad taste on his part; and even though he had not actually made the bet, it would have shown great levity most unbecoming to a person in his position. But that is not proved here. The writ of prohibition must, therefore, be superseded, and the rule nisi for a writ of supersedeas must be made absolute.

- E** **CHARLES, J.**—I fully concur in all that has fallen from my learned brother, both as regards the law and the facts of this case.

Rule absolute for supersedeas.

Solicitors: *Stevens & Co.*, for *J. Crawshaw*, Taunton; *R. H. Willcocks*, for *S. B. Cresswell*, Taunton.

- F** [Reported by *F. A. CRAWLSHEIM, Esq., Barrister-at-Law.*]

G

Re WEBBER. Ex parte WEBBER

- H** [QUEEN'S BENCH DIVISION (Cave and A. L. Smith, JJ.), November 29, 30, 1886]

[Reported 18 Q.B.D. 111; 56 L.J.Q. 209; 55 L.T. 816;
35 W.R. 308; 3 T.L.R. 138; 3 Morr. 288]

Bankruptcy — Property available for distribution — Compassionate allowance granted by Secretary of State—Officer of Indian government not entitled to pension—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 53 (2).

- I** By the Bankruptcy Act, 1883, s. 53: "(1) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution among the creditors so much of the bankrupt's pay or salary as the court . . . may direct . . . (2) Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court on the application of the trustee, shall from time to time make such order as it thinks just for the payment of

the salary, income, half-pay, pension or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the court may direct."

A purely voluntary allowance granted by the Secretary of State for India to an officer of the Indian army who had been retired before he was entitled to a pension, **held** not to be "income" within the meaning of s. 53 (2) of the Bankruptcy Act, 1883, and no order could be made for the payment of any part of such allowance, when received by the officer, to his trustee in bankruptcy.

Notes. The Bankruptcy Act, 1883, s. 53 (1), (2), has been repealed and replaced by s. 51 (1), (2) of the Bankruptcy Act, 1914.

Distinguished: *Re Ward. Ex parte Ward*, [1897] 1 Q.B. 266.

As to appropriation of salary or income, see 2 HALSBURY'S LAWS (3rd Edn.) 456, C 457; and for cases see 5 DIGEST (Repl.) 994 et seq. For the Bankruptcy Act, 1914, s. 51, see 2 HALSBURY'S STATUTES (2nd. Edn.) 387.

Case referred to:

(1) *Ex parte Wicks, Re Wicks* (1881), 17 Ch.D. 70; 50 L.J.Ch. 620; 14 L.T. 836; 29 W.R. 525; 5 Digest (Repl.) 995, 8026.

Also referred to in argument:

Lucas v. Harris (1886), 18 Q.B.D. 127; 56 L.J.Q.B. 15; 15 L.T. 658; 51 J.P. 261; 35 W.R. 112; 3 T.L.R. 106; 21 Digest (Repl.) 735, 2270.

Ex parte Higgins, Re Higgins (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878; 5 Digest (Repl.) 781, 6642.

Grant v. Secretary of State for India (1877), 2 C.P.D. 445; 46 L.J.Q.B. 681; 37 L.T. 188; 25 W.R. 848; 11 Digest (Repl.) 572, 90.

Ex parte Napier (1852), 18 Q.B. 692; 21 L.J.Q.B. 332; 17 Jur. 380; 118 E.R. 261; sub nom. *R. v. East India Co., Ex parte Napier*, 19 L.T.O.S. 214; 16 Digest (Repl.) 319, 975.

Ex parte Benwell, Re Hutton (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 33 W.R. 242; sub nom. *Ex parte Hutton*, 1 T.L.R. 148; 5 Digest (Repl.) 995, 8025.

Cooper v. the Queen (1880), 14 Ch.D. 311; 49 L.J.Ch. 490; 42 L.T. 617; 28 W.R. 611; 16 Digest (Repl.) 270, 377.

Flarty v. Odlum (1790), 3 Term Rep. 681; 100 E.R. 801; 5 Digest (Repl.) 655, 5744.

Appeal by the bankrupt from an order of the judge of Norwich County Court directing that a certain sum should be paid yearly to the trustee in bankruptcy.

The bankrupt, Captain Webber, had been in the service of the Indian government and had been compulsorily retired before he became entitled to a pension. The Secretary of State for India in Council, by virtue of the Government of India Act, 1858, s. 41, thereupon granted Captain Webber what is termed a compassionate allowance of 7s. a day, in all £127 a year. The allowance, according to an affidavit of the bankrupt, granted out of the general revenues of India, and was in no way charged on the English revenues or payable out of them. It was of a different nature to a pension, half-pay, or other payment of the kind; it was not provided for in the regulations of the service, and the granting of it did not form one of the terms upon which the recipient originally entered the service. The recipient had no claim or right to it; it was a mere voluntary act of grace, being, in fact, made in special cases where the recipient had no claim to a pension, and was a matter entirely within the discretion of the Secretary of State. It was intended for the personal subsistence of the recipient and his family. It was fixed according to the wants of the recipient, was revocable at pleasure, could not be commuted, charged, or anticipated, and if the recipient ceased to need it, it would be discontinued. Captain Webber had been adjudicated bankrupt, and on May 24, 1886, an order was made by the

A county court judge that a sum of £50 a year should be paid out of this allowance to his trustee in bankruptcy, under provisions of s. 53 (2) of the Bankruptcy Act, 1883. From that order this appeal was brought.

Swinfen Eady for the bankrupt.

Gregson for the trustee.

B **CAYE, J.**—The question here is, whether a compassionate allowance granted by the Secretary of State for India comes under the terms of s. 53 of the Bankruptcy Act, 1883. It is unnecessary for me to give an opinion upon the question whether or not half-pay or pension comes within the terms of this section. I shall confine myself to the question argued, and not go out of my course to decide another question.

C The evidence of the bankrupt, which is not contradicted by the trustee, is that this compassionate allowance is granted by the Secretary of State for India in Council by the powers of the Government of India Act, 1858, s. 41, it is not provided for in the regulations of service, it is a voluntary act, each case being dealt with on its own merits, and if the recipient ceases to need it it will be discontinued. It differs from anything like half-pay or pension in that it does not form part of the terms on which the recipient entered the service; it is made with reference to the special circumstances of each case.

D The true test to apply in cases of this kind is that laid down in *Ex parte Wicks* (1); e.g., is it a voluntary payment given of pure bounty? Take the case of a private individual. Suppose a man agrees with his servant that he shall serve him on the terms of so much a year, and then after a certain number of years of service he shall have a retiring allowance. The servant who fulfils the necessary conditions has a right to such retiring allowance, and he could enforce his claim to it in a court of law; but if there are no terms, and he makes voluntarily an allowance to a servant, this cannot be recovered at law.

E The governing principle is, that he has no right to it; it is an act of pure bounty. It is said that the Secretary of State for India has stated that if an order is made by a court it will be obeyed. This does not affect the question. It simply means, if the court comes to the conclusion that the Bankruptcy Act was intended to deal with this particular allowance, and to divert it from its intended course, he will obey the court. I am of opinion that this case is covered by *Ex parte Wicks* (1), and I allow this appeal.

G **A. L. SMITH, J.**—I cannot agree with the trustee's contention. This is an appeal from the county court judge of Norwich, who found that £50 a year must be paid to the trustee in bankruptcy out of an allowance of £127 a year belonging to the bankrupt. The point here is, does this compassionate allowance come within the provisions of s. 53 (2) of the Bankruptcy Act, 1883? It is not denied that the allowance is granted on retirement, that it is purely voluntary, and a mere bounty and gift. That being the case, does it come under the words of the section? It is conceded that it does not come within sub-s. (1), but it is urged that it is within sub-s. (2). [His LORDSHIP read the sub-section.] It is not half-pay or pension, or any compensation granted by the Treasury. I will decide the case of "half-pay or pension" when it comes before me. The only words then are "salary or income." It is not "salary," and *Ex parte Wicks* (1) says it is not "income," as it is merely voluntary. The trustee has failed to show that it comes under the provisions of the section, and therefore the order is discharged.

Solicitors : *Charles F. Martelli*; *J. O. Jacobs*.

[Reported by J. E. VINCENT, Esq., Barrister-at-Law.]

R. v. BUCKMASTER

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Pollock, B., Manisty, Hawkins and A. L. Smith, JJ.), December 10, 1887]

[Reported 20 Q.B.D. 182; 57 L.J.M.C. 25; 57 L.T. 720;
52 J.P. 358; 36 W.R. 701; 4 T.L.R.
149; 16 Cox, C.C. 339]

Criminal Law—Larceny—Larceny by a trick—Absence of intention to part with property in thing stolen—Bet made with absconding bookmaker—Money obtained by fraud.

The prisoner, a bookmaker, was taking bets at a race-meeting. R. made two bets on a certain horse, the prisoner stating that if the horse won he would recover the money deposited as well as the winnings. The horse won, but the prisoner disappeared, later denying that he had made the bet. He was convicted of larceny and a Case was stated, the question being whether there was any evidence of larceny to go to the jury.

Held: as R. only intended to part with the money on the assumption that the prisoner intended to deal honestly with it and the prisoner had had no such intention, there was no consensus ad idem, the property did not pass, and there was abundant evidence that the prisoner was guilty of larceny by a trick.

PER MANISTY, J.: It is settled law that if a man parts with the possession of money, but does not intend to part with the property in it, and the person receiving the money intends at that time to steal the money in a certain event, there then is larceny.

Notes. The definition of larceny in s. 1 of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.) 1012), includes obtaining possession by any trick.

Followed: *R. v. Sharp* (1887), 4 T.L.R. 152. Considered: *R. v. Russett*, [1892] 2 Q.B.D. 312; *Oppenheimer v. Frazer and Wyatt*, [1904-7] All E.R. Rep. 143. Applied: *R. v. Fisher* (1910), 5 Cr. App. Rep. 102; *R. v. Hilliard* (1913), 83 L.J.K.B. 439. Considered: *Folkes v. King*, [1922] All E.R. Rep. 658. Applied: *Lakes v. Simmons*, [1927] All E.R. Rep. 49.

As to larceny by a trick, see 10 HALSBURY'S LAWS (3rd Edn.) 770, 771; and for cases see 15 DIGEST (Repl.) 1037 et seq.

Cases referred to:

- (1) *R. v. Oliver* (1811), cited in Russell on Crimes (5th Edn.), Vol. 2, p. 170; cited 2 Leach, p. 1072; 4 Taunt. p. 274; 15 Digest (Repl.) 1041, 10,236.
- (2) *R. v. Robson* (1820), Russ. & Ry. 413, C.C.R. 15 Digest (Repl.) 1042, 10,251.
- (3) *R. v. Nicholson, Jones and Chappel* (1794), 2 East, P.C. 669; 2 Leach, 610; 15 Digest (Repl.) 1046, 10,307.

Case Stated by the chairman of Berkshire Quarter Sessions.

At the general quarter sessions for the county of Berkshire, held on June 27, 1887, Walter Buckmaster was tried upon an indictment which charged that he did on June 9, 1887, feloniously steal, take, and carry away, certain money of the moneys of John Rymer. It was proved that the prisoner and another man, at about 3 p.m., on June 9, 1887, during the Ascot race meeting, were the only persons standing upon a platform or stand made to represent "safes," or iron safe chests. The words "Griffiths, the Safe Man," was printed upon it. The stand was outside the course, on a spot on Ascot Heath where carriages were placed, and was not within any betting enclosure or ring. The prisoner, with a book in his hand, was calling out "Two to one against the field," just before a race was about to be run. Rymer went up to him and asked: "What

A price 'Bird of Freedom'?" to which he replied: "Seven to one to win." Rymer then deposited five shillings with Buckmaster, who told him that if the horse won he (Rymer) would win thirty-five shillings, and get his own five shillings back. He also deposited another five shillings with Buckmaster, who told him that he would have fifteen shillings back including his own five shillings, if the horse was first or second. The man who was with Buckmaster, and was acting with him, received the money and the latter, with whom all the conversation took place, appeared to take down the bet in his book, and gave Rymer a card-ticket with the words "Griffiths, Safe Man" upon it. While the race was being run, the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning the stand had gone. The horse "Bird of Freedom" won the race, and thereupon Rymer went back to the place where the stand had been and he found that the prisoner and the other man had gone. He waited there for half-an-hour and then left. Much later in the afternoon Rymer saw the prisoner on another part of Ascot Heath, and said, "I want £2 15s. from you." The prisoner said he knew nothing about it. Upon being told by Rymer that he would be detained, he admitted the bet, and said he had not the money, but that he was only the clerk, and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card tickets with the words "Griffiths the Safe Man" upon them. It was elicited from Rymer in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited. At the close of the case for the prosecution, on behalf of the prisoner it was submitted that Rymer having parted voluntarily with the money there was no evidence of larceny nor of any taking by prisoner, and none of obtaining by false pretence or trick. The learned chairman declined to withdraw the case from the jury, but assented to state a Case. No evidence at all was called on the part of the prisoner, and a verdict of Guilty was returned. The question for the opinion of the court was, whether there was any evidence to be left to the jury.

Keith Frith for the prisoner.

LORD COLERIDGE, C.J.—I am of opinion that in this case the conviction is right, and should be affirmed.

The only question left to us by the learned chairman is, whether there was any evidence that the prisoner had been guilty of larceny to be left to the jury. In my opinion, there was abundant evidence from which the jury might infer that the prisoner was guilty.

On behalf of the prisoner it has been argued that there is no doubt that the money was intended to be parted with, and that not only was the possession of the money parted with, but the property in it was also intended to be parted with; and that, therefore, as the property was intended to be parted with, there could be no larceny, but only the offence of obtaining money by false pretences; and that, although the prisoner, if he had been indicted for the false pretence, could have been convicted of larceny, the converse does not hold good, and he cannot, upon an indictment for larceny, be convicted of obtaining money by false pretences.

To that there seems to me to be two answers: the first, that, supposing there was an intention on the part of the prosecutor to part with the property in the coin, in order to pass the property from him to the prisoner there must have been a contract under which it could pass; for a change of property could only have taken place by virtue of a contract of some sort; and a contract, by the very meaning of the word, must be the bringing together of two minds. Here there never was any bringing together of the minds of the prosecutor and the prisoner in the shape of a contract; for, supposing the prosecutor to have intended to have parted with his money, he only intended to do so on the

assumption that the prisoner intended to deal honestly with the money; whereas, on the contrary, the prisoner never intended to do that, but, as the evidence shows clearly, intended to do that which the prosecutor never for a moment consented to. No contract ever existed, therefore; and there is high authority that, under such circumstances, the property in the article does not pass. A

In *R. v. Oliver* (1), which was a case tried before Wood, B., the prosecutor there had a quantity of bank-notes, which he wanted to change, and the prisoner offered to change them for him. The prosecutor gave him the bank-notes, on which the prisoner decamped; and the prosecutor never got any money in return. It was argued that, as the prosecutor clearly intended to pass the property in the bank-notes to the prisoner, he could not be convicted of larceny. But Wood, B., held that the case clearly amounted to larceny if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold, and that whether the prisoner had at the time the animus furandi was the sole point upon which the question turned, for, if the prisoner had at the time the animus furandi, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said that B C D

“a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal.” E

It appears to me that that is not only good sense, but very sound law, and it is decisive of the point raised here. I am of opinion, therefore, that there is evidence of larceny here, and that the true view to take of the case is that the property did not pass.

The second answer appears to me to be found in *R. v. Robson* (2), which is even more like this case than the case I have already cited. In *R. v. Robson* (2) the prosecutor was induced by the prisoner's confederates to make a bet with one of them, and to part with a number of bank-notes to another of the confederates, who passed it on to the prisoner to hold as stakeholder. The prosecutor having apparently lost the bet, the money was given by the prisoner to the confederate with whom the bet was made, and he went away. Upon these facts it was held that, where there is a plan to cheat a man of his property under colour of a bet, and he parts with the possession only to deposit the property as a stake with one of the confederates, the taking by such confederates is felonious. The case was tried by BAYLEY, J., who told the jury that if they thought, when the notes were received, there was a plan and concert between the prisoners that the prosecutor should never have them back, but that they should keep them for themselves, under the false colour and pretence that the bet had been won, he was of opinion that in point of law it was a felonious taking by all. The jury convicted, but the learned judge thought proper, as the case came very near *R. v. Nicholson* (3), to submit it to the consideration of the judges, making the distinction between the cases that in *R. v. Robson* (2) at the time the prisoners took the prosecutor's notes, he parted with the possession only, and not the property; and that the property was only to pass eventually, if the confederate really won the wager; and that the prosecutor expected to have been paid had the confederate guessed wrongly. Ten of the judges considered the case, and held the conviction right, because, at the time of the taking, the prosecutor parted only with the possession of the money. F G H I

The true view of the case here is exactly like the view which the judges took in that case. In this case the prosecutor deposits money with the prisoner

A never intending to part with that money, but being told that in a certain event he was to have that money and something more added to it given back to him. The prisoner, on the other hand, took the money never intending to give it back, and decamped with it. It appears to me, therefore, that the possession only of the money was parted with, and that the prosecutor never intended to part with the property in it. No doubt had he had money given back to him, he would not have inquired into the question whether his own 5s. came back to him or not. But that does not affect the question whether, when he placed the coins in the prisoner's hands, he intended to pass the property in them to the prisoner. At all events there was plenty of evidence from which the jury could find that such was not his intention; and, in my opinion, the conviction should be affirmed.

POLLOCK, B.—I have nothing to add.

MANISTY, J.—I have very few words to say. I take it on the authorities cited by my Lord that it is settled law that if a man parts with the possession of money, but does not intend to part with the property in it, and the person receiving the money intends at that time to steal the money in a certain event, that there then is larceny. That is the ground on which I think that, as in this case the prosecutor never intended to part with his 5s. except in the event which did not occur, and the prisoner never intended to return the money, the prisoner was guilty of larceny.

HAWKINS, J.—The only question for our determination is, whether there was any evidence to go to the jury. I am of opinion that there was abundant evidence. I think the evidence pointed to this, that the whole of the prisoner's conduct pointed to an original and preconcerted plan of the prisoner to obtain possession of, and keep the money of, the prosecutor; and that the prosecutor never intended on such terms to part with the property in his 5s. I think, therefore, that there was abundant evidence of larceny in this case, and that the conviction should be affirmed.

A. L. SMITH, J.—I think that it is clear the prosecutor never intended to part with the property in the 5s. except on condition that a bona fide bet was made. I think also that there is evidence that at the time the prosecutor handed the 5s. to the prisoner, the prisoner intended to keep possession of the money, whether "Bird of Freedom" lost or won. He, therefore, obtained the possession of the prosecutor's money by means of a preconcerted and premeditated fraud; in other words, by a trick. There was, therefore, abundant evidence of larceny, and, in my opinion, the conviction should be affirmed.

Conviction affirmed.

Solicitor : *C. Bassett.*

[*Reported by R. CUNNINGHAM GLEN, ESQ., Barrister-at-Law.*]

DAVIS v. SHEPSTONE

[PRIVY COUNCIL (Lord Herschell, Lord Blackburn, Lord Monkswell and Lord Hobhouse), February 19, March 5, 1886]

[Reported 11 App. Cas. 187; 55 L.J.P.C. 51; 55 L.T. 1;
50 J.P. 709; 34 W.R. 722; 2 T.L.R. 380]

Libel—Fair comment—Matter of public interest—Allegations of specific acts of misconduct committed by man in official capacity—Statements by public man published in newspaper.

The appellants published in their newspaper an article accusing the respondent of acts of misconduct committed in the exercise of his office as resident commissioner of a colonial territory. They vouched for the truth of the accusations, and stated that the closest investigation would prove them to be correct. The article was written from information supplied to their reporters. In an action for libel brought by the respondent, the appellants averred that the conduct of the respondent as resident commissioner was a matter of public interest, that the alleged libels constituted a fair and accurate report of the information given to their reporters and a fair and impartial comment upon the conduct of the respondent in his public capacity, published bona fide and without malice. They therefore claimed that the article was privileged.

Held: the qualified privilege attaching to fair comment on the acknowledged or proved acts of a public man did not extend to an assertion that he had been guilty of specific acts of misconduct; nor did that privilege extend to statements made by public persons to other public persons and communicated by the latter to a newspaper; and, therefore, the respondent was entitled to succeed in the action.

Per LORD HERSCHELL, L.C.: There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but also by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

Notes. Referred to: *Pankhurst v. Sowler* (1886), 3 T.L.R. 193; *Joynt v. Cycle Trade Publishing Co.* (1904), 91 L.T. 155.

As to the defence of fair comment, see 24 HALSBURY'S LAWS (3rd Edn.) 70 et seq.; and for cases see 32 DIGEST 141 et seq.

Case referred to:

- (1) *Purcell v. Sowler* (1877), 2 C.P.D. 215; 46 L.J.Q.B. 308; 36 L.T. 416; 41 J.P. 789; 25 W.R. 362, C.A.; 32 Digest 146, 1764.

Also referred to in argument:

Henwood v. Harrison (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, 1735.

Campbell v. Spottiswoode (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, 1802.

Kelly v. Tinling (1865), L.R. 1 Q.B. 699; 35 L.J.Q.B. 231; 13 L.T. 255; 30 J.P. 791; 12 Jur.N.S. 940; 14 W.R. 51; 32 Digest 147, 1775.

Wason v. Walter (1868), L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 17 W.R. 169; 32 Digest 144, 1754.

Davis v. Duncan (1874), L.R. 9 C.P. 396; 43 L.J.C.P. 185; 30 L.T. 464; 38 J.P. 728; 22 W.R. 575; 32 Digest 146, 1768.

A **Appeal** from a decision of the Supreme Court of the colony of Natal refusing an application made by the appellants for an order to set aside the verdict of the jury in an action for libel in which the respondent was plaintiff and the appellants defendants, and for a new trial on the ground of misdirection.

H. Matthews, Q.C. and Cock for the appellants.

B *Sir Richard Webster, Q.C., and Arbuthnot* for the respondent, were not called upon to address the Committee.

LORD HERSCHELL, L.C.—This is an appeal from a decision of the Supreme Court of the colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for £500 damages. **C** The action was brought to recover damages for alleged libels published by the appellants in the "Natal Witness" newspaper in the months of March and May, 1883. The respondent was, in December, 1882, appointed resident commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the **D** respondent while in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others.

Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing :

E "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnable. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for **F** them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there appeared a statement **G** that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserve territory who had visited King Cetewayo, and what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty in detail.

H On May 16, 1883, the appellants published a further article, relating to the respondent, which commenced as follows :

"Some time ago we stated in these columns that Mr. John Shepstone, while in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest **I** investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man."

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the respondent as resident commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the governor of Natal and published in the colony by messengers from Zululand and its King as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the respondent in his public capacity published bona fide and without malice.

The case came on for trial before WRAGG, J., and a jury on Sept. 4, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their statements had been conveyed to the editor of the newspaper by a letter from the Bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the King to the governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for £500. Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds: first, that the learned judge misdirected the jury in leaving them the question of privilege and in not telling them that the occasion was a privileged one; the second ground insisted upon was that the damages were excessive.

Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the respondent could only succeed on proof of express malice, is not well founded. There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

In the present case, the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in Parliament and in courts of justice are privileged, even though they contain defamatory matter affecting the character of individuals. But in *Purcell v. Sowler* (1), the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of

A misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants who, for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the Governor. The language used by the learned
B judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But, in their Lordships' opinion, so far as it erred it erred in being too favourable to the appellants, and it is not open to any complaint on their part.

C The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive, or for interfering with the finding of the jury in this respect.

Appeal dismissed.

D Solicitors: *West, King, Adams & Co.; Freshfield & Williams.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

E

Re DILLON. DUFFIN v. DUFFIN

F [COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), February 13, 14, 1890]

[Reported 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614;
38 W.R. 369; 6 T.L.R. 204]

Gift—Donatio mortis causa—Delivery of subject-matter of gift—Deposit note with cheque endorsed—Sufficiency of delivery.

G *Gift—Incomplete gift—Completion—Assistance of court of equity.*

H The donor held a deposit note upon a joint-stock bank for £580. There was a form of cheque on the back of the note, and on its face was a direction for filling up the cheque when the money or any of it was withdrawn. On Jan. 11, 1888, the donor, being very ill, expressed to the donee his intention of giving her the deposit note on condition that she should give it back if he recovered. He stamped and filled in the cheque at the back of the note and handed the note to her. He died on Jan. 15.

I **Held:** the delivery of the deposit note with the cheque endorsed constituted a valid donatio mortis causa of the money deposited; the principle that a court of equity would not assist a volunteer to perfect an incomplete gift did not apply to a donatio mortis causa; and, therefore, the executors of the donor would be considered as trustees for the donee for the purpose of giving effect to the gift.

Notes. Explained: *Re Beaumont, Beaumont v. Ewbank*, [1900-3] All E.R. Rep. 273. Considered: *Re Weston, Bartholomew v. Menzies*, [1900-3] All E.R. Rep. 283; *Re Richards, Jones v. Rebbeck*, [1921] 1 Ch. 513; *Deljoffe v. Fader*, [1939] 3 All E.R. 682. Applied: *Birch v. Treasury Solicitor*, [1951] Ch. 298. Referred to: *Re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394; *Re Wasserberg, Union of London and Smiths Bank v. Wasserberg*, [1914-15] All E.R. Rep. 217;

Re Lee, Treasury Solicitor v. Parrott (1918), 87 L.J.Ch. 594; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

As to *donationes mortis causa*, see 18 HALSBURY'S LAWS (3rd Edn.) 400 et seq.; and for cases see 25 DIGEST (Repl.) 593 et seq.

Cases referred to :

- (1) *Duffield v. Elwes* (1827), 1 Bli. N.S. 497; 4 E.R. 959; sub nom. *Duffield v. Hicks, Dow. & Cl. 1, H.L.*; 25 Digest (Repl.) 603, 380.
- (2) *Moore v. Darton* (1851), 4 De G. & Sm. 517; 20 L.J.Ch. 626; 18 L.T.O.S. 24; 64 E.R. 938; 25 Digest (Repl.) 594, 309.
- (3) *Cassidy v. Belfast Banking Co.* (1887), 22 L.R.Ir. 68; 25 Digest (Repl.) 598, *187.
- (4) *Re Mead, Austin v. Mead* (1880), 15 Ch.D. 651; 50 L.J.Ch. 30; 43 L.T. 117; 28 W.R. 891; 25 Digest (Repl.) 599, 343.

Also referred to in argument :

- Hewitt v. Kaye* (1868), L.R. 6 Eq. 198; 37 L.J.Ch. 693; 32 J.P. 776; 16 W.R. 835; 25 Digest (Repl.) 600, 352.
- Re Beak's Estate, Beak v. Beak* (1872), L.R. 13 Eq. 489; 41 L.J.Ch. 470; 26 L.T. 281; 36 J.P. 436; 25 Digest (Repl.) 600, 357.
- Clement v. Cheesman* (1884), 27 Ch.D. 631; 54 L.J.Ch. 158; 33 W.R. 40; 25 Digest (Repl.) 599, 344.
- Amis v. Witt* (1863), 33 Beav. 619; 55 E.R. 509; 25 Digest (Repl.) 597, 333.
- Moore v. Moore* (1874), L.R. 18 Eq. 474; 43 L.J.Ch. 617; 30 L.T. 752; 38 J.P. 804; 22 W.R. 729; 25 Digest (Repl.) 582, 225.
- Re Taylor, Taylor v. Taylor* (1887), 56 L.J.Ch. 597; 25 Digest (Repl.) 606, 408.
- Re Farman, Farman v. Smith* (1887), 57 L.J.Ch. 637; 58 L.T. 12; 4 T.L.R. 168; 25 Digest (Repl.) 609, 435.
- Rankin v. Weguelin* (1832), 27 Beav. 309; 29 L.J.Ch. 323, n.; 54 E.R. 121; 25 Digest (Repl.) 599, 341.
- Re Hughes* (1888), 59 L.T. 586; 36 W.R. 821, C.A.; 25 Digest (Repl.) 595, 319.

Appeal by the residuary legatee from a decision of KEKEWICH, J., that a gift of a deposit note with cheque endorsed was a valid *donatio mortis causa*.

James Dillon had on deposit at the London and Westminster Bank a sum of £580. Being seriously ill, in January, 1888, he sent for his sister-in-law Miss Duffin, who came to him on Jan. 11, 1888. According to her evidence she found him in his bedroom. When she had been with him a short while he took the deposit note relating to the £580 deposit out of his cash-box, and told her to fetch him a pen, ink, and a stamp, and said :

"I am going to give you this deposit note. I am going to give it to you conditionally. If I get well you will give it me back; if not, you will be all right."

She brought him the stamp, and he filled up a form of cheque at the back of the deposit note and gave it to her. The note remained in her possession till Jan. 15, 1888, when Mr. Dillon died. The deposit note was in the following form :

"No. 374. London and Westminster Bank, Ltd. £580—91, Westminster Bridge Road, Lambeth, Aug. 25, 1886.—Received from Mr. James Dillon, five hundred and eighty pounds sterling, to the credit of his deposit account. For the London and Westminster Bank, Ltd.:—Entd.—George Bankes, Accountant, A. F. Esse, jun. manager. This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the 'Times' newspaper. When the money is withdrawn or the interest paid the depositor must sign the cheque on the back hereof, first affixing a penny draft stamp. If part only is withdrawn a new receipt will be given for the balance."

A On the back of the deposit note was the following form of cheque :

"London, , 18 .—To the London and Westminster Bank, Ltd., Lambeth Branch.—Pay to self or bearer five hundred and eighty pounds and interest. £580."

B Miss Duffin claimed the amount of the deposit as a donatio mortis causa. James Dillon by his will appointed Miss Duffin and her brother and a niece executors of his will. One of the residuary legatees raised the question whether under the above circumstances there was a good donatio mortis causa to Miss Duffin. KEKEWICH, J., decided in favour of Miss Duffin, and the residuary legatee appealed.

Cozens-Hardy, Q.C., and *Method* for the residuary legatee.

C *Warmington, Q.C.*, and *Bramwell Davis* for the donee.

COTTON, L.J.—I will deal first with the point raised as to the evidence brought forward to substantiate the claim of the lady who claims to be entitled to this donatio mortis causa. The only witness who can speak to what took place when the deposit note was handed over is the lady herself, and if her story is correct there can be no doubt that the deceased did hand over to D her the deposit note. KEKEWICH, J., relied on the accuracy of her statement. It is said she made a mistake as to the exact time when the gift was made; but there is nothing more usual than for a person, speaking with general accuracy and on most points with complete accuracy, to make a slight mistake as to the time of some particular occurrence in a matter like this. In my opinion it would be wrong, when KEKEWICH, J., who saw the lady and heard her E evidence, believed her story, for us on the grounds put forward to treat her evidence as unreliable.

Then it is said that her evidence was not corroborated, and that the court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone, unless it be corroborated. I do not think that this proposition is now law. Besides, in my opinion, there is corroboration here in the sense F that the document produced bears the signature of the deceased. For what possible reason should he have signed this just before his death unless he meant to give it to her? It was contended that she was his executrix, and that it was to enable her in that capacity to get the money more easily; but I think that could hardly have been the reason. In my opinion the circumstances strongly corroborate her evidence. If so, there was no doubt a donatio mortis G causa if this document was capable of being the subject of one.

In considering that question I will first deal with the difference between the present case and other cases cited in argument. I was surprised to find that no evidence was brought forward on either side to show what the practice of the London and Westminster Bank and other banks is which put a memorandum of this kind on their deposit notes, or why they put it there. In the absence H of such evidence, I come to the conclusion that, in order to preserve convenient evidence when the money is withdrawn, they put this form of cheque on the note, that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay back the money unless the cheque is signed and produced. I think they would have no power to withhold the money altogether in case from any cause the cheque is not I signed; but they rightly require some reasonable explanation to be given to justify them in paying without the production of this document filled up in due form as required. I do not think the insertion of this provision has the effect of placing the account in which this money stands in the same position as a balance on an ordinary drawing account, so as to prevent the fund from being given away as a donatio mortis causa.

It is said that this is the first time that this question whether a deposit note is a good subject of a donatio mortis causa has come before the Court of

Appeal in England, and we are asked and have power to review the cases. A
 There has, however, been a current of decisions in the courts of judicature in
 England in favour of the donation, and there is a decision of the Court of Appeal
 in Ireland which takes the same view. But, to deal with the question on
 principle, why should not this document be a good subject of donatio mortis
 causa? It is true that the fact of the cheque having been filled in and signed B
 does not give the donee a title at law to be paid, because it was not presented
 till after the death of the drawer. But why is there not a good donatio mortis
 causa apart from the cheque?

Duffield v. Elwes (1) is in point as to that. It shows that there may be a
 good donatio mortis causa of an instrument which does not pass by delivery,
 and that the executors of the drawer would be considered as trustees for the
 donee for the purpose of giving effect to the gift. The judgment of KNIGHT BRUCE, C
V.-C., in *Moore v. Darton* (2), is very instructive as showing what kind of
 instruments may be the subjects of donatio mortis causa. There a document
 was executed when a deposit of money was made. The mere fact of the
 deposit would create a debt, but the document, besides acknowledging the
 receipt of the money, expressed the terms on which it was held, and showed D
 what the contract between the parties was. It was held that the delivery of
 that document was a good donatio mortis causa of the money deposited, and
 so, in my opinion, was the delivery of the deposit note in the present case.
 The delivery gives no legal title to the donee, nor did the delivery of the
 security in *Duffield v. Elwes* (1); but the House of Lords there laid it down
 that the executors become trustees for the donee, and that they are bound to E
 do everything which may be necessary in order to enable the donee to get
 the money.

No doubt that is anomalous, and it would not be so in the case of a gift inter
 vivos. The court does not give any assistance to mere volunteers in such cases, and
 would not interfere to compel either the donor or his executors to perfect the
 gift. The doctrine is, therefore, anomalous, and peculiar to the case of a
 donatio mortis causa. It is true that here the assistance of the court might F
 be dispensed with, the donee herself being one of the executors; but I do not
 rely on that. Had the executors all been strangers, they must, according to
Duffield v. Elwes (1), lend their names to enable her to recover the money, she
 having an equitable title to it. The same view was taken in the Irish case,
Cassidy v. Belfast Banking Co. (3), by the Court of Appeal in Ireland, G
 though in that case the proceeding was irregular, and the executors, and not
 Cassidy, would have been the proper plaintiffs. In my opinion the appeal fails,
 and should be dismissed

Re Mead, Austin v. Mead (4), was much relied on by the residuary legatee, but
 it is quite distinct from the present case, for there the donor did not intend
 to give the deposit note, but only to give by means of a cheque a part of H
 the money deposited.

LINDLEY, L.J.—I am also of opinion that the decision of *KEKEWICH, J.*,
 was correct on both the points raised in this appeal before us. We were asked
 to overrule the judge's decision upon the evidence. It would be very difficult—
 I do not say impossible—for us to do so when he has seen and heard the witness, I
 and we have not. I am bound to say that, having attended to the evidence
 which has been read, I fully believe the lady's story.

Then it is said that, even assuming the deceased intended to make a donatio
 mortis causa, this deposit note cannot be made the subject of donatio mortis
 causa. Why should it not? There is at first sight this difficulty, that the note
 is not a negotiable instrument, and cannot therefore be sued upon in the donee's
 own name, and the gift being voluntary, the court, according to its ordinary
 principles, will not compel either the donor or his executors to do anything to

A perfect it. But that difficulty was set at rest ages ago. SIR J. LEACH, V.-C., decided, in *Duffield v. Elwes* (1), that the court would not under circumstances like those of the present case assist the voluntary donee to obtain the benefit of the gift; but that decision was reversed on appeal, and the reasoning of the judge condemned, and LORD ELDON said that the principle that a court of equity will not assist a volunteer to perfect an incomplete gift does not apply to a donatio mortis causa. Why should not the court assist the donee in the present case?

It is said that there was no good donatio mortis causa because a man cannot make such a gift of his own cheque. I will assume that that proposition is correct, though I think it may some day require consideration. But assuming it was correct, I think that it does not dispose of the present case. There is indeed upon the deposit note a form of cheque payable to bearer which has been filled up, stamped, and signed. But that is a mere means of preserving evidence of the payment of the money deposited. The thing that is given is the deposit note, and not the cheque, and I am convinced that a perfectly valid donatio mortis causa can be made of this deposit note. The authorities are all in favour of that view, but we were asked to overrule them. It would be a strong thing to do so after they have been acted on for so many years; but, apart from that consideration, I think that on principle we ought to affirm them. I agree that this appeal fails.

LOPES, L.J.—The first point here is, whether this donatio mortis causa was proved. In my opinion the judge was quite right in believing the story told by this lady. It is true that there was a certain discrepancy in her statements; but the learned judge, having seen and heard her and considered the rest of the evidence, came to the conclusion that her story was to be believed, and I see no reason for thinking that conclusion erroneous. Her evidence was corroborated on almost every point on which under the circumstances any corroboration could be expected.

There is the further question to be considered, whether this deposit note was a good subject of donatio mortis causa. The law—though I am not so familiar with it as my learned brethren—seems to be well established. It seems that the cheque of another person than the donor, a promissory note, and an ordinary deposit note, are good subjects of donatio mortis causa. But exception is taken to the deposit note in this case on the ground of the form of cheque upon the back of it. In my opinion that does not in any way alter the case. It appears to me to have been merely an arrangement by the bankers to enable them more conveniently to preserve evidence of the money having been withdrawn. I think it was clearly the intention of the donor to give the donee not merely a cheque, but the deposit note. In my opinion, the decision of the learned judge was quite correct, and this appeal must be dismissed.

Solicitors: *Gedde, Kirby & Millett, H. F. & E. Chesters.*

[Reported by A. J. SPENCER, Esq., Barrister-at-Law.]

PENNY v. HANSON

[QUEEN'S BENCH DIVISION (Denman and Mathew, JJ.), February 25, 1887]

[Reported 18 Q.B.D. 478; 56 L.J.M.C. 41; 56 L.T. 235;
35 W.R. 379; 3 T.L.R. 409; 16 Cox, C.C. 173]

Criminal Law—Vagrancy—Fortune-telling—Intent to deceive and impose—Statement of ability to forecast future—No person's fortune told—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4.

By s. 4 of the Vagrancy Act, 1824: "Every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and a vagabond . . ."

The appellant advertised in newspapers that he could cast nativities and answer astrological questions. The informant, a detective, wrote to the appellant asking for information and received a circular in which, after stating his views on astrology as a science, the appellant stated that, on being informed of the birth dates of the persons who consulted him, he would, on payment of certain sums of money, forecast their future. Nothing was told to the informant as being his fortune and there was no evidence whether or not the appellant believed implicitly in his science.

Held: the advertisements and circular amounted to a pretence or profession to tell fortunes under s. 4 of the Vagrancy Act, 1824, notwithstanding the fact that the informant's fortune was not in fact told.

Notes. Section 4 of the Vagrancy Act, 1824, has been repealed in so far as it extends to persons purporting to act as spiritualistic mediums or to exercise any powers of telepathy, clairvoyance or other similar powers, or to persons who, in purporting so to act or to exercise such powers, use fraudulent devices: see Fraudulent Mediums Act, 1951 (30 HALSBURY'S STATUTES (2nd Edn.) 40), which makes new and express provision for the punishment of such fraudulent persons.

Referred to: *Lewis v. Fermor* (1887), 18 Q.B.D. 532; *Davis v. Curry*, [1918] 1 K.B. 109.

As to fortune-telling, see 10 HALSBURY'S LAWS (3rd Edn.) 699; and for cases see 15 DIGEST (Repl.) 924, 925. For the Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202.

Case referred to in argument:

Monck v. Hilton (1877), 2 Ex. D. 268; 46 L.J.M.C. 163; 36 L.T. 66; 41 J.P. 214; 25 W.R. 373, D.C.; 15 Digest (Repl.) 924, 8861.

Case Stated by a metropolitan magistrate.

Upon the hearing of an information preferred by the respondent against the appellant under s. 4 of the Vagrancy Act, 1824, charging that the appellant did unlawfully pretend to tell fortunes to deceive and impose on one Timm Khurt and others of Her Majesty's subjects, it was proved or admitted that the appellant had caused to be inserted in various newspapers advertisements to the following effect:

"Neptune, the astrologer's permanent address, is 12, Grenville Street, Brunswick Square, London, W.C. Terms sent on application.

Wanted everyone to have their own nativity cast yearly; advice given and astrological questions answered. For terms send stamps to "Neptune," 12, Grenville Street, Brunswick Square, W.C."

A Khurt, a detective, answered one of the advertisements by a letter under an assumed name and address as follows :

"Sir,—I have seen your advertisement and should like to know further particulars with a view to receive advice.—I am, Sir, yours truly, Timm Nicholans."

B In reply he received a printed circular as follows :

"ASTROLOGY

C Is a science giving cause and effects; without this it could not be accurately termed a science. In all ages some of the most eminent men have been practical astrologers; even now it is the same. In ancient time astrologers occupied more prominent positions than any other class of prophets, being men of science and knowledge. We do not consult the spirits of the so-called dead, nor use any unlawful means; neither do we practise any of the black arts, or other mysteries, nor use enchantments (mystery is only a word that expresses our want of knowledge).

D "The works of the Great First Cause are all governed by immutable and perfectly natural laws, working in order and harmony. Every cause produces its own effects. Every planet in our solar system has its own orbit (course to run) round the sun, from which it cannot deviate. It is the same in the animal and vegetable kingdoms, and man is no exception to the Divine laws which govern all things. We all have our own orbit or sphere (sun) of usefulness, around which we revolve in this life. By our own mistakes
E in life we create clouds that sometimes obscure our path, and in the desire for betterment we have a divine right to consult the works of the Great First Cause, who has declared that the stars are for signs (of what? the past, present, or future) and for seasons.

F "By the positions of the planets in the nativity, and their aspects to each other, we are able to give the general descriptions of person, the diseases liable to, health, mental abilities and disposition, the occupation most suitable, where and when successful, marriage, travelling, friends, etc., and the events of everyday life. Interviews are unnecessary; all that is required is the time of birth as near as possible, day of week, day of month, year, sex, and birthplace. . . .

G "A stamped addressed envelope must accompany every communication where a reply is required.

H "All work done will be in accordance with the remuneration received, and will be executed as early as possible.—Address R. H. Neptune, 12, Grenville Street, Brunswick Square, London, W.C."

I On the part of the appellant it was contended (i) that there was no evidence of pretence or profession to tell the fortune of Timm Khurt, the informant, inasmuch as there was nothing whatever told to him as being his fortune, and that by the Act such pretence or profession must consist of the actual telling and purporting to tell a fortune; (ii) that the profession made by the appellant in his circular was that he could apply certain rules (which were known to those who had studied astrology) to the particular cases of individuals, and although this was coupled with an expression of opinion that such fixed rules were sound, and when properly applied would give an indication of what was likely to happen, yet there was no pretence by the appellant that he had any mysterious personal power of divination, such as might impose on the credulity of the superstitious, which was the mischief aimed at by that portion of the statute under which the offence was charged; (iii) that there was no evidence of intent to deceive as required by the words of the Act, inasmuch as there was no evidence

that the appellant had not the most implicit faith in the science he professed to apply, namely, astrology.

The magistrate was of opinion that there was evidence that the appellant did pretend and profess to tell fortunes, and that he did it to deceive and impose on Timm Khurt and others of Her Majesty's subjects within the meaning of the statute. He, accordingly, convicted the appellant and fined him £5.

By the Vagrancy Act, 1824, s. 4 :

"Every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and a vagabond. . . ."

Murphy, Q.C., (*Wormald* with him) for the appellant.

Poland for the respondent, was not called on to argue.

DENMAN, J.—This is an instance in which the doctrine *res ipsa loquitur* applies. It is nonsense to suppose that in these days of advanced knowledge the appellant really did believe he had the power to predict a man's future by knowing at what hour he was born, and the position of the stars at the particular moment of his birth. No person who was not a lunatic could believe he possessed such power. There was, therefore, no need on the part of the prosecution to negative his belief in such power or capacity. The magistrate rightly drew an inference that the appellant had an intent to deceive and impose on the prosecutor. I do not decide whether merely telling fortunes is or is not an offence under the statute, but this advertisement and circular amounted to a pretending and profession to tell fortunes within s. 4 of the Act. I think there was ample evidence on which we ought to hold the magistrate was right.

MATHEW, J.—I am of the same opinion.

Solicitors: *Webb & Templeton; Hare & Co.*, for the Solicitor to the Treasury.

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

DE FRANCESCO v. BARNUM AND OTHERS

[CHANCERY DIVISION (Fry, L.J.), August 4, 5, 1890]

[Reported 45 Ch.D. 430; 60 L.J.Ch. 63; 63 L.T. 438; 39 W.R. 5; 6 T.L.R. 463]

Master and Servant—Apprentice—Infant apprentice—Apprenticeship deed—Benefit of infant—Contract to be read as a whole.

By an apprenticeship deed between an infant, her parent, and the plaintiff, a dancing master, the infant was apprenticed to the master for a term of seven years to be instructed in stage dancing. The deed provided that the infant should not contract matrimony within the said term, that her services should be entirely at the disposal of the master, and that she should not accept any professional engagement without his full consent. The master agreed that he would, with qualified assistants, teach the apprentice dancing, and make her small payments for each night on which she had an engagement. The deed also gave the master the right to engage the apprentice for performances in any foreign country, and provided that he should during such engagement pay her a certain sum and provide board and lodging. The deed contained no provision for any remuneration to the infant except during an engagement, nor any

undertaking by the master to provide her with any engagement or with clothes, lodging, or food, except when abroad. It was also provided that if at any time during the seven years the master should be of opinion that the apprentice was unfit from any cause (physical or otherwise) to pursue the vocation of a stage dancer, he might put an end to the deed by giving the parent notice to that effect. The infant entered into an engagement to perform as stage dancer for the defendant B., without the consent of the master.

In an action brought by the master for specific performance of the contract, an injunction, and damages against the defendant B. and his agent for inducing breaches of the contract,

Held: the court must regard the contract as a whole and the circumstances of the case; the contract contained stipulations of an unusual character which placed an inordinate power in the hands of the master; and, therefore, the infant was not bound by the contract, and the action failed.

Notes. Considered: *Whitwood Chemical Co. v. Hardman* (1891), 39 W.R. 433. Applied: *Corn v. Matthews*, [1893] 1 Q.B. 310. Considered: *Clements v. London and North Western Rail. Co.*, [1894] 2 Q.B. 482; *Roberts v. Gray*, [1911-13] All E.R. Rep. 870; *Wilkins v. Weaver*, [1915] 2 Ch. 322. Approved: *Mackinlay v. Bathurst* (1919), 36 T.L.R. 31. Considered: *Doyle v. White City Stadium, Ltd.*, [1934] All E.R. Rep. 252. Referred to: *Long v. Smithson* (1918), 88 L.J.K.B. 223; *Jones Bros. (Hunstanton), Ltd. v. Stevens*, [1954] 3 All E.R. 677.

As to infant's capacity in contract, see 21 HALSBURY'S LAWS (3rd Edn.) 138 et seq.; and for cases see 28 DIGEST (Repl.) 498 et seq.

E Case referred to:

(1) *Gylbert v. Fletcher* (1629), Cro. Car. 179; 79 E.R. 757; 34 Digest (Repl.) 318, 2364.

Also referred to in argument:

Lumley v. Gye (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 34 Digest (Repl.) 210, 1474.

Bowen v. Hall (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 34 Digest (Repl.) 211, 1480.

Leslie v. Fitzpatrick (1877), 3 Q.B.D. 229; 47 L.J.M.C. 22; 37 L.T. 461; 41 J.P. 822; 34 Digest (Repl.) 44, 198.

Cooper v. Cooper (1888), 13 App. Cas. 88; 59 L.T. 1, H.L.; 28 Digest (Repl.) 553, 689.

Branch v. Ewington (1780), 2 Doug. K.B. 518; 99 E.R. 330; 34 Digest (Repl.) 325, 2446.

R. v. Inhabitants of Arundel (1816), 5 M. & S. 257; 104 E.R. 1045; 34 Digest (Repl.) 317, 2352.

Meriton v. Hornsby (1747), 1 Ves. Sen. 48; 27 E.R. 883; 34 Digest (Repl.) 332, 2539.

Hill v. Allen (1748), 1 Ves. Sen. 83; 1 Dick. 130; 27 E.R. 906; 34 Digest (Repl.) 332, 2540.

R. v. Lord (1848), 12 Q.B. 757; 3 New Mag. Cas. 87; 3 New Sess. Cas. 246; 17 L.J.M.C. 181; 12 L.T.O.S. 191; 12 J.P. 759; 12 Jur. 1001; 116 E.R. 1055; 34 Digest (Repl.) 46, 208.

Meakin v. Morris (1884), 12 Q.B.D. 352; 53 L.J.M.C. 72; 48 J.P. 344; 32 W.R. 661, D.C.; 34 Digest (Repl.) 318, 2367.

R. v. Inhabitants of Laindon (1799), 8 Term Rep. 379; 2 Const. 378; 101 E.R. 1444; 34 Digest (Repl.) 314, 2311.

Action brought by the plaintiff, a dancing master, to enforce a contract of apprenticeship made with an infant, and claiming damages for enticement and alleged breach of that contract.

By an indenture dated Dec. 6, 1886, and made between the defendant Helen Maude Parnell (an infant of the age of fourteen years), thereafter called the said

apprentice of the first part, the defendant Elizabeth Parnell, widow (the mother of the said infant, thereafter called the parent), of the second part, and the plaintiff (a teacher of stage dancing) of the third part, it was witnessed as follows:

"That in pursuance of the said agreement in this behalf the said apprentice, by and with the consent of the parents, doth put herself apprentice to the said Guiseppe Venuto de Francesco, to learn his art, and with him (after the manner of an apprentice) to serve from Dec. 6, 1886, until the end and term of seven years from thence next following, and to be fully complete and ended, during which term the said apprentice her said master faithfully shall serve, his secrets keep, his lawful commands everywhere obey. She shall do no damage to her said master nor see it to be done by others, but that she to the utmost of her power shall let or forthwith give warning to her said master of the same. She shall not waste the goods of her said master nor lend them unlawfully to any. She shall not contract matrimony within the said term. She shall neither contract professional engagements nor accept such unless with the full written permission of her said master. She shall not absent herself from her said master's service unlawfully, but in all things as a faithful apprentice, she shall behave herself towards her said master and all his during the said term. And the said Guiseppe Venuto de Francesco, in consideration of the faithful services of the said apprentice, in the art of choreography which he useth, by the best means that he can shall teach and instruct or cause to be taught and instructed his said apprentice during the said term, but subject in all respects to the stipulations hereinafter mentioned. And this indenture also witnesseth that, in pursuance of the said agreement in this behalf and in consideration of the premises, the parents and the said Guiseppe Venuto de Francesco hereby mutually covenant and agree with each other as follows, that is to say,

"1. That the said Guiseppe Venuto de Francesco, in conjunction with qualified assistants, shall instruct the said apprentice in the higher branches of the choreographic art for the term of seven years, to be computed from the date of these presents.

"2. That the said Guiseppe Venuto de Francesco shall pay to the said apprentice the following remuneration for all or any choreographic engagements of the said apprentice during the said terms, viz., in London and suburbs for the first three years 9d. per night, and 6d. for each matinée, and for the remainder of the said term 1s. per night, and 6d. for each matinée. The said Guiseppe Venuto de Francesco shall have the right to engage the said apprentice for performances in America or in any colonial and foreign State, and shall pay to the apprentice during the continuance of such engagement the sum of 5s. per week, and also provide the said apprentice with board and lodging during such last-mentioned engagement.

"3. In the event of there not being sufficient dancing, the apprentice may be required for utility business, and shall be paid for such service at the rate of 6d. per night or for such matinée.

"4. The services of the said apprentice shall be entirely at the disposal of the said Guiseppe Venuto de Francesco, and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said Guiseppe Venuto de Francesco.

"5. The said apprentice shall take and receive lessons daily (of one hour's duration) except Saturdays and Sundays, and except in case of ill-health, during performances, rehearsals, public holidays, or when otherwise unavoidably prevented.

"6. The said apprentice shall abide by and conform to the rules, orders, and regulations of the theatre where the said apprentice shall be engaged.

"7. The parents and apprentice shall conform to all the requirements of the Education Acts, and the parents shall furnish the said Guiseppe Venuto de Francesco on the first day of each month with a governess's certificate that the said apprentice's scholastic obligations are strictly adhered to.

"8. In case the said Guiseppe Venuto de Francesco shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing, the said Guiseppe Venuto de Francesco may put an end to these presents and every matter and thing herein contained, by giving to the parents and the said apprentice notice in writing to that effect.

"9. Should the parents fail in the fulfilment of any of the terms of these presents on his or her part herein contained, or if the said apprentice shall fail to comply with the rules and regulations which may be necessary for the fulfilment of any engagement, or accept any engagement without having previously obtained the written consent of the said Guiseppe Venuto de Francesco, or practise the art of stage dancing under the direction of any person or persons other than the said Guiseppe Venuto de Francesco or his assistants, or withhold her talents and best endeavours, or by direct or indirect insubordination, or fail to attend practice or rehearsal regularly and punctually, or decline to accept any engagement or stage business of which the said Guiseppe Venuto de Francesco may approve, or not give proper attention to her duties at the theatre or elsewhere, and above all should the conduct of the apprentice be liable to blame in or out of school, the said Guiseppe Venuto de Francesco may by notice in writing addressed in a registered letter to the parents or the survivor of them, put an end to these presents, and the parents shall thereupon pay as and for liquidated damages to the said Guiseppe Venuto de Francesco the sum of £50."

Another indenture of the same date, containing similar provisions, was made between the defendant Ada Parnell, an infant of the age of twelve years, of the first part, the defendant Elizabeth Parnell of the second part, and the plaintiff of the third part.

In August, 1889, the apprentices, without the consent of the plaintiff, arranged with the defendant Parravicini, as agent for the defendant Barnum, to perform as stage dancers at Olympia, each receiving one guinea per week. The plaintiff having become aware of this arrangement in November, 1889, commenced this action against Barnum and his agent Parravicini, and Elizabeth Parnell, Helen Maude Parnell, and Ada Parnell, claiming specific performance of the indentures, an injunction restraining the defendants Helen Maude Parnell and Ada Parnell from performing and the other defendants from permitting or allowing them to perform without the plaintiff's consent, and damages against the defendants Barnum and Parravicini for inducing the infants, the plaintiff's pupils, to break their engagements with him. On Nov. 22 the plaintiff moved for an injunction until the trial of the action or further order restraining the defendants Barnum and Parravicini from inducing or allowing the defendants Helen Maude Parnell and Ada Parnell to perform as stage dancers at Olympia without the written permission of the plaintiff, and to restrain the infant defendants from performing, and the defendant Elizabeth Parnell from allowing them to perform, at Olympia or elsewhere, without the consent of the plaintiff; but CHITTY, J., refused to grant the injunction on the ground that *Gylbert v. Fletcher* (1) had established that the master could not sue his apprentice on the covenants to serve in the apprenticeship deed purporting to be entered into by the apprentice, therefore the negative clauses could not be enforced by injunction. The action now came in for trial before FRY, L.J., sitting as an additional judge of the Chancery Division.

The plaintiff in his evidence deposed that before the infant defendants signed the agreements to dance at Olympia he had given Barnum's agent, Parravicini, notice that they were apprenticed to him, though Parravicini denied this. It also appeared that the plaintiff's establishment had a high reputation, and that, owing to the poverty of most of the pupils, the only remuneration received by the plaintiff for his instruction was the pay he received from theatrical managers for the services of his pupils during the term of their apprenticeship. The plaintiff had received no premium in respect of the infant defendants, and they had received some money from him as payment for their services.

Neville, Q.C., and *Kalisch* for the plaintiff.

Warmington, Q.C., and *W. G. Lemon* for the defendant Barnum.

Wilkinson for the defendant Parravicini.

W. H. Stevenson for the infant defendants.

Sinclair Cox for the defendant Mrs. Parnell.

FRY, L.J.—This is an action brought by Signor de Francesco, who is the proprietor and manager of a large school for the teaching of ballet-dancers, against several defendants. Those defendants are, in the first place, Mr. Barnum, who, at the time this action was brought, was described as proprietor of a certain show known as Barnum's Show at Olympia. The next defendant is a Signor Parravicini, who is a theatrical agent in London, and who was employed by Mr. Barnum to engage ballet-dancers for him. The next defendant is Mrs. Parnell, who is the mother of the two infants, the ballet-girls; and lastly come the two infant defendants, who are apprenticed to Signor de Francesco. Those are the parties to the action.

In the first place, with regard to the two infants, the case appears to me to have been determined by CHITTY, J., when it came before him on the motion. I say that for this reason: that he pointed out in his judgment that, so far back as the reign of Charles I, it had been determined that an infant could not be sued at law upon an apprenticeship indenture; there are other remedies which the master may have recourse to, but that he cannot sue the apprentice at law; and furthermore that there is no case in which the apprentice has been sued in equity; and he came to the conclusion that that authority was binding on him unless after the various statutes, the statute of Elizabeth and the subsequent statutes with regard to apprenticeship were all examined, there is some explanation given of that authority. Counsel for the plaintiff very candidly stated, after examining the statutes, that he is unable to offer any explanation of that authority, and therefore he very wisely and rightly suggested that I should probably not want to reconsider that branch of the argument, but consider myself bound by what CHITTY, J., had done in this case. Therefore the case has not been elaborately argued on that point. I only on this part of the case follow CHITTY, J., at the same time saying that nothing that has occurred has created, in my mind, any reasonable belief that the decision of CHITTY, J., was not perfectly in accordance with the law. For my own part, I should be very unwilling to extend decisions, the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interests of mankind that the rule of specific performance should be extended to forcing people to maintain permanent and continuous relations which they are unwilling to maintain. I think the courts are bound to be jealous in case they should turn contracts of service into contracts of slavery, and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner. So much for the case against the infants.

With regard to the first defendant Mr. Barnum, the case stands in this way: It is alleged that he has enticed away the apprentices of Signor de Francesco,

A that he has done so with the knowledge of their engagement with Signor
de Francesco, and consequently what he did was in law malicious, and he
therefore is liable in damages for the malicious act. To that his defence is that
the indentures of apprenticeship which were entered into between the infants and
B Signor de Francesco were not valid and binding in law; and that that being so,
the whole structure of the case against him fails; and he further argued that
he had not done anything which was malicious, and that there was no employ-
ment in fact of which they were deprived or from which they were enticed away.
He has further urged that there is no evidence of damage before me to justify
my pronouncing a judgment against him for damages.

The most important question in this case is the first of those propositions
C which has been urged at the Bar on Mr. Barnum's behalf. Is there, or is there
not, in this case a valid contract between the infants and Signor de Francesco?
From a very early date it has been held that one exception to the incapacity of
an infant to bind himself relates to contracts for his good teaching or instruction
whereby he may profit himself afterwards, to use LORD COKE's language. There
is another exception which is based on the desirability of infants employing
D themselves in labour; therefore, where you get a contract for labour and you have
a remuneration of wages, that contract I think must be taken to be *prima facie*
binding upon the infant. At any rate it is plain that a contract by which an
infant binds himself to learn an art or trade to his own future profit is *prima*
facie valid and binding. But no doubt the law has grafted on that general
principle certain well-known and defined exceptions. It has been held at law from
E the time of LORD COKE and onwards, that an infant cannot bind himself to
be liable to a penalty, that the contract to impose a penalty on an infant is
void. Again it has been held that a contract by which an infant renders his
vested interest subject to forfeiture is void against the infant; and again I
think it may be taken that, wherever you find extraordinary or unusual stipulations
contained in a contract either of apprenticeship or of service, there the court at
F least must be on the watch lest the infant should be held to be bound by a
contract which is not reasonable, and which is not good in law and which is
not maintainable.

I approach this subject with the observation that it appears to me the question
is: Is the contract for the benefit of the infant? Not, Is any one particular
stipulation for the benefit of the infant? Because it is obvious that the contract
G of apprenticeship or the contract of labour must, like any other contract, contain
some stipulations for the benefit of the one contracting party, and some for the
benefit of the other. It is not because you can lay your hand on a particular
stipulation which you may say is against the infant's benefit that therefore the
whole contract is not for the benefit of the infant. The court must look at the
whole contract, having regard to the circumstances of the case, and determine
H subject to any principles of law which may be ascertained by the cases, whether
the contract is or is not beneficial. That appears to me to be in substance a
question of fact.

In the present case, I must bear in mind that the two girls who were
apprenticed in 1886 were at that time not ignorant of the art of dancing. It
appears they had learnt something of it from their mother, who herself had been
I connected with the theatre, and also from friends who were familiar with the
art of dancing. By this indenture which I have already mentioned, dated Decem-
ber, 1886, the defendant Helen Maude Parnell, with the consent of her parents,
put herself apprentice to Signor de Francesco to learn from Dec. 6, 1886, until
the full end of the term of seven years thence next following, and the deed
contains the usual stipulations with regard to faithful service by the apprentice
during that term. There is the further stipulation that she shall not contract
matrimony within the said term; and further, that she shall not accept pro-
fessional engagements unless with the full written permission of her master.

So far, the contract with the exception of the stipulation about matrimony seems to be of a usual description. But then we come to the clauses by which Signor de Francesco undertakes his duties towards the infant. In the first place, he agrees that he will with qualified assistants instruct the apprentice in what are described as the higher branches of the "choreographic art," which I understand to be dancing, "for the term of seven years." Then he agrees to pay the apprentice

"the following remuneration for all or any choreographic engagements of the said apprentice during the said term, namely in London and suburbs, for the first three years 9d. per night, and 6d. for each matinée, and for the remainder of the said term 1s. per night and 6d. for each matinée."

Then further he shall have the right to engage the apprentice for performances in America or any foreign or colonial State, and shall pay to the apprentice during the maintenance of such engagement abroad the sum of 5s. a week and provide the apprentice with board and lodging during such last-mentioned engagement.

It is obvious that that is a very unusual stipulation. There is no provision for remuneration of any sort or kind except during the engagement. There are no wages to be paid to the girls except during the engagement; the matter therefore rests with Signor de Francesco as to how far these children shall take any wages at all. Besides this it must not be forgotten that he has a right to send these apprentices for performances to any foreign State or foreign country, which is a circumstance which, if exercised, would remove the infants, or probably would remove the infants, from their maternal care. Perhaps it is right on this point that I should say that, so far as the evidence goes, I am satisfied that the establishment of Signor de Francesco is carried on in a thoroughly careful and respectable manner. It appears that whenever the girls go anywhere out of London they are placed under the care of matrons, whose duty it is to look after them, and that a similar care is extended to them when they have been to a performance at the Crystal Palace, when they had to perform the journeys between London and Sydenham. The mother, who was in the witness-box, says explicitly so far as regards the care while the children had been under Signor de Francesco's management she has no complaint to make whatever. I say that by way of parenthesis. At the same time it is obvious that the clause I have read places a very large power indeed in the hands of Signor de Francesco.

The next provision is that if there is not sufficient dancing the apprentice may be required to do utility business and receive certain remuneration. That would not seem unreasonable. Then it is provided,

"The services of the apprentice shall be entirely at the disposal of Signor de Francesco, and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said"

Signor de Francesco. Be it observed there is no corresponding obligation on the part of Signor de Francesco. He requires the infant to enter into no engagements without his permission, but does not in any corresponding way bind himself to any extent to provide engagements or employment for the infant.

Then comes the provision with regard to the apprentices receiving lessons and a provision as to the rules and regulations of the theatre; they all seem reasonable. Then there is a provision, which is praiseworthy, requiring the infant to conform to the Education Acts; and then comes cl. 8 :

"In case the said Guiseppe Venuto de Francesco shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing the said Guiseppe Venuto de Francesco may put an end to these presents and every matter and thing herein contained by

A giving to the parents and the said apprentice notice in writing to that effect."

Be it observed that that clause is provided to operate throughout the whole seven years. It might at any time be enforced subject only to this, that it must be after a fair trial. But what is a fair trial? How long after the fair trial this notice may be given is not stipulated for in any manner whatsoever.

B We have, therefore, to put it shortly, the contract under which the infant is placed, I might almost say, absolutely at the disposal of the teacher. The child may be required to undertake any engagements at any theatre in England, or any theatre in the United Kingdom, or anywhere else in the world. The child is to receive no remuneration, no maintenance except when employed,

C there is no correlative obligation on Signor de Francesco to find employment for the child, there is power in him to put an end to a child's chances who is under his care at any time during the term or any part of the term.

Those are stipulations of an extraordinary and an unusual character which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation on his part. I cannot, therefore, say that

D on the face of this instrument it appears to be one which the court ought to hold for the benefit of the infant.

I will suppose myself sitting in chambers administering the jurisdiction in this division of the court over infants, and I ask myself whether I should approve of such a contract as that as being for the benefit of an infant ward of court, assuming of course in so doing the infant ward of court was one whom it was

E desirable to apprentice to the art of a ballet dancer. I cannot say that I should hold anything of the kind. It may be that evidence could be tendered which would show me that no other form of contract is available, that the same contract prevails in every school, and that no person can hope to enter the profession of a ballet dancer except by an apprenticeship in these terms. That may be so. But no evidence of the sort has been tendered before me. I have undoubtedly

F this in favour of upholding it, that the school of the plaintiff is said by Mrs. Parnell to be a very excellent school, and for anything I know it may be the best in London, and I have already said Signor de Francesco is a person who is well able to and does protect the interests of the girls who are under his care on their tours and so on. At the same time this, it seems to me, does place in his hands an inordinate power which, except under the pressure of some

G evidence which has not been given, I cannot help being of opinion is not for the infant's benefit.

I hold, therefore, this instrument is one by which the infants are not bound, and consequently Mr. Barnum, having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. Barnum.

H That really concludes the case, because the same observations cover any suggestion that may be made with regard to Mr. Parravicini and the mother. But, with regard to Mr. Parravicini, it is right I should express an opinion upon the point that has been raised between him and Signor de Francesco. Signor de Francesco relies for his case against Signor Parravicini upon notice which he says he personally gave Parravicini. I come to the conclusion that it has not been

I proved to my satisfaction that there was any notice given of the contract entered into, and consequently that Parravicini did nothing whatever with any knowledge of the engagement between the plaintiff and the girls. The result of the whole of the observations I have made is this, that I am bound to dismiss the action against all defendants, with costs to be paid by the plaintiff.

Solicitors: *Brandon & Nicholson; H. Levy; Clinton & Co.; Campbell, Reeves & Hooper.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

STONOR v. FOWLE

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Herschell and Lord Macnaghten), November 22, 24, 1887]

[Reported 13 App. Cas. 20; 57 L.J.Q.B. 387; 58 L.T. 1;
52 J.P. 228; 36 W.R. 742; 4 T.L.R. 109]

County Court—Practice—Judgment summons—Order for committal of debtor—
Direction for payment of debt by instalments—Debtors Act, 1869 (32 & 33
Vict., c. 62), s. 5.

Judgment was recovered in the county court against a debtor and an order for payment of a first instalment of £20 was made. The debtor having made default in payment, a judgment summons was issued against him under s. 5 of the Debtors Act, 1869, and the county court judge made an order to commit the debtor to prison for ten days, directing that the warrant was not to issue if the debtor paid the £20 by instalments of £4 a month, commencing in fourteen days. The debtor paid the first two instalments and then defaulted, and a warrant for his arrest and commitment was issued against him.

Held: the order made by the county court judge was in respect of the default in payment of the £20 and had no relation to the payment or non-payment of the instalments of £4, and, accordingly, the order of the learned judge and the warrant were valid.

Decision of the Court of Appeal, 18 Q.B.D. 213, reversed.

Notes. Applied: *Re Blanchard, Ex parte Blanchard*, [1932] All E.R. Rep. 543. Considered: *Re Judgment Debtor* (1935), 51 T.L.R. 524; *Cockburn v. Cockburn*, [1957] 3 All E.R. 260. Referred to: *Re Berkshire County Court Case* (1887), 4 T.L.R. 40; *Re Nuthall* (1891), 64 L.T. 241; *Re Watson, Ex parte Johnston, Johnston v. Watson*, [1893] 1 Q.B. 21; *Bailey v. Plant* (1900), 2 W.C.C. 160; *Saunders v. Swansea Finance Co.* (1905), 21 T.L.R. 317; *Neson v. Metcalfe*, [1920] All E.R. Rep. 763.

As to committal for non-payment of judgment debts, see 2 HALSBURY'S LAWS (2nd Edn.) 639 et seq.; and for cases see 5 DIGEST (Repl.) 1105 et seq. For the Debtors Act, 1869, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 294.

Case referred to:

(1) *Re The Debtors' Act* (1870), 22 L.T. 666; 5 Digest (Repl.) 1111, 8973.

Also referred to in argument:

Marris v. Ingram (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1094, 8818.

Andrews v. Marris (1841), 1 Q.B. 3; 1 Gal. & Dav. 268; 10 L.J.Q.B. 225; 6 Jur. 58; 113 E.R. 1030; 13 Digest (Repl.) 374, 43.

Kinning's Case (1847), 10 Q.B. 730.

Ex parte Kinning (1847), 4 C.B. 507.

Ex parte O'Neill (1850), 10 C.B. 57.

Abley v. Dale (1850), 10 C.B. 62; 1 L.M. & P. 626; 20 L.J.C.P. 33; 15 J.P. 147; 14 Jur. 1069; 138 E.R. 26; 5 Digest (Repl.) 1113, 8984.

Dews v. Riley (1851), 11 C.B. 434; 2 L.M. & P. 544; 20 L.J.C.P. 264; 18 L.T.O.S. 155; 16 J.P. 39; 15 Jur. 1159; 138 E.R. 542; sub nom. *Dews v. Riley, Cox M. & H.* 523; 13 Digest (Repl.) 375, 44.

Davies v. Fletcher (1853), 2 E. & B. 271; Saund. & M. 137; 22 L.J.Q.B. 429; 21 L.T.O.S. 127; 17 J.P. 679; 17 Jur. 894; 1 W.R. 367; 1 C.L.R. 1025; 118 E.R. 769; 13 Digest (Repl.) 375, 46.

Re Park, Ex parte Koster (1885), 14 Q.B.D. 597; 52 L.T. 946; 33 W.R. 606; 2 Morr. 35, C.A.; 5 Digest (Repl.) 1110, 8963.

Kinning v. Buchanan (1849), 8 C.B. 271; 7 Dow. & L. 169; 18 L.J.C.P. 332; 13 L.T.O.S. 546; 13 Jur. 812; 137 E.R. 513; Digest Supp.

- A *Sintzenick v. Lucas* (1793), 1 Esp. 43, N.P.; 21 Digest (Repl.) 231, 249.
Green v. Alston (1857), 1 F. & F. 12.

Appeal by the county court judge from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), reported sub. nom. *R. v. Brompton County Court Judge*, 18 Q.B.D. 213, affirming a decision of the Divisional Court (LORD COLERIDGE, C.J., and MANISTY, J.).

- B On Jan 7, 1886, in an action of *Reeves v. Fowle*, which was brought in the Brompton County Court, the plaintiff recovered judgment against the defendant for £57 2s. 2d., debt and costs, whereupon an order was made on the defendant to pay that amount by two instalments, the first, of £20, on Jan 21, 1886, and the second, of the balance, on Feb. 21. The defendant made default in payment of the first instalment, and a judgment summons was issued against him under s. 5 of the Debtors Act, 1869. This summons was heard on Mar. 4, and an order was made for the commitment of the defendant. The order, as it appeared in the commitment summons book, was in the following terms: "Commitment ten days; suspended fourteen days." Contemporaneously with the making of this order the judge, in accordance with the usual practice of the court, gave a verbal direction to the registrar that the warrant was not to issue at all if the defendant paid the amount by instalments of £4 a month, commencing on Mar. 18. The registrar made a note of this direction on a slip of paper in the following terms, "Fourteen days, £4 a month," but did not enter it as part of the order in the commitment summons book. The defendant paid the first two instalments, but, having made default in the payment of the third, a warrant for his arrest and commitment was issued against him. On June 17, the defendant applied for a copy of the committal order, and received a paper certified by the seal of the court, and admittedly made out by a clerk in the registrar's office of the county court, in which he found that he was to pay monthly instalments of £4, and in default to be committed to prison for ten days. A rule nisi for a prohibition was obtained to restrain all further proceedings on the committal order of Mar. 4, on the ground that, since the defendant had made default in the payment of the £4 instalments, there had not been the necessary inquiry as to his ability and refusal to pay the instalments. The Divisional Court made the rule for a prohibition absolute, and their decision was affirmed by the Court of Appeal.

- G *Sir Richard Webster, Q.C.* and *R. S. Wright (Sir Edward Clarke, Q.C. with them)* for the appellant.
Sir Henry James, Q.C., and *Robert Wallace (Willis, Q.C., with them)* for the respondent.

- LORD HALSBURY, L.C.**—In this case, I desire to say at once that, if I understood the facts to be as assumed by the Lord Chief Justice and by the Court of Appeal, I should entirely agree with the law which they have laid down in their judgments. The two different propositions which have been suggested as guiding the interpretation of the statute are as distinct as anything can be. The Debtors Act, 1869, in that respect giving the jurisdiction to the judges both of the High Court and of the county court, although exercised under different provisions, has prescribed that there shall be in substance an abolition of imprisonment for debt, but has also provided that, if a debtor, having had the means or having the means at the time when the matter comes for adjudication before either the judge of the High Court or the county court judge, wilfully refuses to pay, or has improperly spent the money which he had after the date of the judgment, and has not applied it as he should have done in honesty for the purpose of satisfying the creditor's claim, there shall then be a jurisdiction, exercised by whichever judge exercises the jurisdiction, of sending him to prison, and that that sending of him to prison shall be a punishment

to him for the offence which, on that hypothesis, he has already committed, inasmuch as the Act specially provides that that imprisonment shall not be in satisfaction of the debt; it is an imprisonment for the offence which he has already committed.

In this particular case, there are two views suggested as being, the one or the other, the true view of the facts. A certain debt was due by this debtor, and, on Mar. 4, the debtor having been at a previous court ordered to pay £20, the matter is brought before the judge. It is suggested on the one side that what happened was that the learned judge made an inquiry into the means of the debtor and ascertained on that Mar. 4 that he either had had or had at that date (it is immaterial to inquire which) means whereby that debt might have been discharged, and that, having adjudicated that he had or had had that £20, he had refused or neglected to pay it, and that thereupon the learned judge directed an order for his commitment for ten days for the offence which at that date, namely, Mar. 4, was already consummate, but that he gave a direction to the registrar of the court, in consequence of something which passed between the plaintiff and the defendant in the cause, that, although that warrant of commitment might then and there have issued because the offence had already been committed, yet it might be suspended and not put into execution if the debtor paid £4 a month in discharge of the debt which he had so owed, and had so wilfully refused or neglected to pay.

If that is the true view of the facts, it does not appear to be doubted that that was within the legal competency of the judge. What happened afterwards, whether the debtor had means or had not, whether he did comply with the conditions into which he had entered or not, could in logic or good sense have no relation to the offence which, on Mar. 4, was already consummate. But the parties, with the assent of the judge, appear to have agreed that the extreme rigour of the law might be relaxed if, instead of continuing his refusal or neglect to pay, the debtor would comply with what the plaintiff in the cause was satisfied with, namely, the gradual wiping off of the debt by the payment of £4 a month. And I do not think that any one observation of the learned judges in the courts below, with the single exception perhaps of LOPES, L.J., seems to throw any doubt on such a course being legal. LOPES, L.J., however, rather indicates that it might be a sort of circuitous evasion of the Act of Parliament. I do not share his doubt. On the other hand, it is suggested that the facts of the case were these: that the £20 being due the parties appeared before the learned judge, and that the learned judge made no order for commitment for the non-payment of the £20, because, as the whole thing took place on Mar. 4, I suppose it would be too unreasonable and absurd to suppose that he made two contradictory orders at the same time; that what he did was to make a substituted order with regard to the £20 with which the previous order had dealt, and to reduce the amount payable to instalments of £4 a month.

The question of fact for your Lordships to determine on those materials resolves itself into this question: What was it that the learned judge did at that date, and was there any substituted order made? I have no doubt that the learned judge would, under the Debtors Act, have the power and authority to make such a substituted order had he been so minded. But the answer appears to me to be overwhelmingly conclusive. There is not a fragment of evidence of any such order having been made at all. On the contrary, in the form which is relied on in argument by the respondent, "I hereby certify that the above is a true copy of an entry in the summonses for commitment, interpleader, and minute of orders thereon," I find that every one of the entries included in that certificate is absolutely inconsistent with the existence of any such order as it is suggested to your Lordships was made. I find that the amount for which the summons was issued was £20. I find that the order is not an order for £4, with the additional direction that if not paid the person is to be

A committed; but I find, "Commitment ten days; suspended fourteen days." What does that mean? If the order which is now suggested was made, namely, that the instalment was altered from £20 to £4, and that that was to be paid in future, how could there be any commitment for ten days? There was no default made, and the commitment for ten days would have been totally inappropriate, for the judge could not possibly anticipate that the order would not be obeyed.

B When one looks at the order which was ultimately issued, it appears to be very clear in its terms. Those terms are: "Whereas the defendant hath made default in payment of," what? "of £20 16s."—the odd 16s. being the cost of the hearing, I suppose—

C "And whereas a summons was, at the instance of the plaintiff, duly issued out of this court, by which the defendant was required to appear personally at this court on the 4th day of March, 1886, to be examined on oath touching the means he had then, or had had since the date of the judgment, to satisfy the sum then due and payable in pursuance of the judgment, and to show cause why he should not be committed to prison for such default. And whereas, at the hearing of the said summons it has now been proved to the satisfaction of the court that the defendant now has [or has had] since the date of the judgment, the means to pay the sum then due and payable in pursuance of the judgment, and has refused [or neglected] to pay the same, and the defendant has shown no cause why he should not be committed to prison: Now, therefore, it is ordered that for such default as aforesaid [for the nonpayment of the £20 which he had the means of paying on Mar. 4] the defendant shall be committed to prison for ten days."

F Every document in the cause appears to me to bear the same meaning. The judge's note is, "C," meaning committed, for "ten days," "S.W.," suspended warrant, for "fourteen days." And even this document, on which so much reliance has been placed, drawn up by the registrar, or noted rather on a scrap of paper having apparently no particular relation to the forms of the court, "10 S. 14-4," seems to be in exact accordance with the note of the learned judge. I read that to mean "10," ten days' commitment; "S," suspend; "14," fourteen days; and then at the bottom "4," £4, not £4 a month; the word "month" does not occur. What I should understand that to mean was that the order had then been made by the judge for commitment for ten days, but that it was to be suspended for fourteen days, and that the condition on which the warrant was to lie in the office and not to be given out to the high bailiff for execution was the payment of £4.

G If that is the true view of the matter, what is the error, what is the mischief, what is the objection on the part of the defendant, of which he has a right to complaint? He is not being adjudicated, as counsel for the respondent put it, in default for his not having paid the £4 at the end of the fourteen days, but what he is adjudicated as guilty of contempt for, and what he is sent to prison for, is what the judge has found as a fact on the judicial evidence before him, I namely, that, on Mar. 4, he had, or had had, the £20, and did not pay it. I cannot help thinking that some confusion has been created by the ambiguous use of the word "order," without describing what order, and of the word "direction," without describing what direction. This was an order of commitment for ten days for the nonpayment of the £20 on Mar. 4, and has no relation to the payment or the nonpayment of the £4 at any subsequent date. Under these circumstances, it seems to me that the learned judge had full jurisdiction to make the order, which, in fact, I find he did make, and, if so, of course, this writ of prohibition cannot be sustained.

I desire to say one word as to the letter of the solicitor on the one side, and the reply of the person professing to act under the orders of the court on the other. It seems to me to have been an irregular proceeding from beginning to end. The solicitor had no right to write such a letter; the registrar had no right to make any such reply. The registrar was thereby taking on himself to give an exposition in contradiction of what the judge's order really was, and I cannot help thinking that that letter bears on the face of it a sort of invitation to the registrar to fall into the trap, which, as it appears to me, he has fallen into. I only desire to say on that matter that I should regard it as certainly a novelty in our jurisprudence if the regular order of a learned judge could be affected, or qualified, or altered in the slightest degree by what some subordinate officer of the court thought proper to say in writing about it, even though in so doing he committed this additional irregularity, that to that private correspondence he thought proper to affix the seal of the court.

For these reasons, I move your Lordships that the judgment of the court below be reversed, and that this appeal be allowed with costs.

LORD WATSON concurred.

LORD BRAMWELL.—I am entirely of the same opinion, and for the same reasons. There is one observation which I should like to make, partly owing to what was said by the learned counsel who followed senior counsel for the respondent. No doubt the county court judges have to do their business in a considerable hurry, and especially such business as this, as I can well testify from my own experience of these things. They cannot give them that elaborate discussion which is perhaps desirable. But I think that a county court judge would do wrong if, merely because both parties were willing to give time, as was done here, he should adjudicate that the man had means, and had made default. I think that that would be wrong. At the same time, if the whole conduct of the parties before him was such as to recognise that the man had had means, the county court judge might well adjudicate without any specific proof of it. I think that it is important to bear in mind that an adjudication of committal ought clearly only to take place where there has been a wilful default in payment; because in truth this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money. I quite agree that, for the reasons which have been given, we ought to decide that there was here a finding by the county court judge that the debtor had had the means and had made a default in paying the amount, and an adjudication that for that default he should go to prison for ten days, but there was a direction at the same time that the execution of that order should be respited or delayed, and that it should not be executed at all if payment were made according to the instalments which were mentioned.

LORD HERSCHELL.—I quite agree. I am not surprised altogether at the view taken by the learned judges in the court below of the facts, considering the way in which the case was presented to them and the admissions or statements which were made by the learned counsel who appeared on behalf of the county court judge. I think that we have probably an advantage which they had not with regard to arriving at a correct view of the facts of the case. I should be extremely sorry to throw any doubt on the view which was expressed by **LORD ESHER, M.R.**, in conformity with that which he said had been entertained by **WILLES, J.** (*Re The Debtors Act* (1)), and had been acted on by the judges, but I think that, in the present case, there was an inquiry as to the means of the debtor; there was the conclusion that he was in default; there was an order for his commitment in respect of that default; and all that was done further was that, in mercy to the person declared liable to suffer imprison-

A ment, he was allowed an opportunity of escaping from that liability, provided he made certain payments. I do not think that it is material how the amount of those payments was arrived at, whether it was according to what the judge thought he would be able to pay, which was perfectly consistent with his having been in default in respect of past nonpayment, or whether it was according to what the plaintiff was willing to take. I do not think that we need enter
B into those motives at all, because I do not think that it was in respect of the nonpayment of that sum that any proceedings were about to be taken to cause the debtor to suffer imprisonment, which led to this application for a prohibition.

But I desire to say this with regard especially to what was urged by junior counsel for the respondent, that I think that a judge would very much neglect
C his duty if, in order to save himself the trouble of inquiring whether there was default, and whether the man had possessed the means of making payment of the instalments down to that time ordered, he were to issue a warrant of commitment with a stipulation for suspending it if some smaller sums were paid, without having really arrived at the conclusion that there had been default. I think that that would be a most irregular and improper proceeding, and one which
D might very well be called in question. I think that it would be an abuse, but, if there has been really in good faith a determination and adjudication of a past default, then I cannot see that the case is really open to the objections which have been raised.

LORD MACNAGHTEN concurred.

Appeal allowed.

E Solicitors : *Solicitor to the Treasury*; *E. A. Fuller.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

LEVER AND OTHERS v. GOODWIN AND OTHERS

[*COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), May 21, 23, 25, 1887*]

[*Reported 36 Ch.D. 1; 57 L.T. 583; 36 W.R. 177; 3 T.L.R. 650; 4 R.P.C. 492*]

Passing Off—Wrapping of goods—Goods wrapped by defendants in similar way to plaintiffs'—Account of profits—Sales by plaintiffs to retailers and by defendants to wholesalers.

H Both the plaintiffs and the defendants were soap manufacturers, the plaintiffs selling their produce to retailers and the defendants selling theirs to wholesalers. The defendants began to sell soap in wrappers which bore a close resemblance to the wrappers on soap made by the plaintiffs. The plaintiffs claimed an injunction to restrain the defendants selling soap in these wrappers and an account of profits from the defendants.

I **Held:** on the facts the plaintiffs were entitled to an injunction; with regard to an account, the defendants had put into the hands of the wholesalers to whom they sold their soap the means of committing a fraud on the plaintiffs by selling the defendants' soap as that of the plaintiffs, and, therefore, the plaintiffs were entitled to an account of the profits which the defendants had made by the sale of their soap to wholesalers in the wrappers complained of.

Notes. Followed : *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893. Considered : *Smith's Potato Crisps v. Paige's Potato Crisps* (1928), 45 P.C. 132. Referred to : *A. Boake, Roberts & Co., Ltd. v. W. A. Wayland & Co., Re A. Boake, Roberts*

& Co., Ltd.'s Trade Marks (1909), 26 R.P.C. 251; *Price's Patent Candle Co. v. Ogston and Tennant* (1909), 26 R.P.C. 797; *Edge v. Niccolls* (1910), 80 L.J.Ch. 154; *Lines v. Farris* (1925), 43 R.P.C. 64; *Draper v. Trist*, [1939] 3 All E.R. 513.

As to passing off in general, see 38 HALSBURY'S LAWS (3rd Edn.) 593; and for cases see 43 DIGEST 264.

Case referred to :

- (1) *Edelsten v. Edelsten* (1863), 1 De G. J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, 614.

Also referred to in argument :

- Blofeld v. Payne* (1833), 4 B. & Ad. 410; 1 Nev. & M.K.B. 353; 2 L.J.K.B. 68; 110 E.R. 509; 43 Digest 334, 1555.

- Leather Cloth Co. v. Hirschfield* (1865), L.R. 1 Eq. 299; 13 L.T. 427; 30 J.P. 179; 14 W.R. 78; 43 Digest 237, 825.

- Davenport v. Rylands* (1865), L.R. 1 Eq. 302; 35 L.J.Ch. 204; 14 L.T. 53; 12 Jur.N.S. 71; 14 W.R. 243; 43 Digest 237, 829.

Appeal by the defendants from an order of CHITTY, J., in an action brought by the plaintiffs for infringement of their trade mark and for selling soap in such wrappers as to pass it off as being soap of the plaintiffs' manufacture. The learned judge dismissed the action so far as it related to the infringement of the trade mark, but gave judgment for the plaintiffs on the ground of the defendants passing off their goods as being those of the plaintiffs' manufacture and granted an injunction restraining the defendants from selling, offering for sale, or disposing of, any soap not manufactured by or for the plaintiffs in the wrappers in question. The judge further directed an account of the profits made by the defendants in selling or disposing of soap made by or for the defendants in any wrapper such as that contained in certain marked exhibits. No question as to the form of this account was raised before CHITTY, J.

The plaintiffs sold their soap to retail dealers in packets which did not bear their name, but were wrapped up in a special kind of paper known as parchment paper, of which they were almost the only users, with space printing calling the soap "Sunlight Self-washer" or "Sunlight Self-washing." Early in 1885 the defendants commenced to sell their soap in packets of the same size and shape, wrapped in the same kind of paper, with spaced printing of the same colour as that of the plaintiffs, describing the soap as "Goodwin's Self-washing Soap." The general appearance of these packets was very like those of the plaintiffs, though, if put side by side, there was no difficulty in distinguishing them. The defendants did not carry on a retail business.

Aston, Q.C., and *Chadwyck Healey* for the defendants.

Romer, Q.C., *Lockwood, Q.C.*, and *John Cutler* for the plaintiffs.

COTTON, L.J.—There are two questions here, first of all, whether CHITTY, J., was right in granting an injunction against the defendants; secondly, if that be decided against the defendants, what ought to have been the form of the decree as regards profits?

Consider what this case is. Undoubtedly it is complicated by the fact that when the plaintiffs, who are wholesale manufacturers of soap, commenced their action, they were on the register for, and considered themselves entitled to, the trade mark of the words "Self-washer" and "Self-washing." They claimed to protect that trade mark by their action; but it was not a proper trade mark, and has since that time been struck off the register. The plaintiffs also raised this case: "You, the defendants, are selling your soap in a wrapper and dress which represents it to be our soap, and therefore, on the old common law doctrine enforced in courts of equity by injunction, we ask to restrain you from passing

A off your goods as our goods." [His Lordship referred to the adoption by the defendants, about the end of 1884, of a way of making up their soap in packets having a great general resemblance to those of the plaintiffs.] What was the contention on behalf of the defendants? Looking at the two tablets, one cannot but see that there is a strong resemblance between them, and especially to the eyes of people who cannot read. But counsel for the defendants' contention
B was this: there is no trade mark in "Self-washing" or "Self-washer;" there is no monopoly in this parchment paper; there is no monopoly in the spaced printing; then why should we be restrained in carrying on business, from using those things as to which the plaintiffs cannot claim any monopoly? That is an obvious fallacy. There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods
C as the plaintiffs', then the defendants have brought themselves within the old common law doctrine, in respect of which equity will give to the aggrieved party an injunction, in order to restrain the defendants from passing off their goods as those of the plaintiffs.

Is there, then, here enough to show that the defendants' soap was represented as manufactured by the plaintiffs? It is in evidence that, as a matter of fact, up
D to this time, soap for sale had scarcely ever been wrapped in parchment paper except by the plaintiffs. It is in evidence also that, although this spaced printing was used as regards groceries, it was not used as regards soap, except by the plaintiffs. That being so, can we come to any other conclusion than this—that the use of this paper and the use of this particular printing was intended to represent these goods as the goods of the plaintiffs, which had
E become known in the market, and would, in my opinion, induce people who do not when they buy an article look carefully to see what the particular mark or name upon it is, to consider, when they got handed down to them one of the tablets of the defendants in this new dress, that they were getting the same soap as they had been accustomed to buy in this kind of packet.

The principal argument on behalf of the defendants was that the essential marks in the two packets are "Sunlight Self-washer" in the one case, "Goodwin's Self-washing Soap" in the other; and that the name is that which would guide everyone who bought this soap. In my opinion that argument is wrong. It is very true that Goodwin's name appears as the maker or the wholesale seller of this particular soap; but it is quite contrary to experience, and quite contrary
G to the evidence, to suppose that everyone when buying a packet of tabular soap would look to the name for the purpose of determining whether what he has bought is that which he has been accustomed to buy in a very similar packet. I do not for a moment suggest that the plaintiffs could have absolutely restrained the use of the words "Self-washing," nor do I say that they could absolutely have restrained the defendants from having the spaced printing, or from the use of
H the parchment paper; but when we find that, as regards soap for sale, they were almost exclusively used by the plaintiffs, we cannot but see that this combination is calculated to induce people to believe that what they were buying, which was the defendants' soap, was what they had known and appreciated—namely, the plaintiffs' soap. In my opinion, the injunction was right.

Ought there to be an alteration as regards the account of profits? Junior
I counsel for the defendants referred us to cases on the question of damages. In my opinion, those cases are not relevant to the question as to the form of the account of profits. It is well known that both in trade mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief. He may say either: "I claim from you the damages I have sustained from your wrongful act," or: "I claim from you the profits which you have made by your wrongful act." Counsel contended that the only profit which the plaintiff could call for was that profit which arose from the sale of this soap where the ultimate purchaser bought it, not as the

defendants' but as the plaintiffs' soap. In my opinion, that is mistaking the whole gist of this action. The defendants, as I understand, do not sell anything to retail purchasers; they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and are going to re-sell by retail. The complaint against the defendants is this: "You have dressed your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs." The profit for which the defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as Goodwin's that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it puts into the hands of the middlemen the means of committing a fraud on the plaintiffs by selling the soap of the defendants as the soap of the plaintiffs. In my opinion, therefore, the account of profits was right as it stands.

LINDLEY, L.J.—I am of the same opinion. As to the main question, I think the case is plain and easy, and it may be rested upon the defendants' own evidence and upon the appearance of the packages. What is called the general "get up," which is an expression used by some of the witnesses, is so similar that obviously the one might easily be mistaken for the other. Of course in all these cases there are differences as well as resemblances, and the question, so far as the packages are concerned, must always be decided by contrasting the striking resemblances with the striking differences. The only difference which strikes me at all is this—that Goodwin has substituted the word "Goodwin" in large letters for "Sunlight." That is the whole difference which catches the eye. Then look at the resemblances; look at the paper; look at the printing; look at the blank space, and the catch words; look at the whole thing, and it is impossible not to arrive at the conclusion not only that one was intended to pass for the other, but that that intention has been realised. I say that apart from the evidence. If you look at the evidence, it comes out clearly and strongly that the defendants' soap is often bought under the belief that it is the plaintiffs' soap, and it is of no use to point out the differences, which of course may be perceived when attention is drawn to them.

The question raised by junior counsel for the defendants as to profits and the form of the account, struck me as somewhat novel and deserving of attention; but, having looked at *Edelsten v. Edelsten* (1), and having regard to the reasons given in the judgment of LORD WESTBURY in that case, I am satisfied that CHITTY, J., was right, and for the reasons which have been given I am of opinion that the appeal fails.

BOWEN, L.J.—I am of the same opinion.

Solicitors: *Salaman; Emmet, Son & Stubbs*, for *A. & G. W. Fox*, Manchester.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

THOMAS v. KELLY

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord FitzGerald and Lord Macnaghten), July 12, 13 16, 1888]

[Reported 13 App. Cas. 506; 58 L.J.Q.B. 66; 60 L.T. 114;
37 W.R. 353; 4 T.L.R. 683]

Bill of Sale—Assignment of chattels to be acquired in futuro—"In or about the same or other premises of assignor"—"Whether brought there in substitution for, or renewal of, or in addition to" specifically assigned goods—*Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43), s. 9, Sched.*

Bill of Sale—Form—Validity of bill substantially in accordance with statutory form—No departure in any material respect.

A bill of sale which purports to assign chattels which are not then in the possession of the grantor but may thereafter be acquired by him is void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form prescribed by the schedule to that Act, whether such future or after acquired property is brought on the premises on which the specifically assigned goods are at the time of the grant of the bill, or any other premises on which those goods, or any part of them, might be, and whether the future property is in substitution for, or renewal of, or in addition to, the specifically assigned goods.

Per LORD FITZGERALD: I do not think that the legislature intended by the words "in accordance with the form in the schedule" [in s. 9 of the Act of 1882] a literal conformity with the statutable form of the bill of sale. I adopt the view that it is sufficient if the bill of sale is substantially in accordance with and does not depart from the prescribed form in any material respect.

Notes. Followed: *Hadden Best v. Oppenheim* (1889), 60 L.T. 962. Considered: *Re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464. Distinguished: *Seed v. Bradley*, [1894] 1 Q.B. 319. Considered: *Coates v. Moore*, [1903] 2 K.B. 140; *Burchell v. Thompson*, [1920] 2 K.B. 80. Referred to: *Bouchette v. Attenborough* (1887), 3 T.L.R. 813; *Tailby v. Official Receiver*, ante p. 486; *Parsons v. Brand Coulson and Dickson* (1890), 25 Q.B.D. 110; *Bird v. Davey*, [1891] 1 Q.B. 29; *Heseltine v. Simmons*, [1892] 2 Q.B. 547; *Peace v. Brookes*, [1895] 2 Q.B. 451; *Sims v. Trollope* (1896), 75 L.T. 351; *De Braam v. Ford*, [1900] 1 Ch. 142; *Saunders v. White*, [1902] 1 K.B. 472; *Mourmand v. Le Clair* (1903), 51 W.R. 589; *Brandon Hill, Ltd. v. Lane*, [1914-15] All E.R. Rep. 709; *Commercial Credit Co. of Canada v. Fulton*, [1923] A.C. 798; *Young v. Bristol Aeroplane Co. Ltd.*, [1944] 2 All E.R. 293

As to the subject-matter and the form of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 280 et seq., and for cases see 7 DIGEST (Repl.) 55 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, ss. 4, 5, and 9, see 2 HALSBURY'S STATUTES (2nd Edn.) 575-576, 580.

Cases referred to:

- (1) *Re Barber, Ex parte Stanford* (1886), 17 Q.B.D. 259; 55 L.J.Q.B. 341; 54 L.T. 894; 34 W.R. 507; 2 T.L.R. 557, C.A.; 7 Digest (Repl.) 56, 290.
- (2) *Roberts v. Roberts* (1884), 13 Q.B.D. 794; 53 L.J.Q.B. 313; 50 L.T. 351; 32 W.R. 605, C.A.; 7 Digest (Repl.) 56, 292.
- (3) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- (4) *Brantom v. Griffiths* (1876), 1 C.P.D. 349; 45 L.J.C.P. 588; 34 L.T. 871; 24 W.R. 762; affirmed (1877), 2 C.P.D. 212; 46 L.J.Q.B. 408; 36 L.T. 4; 41 J.P. 468; 25 W.R. 313, C.A.; 7 Digest (Repl.) 39, 204.

- (5) *Meux v. Jacobs* (1875), L.R. 7 H.L. 481; 44 L.J.Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526, H.L.; 7 Digest (Repl.) 37, 191.

Also referred to in argument :

Crush v. Turner (1878), 3 Ex.D. 303; 47 L.J.Ex. 639; 39 L.T. 192; 26 W.R. 900; affirmed (1879), 4 App. Cas. 221; 48 L.J.Q.B. 481; 40 L.T. 661; 27 W.R. 553, H.L.; 11 Digest (Repl.) 82, 1016.

Manchester, Sheffield and Lincolnshire Rail. Co. v. Brown (1883), 8 App. Cas. 703; 53 L.J.Q.B. 124; 50 L.T. 281; 48 J.P. 388; 32 W.R. 207, H.L.; 8 Digest (Repl.) 66, 441.

Great Western Rail. Co. v. Bunch (1888), post p. 913; 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128; 52 J.P. 147; 36 W.R. 785; 4 T.L.R. 356, H.L.; 8 Digest (Repl.) 134, 861.

Crosser and Long v. Maxwell & Co. [1885] W.N. 95, C.A.; 7 Digest (Repl.) 60, 316.

Levy v. Polack (1885), 52 L.T. 551, D.C.; 7 Digest (Repl.) 60, 315.

Re McManus, Ex parte Jardine (1875), 10 Ch. App. 322; 44 L.J.Bey. 58; 32 L.T. 681; 23 W.R. 736, L.J.J.; 7 Digest (Repl.) 79, 453.

Witt v. Banner (1886), 19 Q.B.D. 276; 56 L.J.Q.B. 550; 57 L.T. 307; 35 W.R. 761; 3 T.L.R. 759; affirmed (1887), 20 Q.B.D. 114; 57 L.J.Q.B. 141; 58 L.T. 34; 36 W.R. 115; 4 T.L.R. 113, C.A.; 7 Digest (Repl.) 75, 440.

Davis v. Burton (1883), 11 Q.B.D. 537; 52 L.J.Q.B. 636; 32 W.R. 423, C.A.; 7 Digest (Repl.) 68, 384.

Melville v. Stringer (1884), 13 Q.B.D. 392; 53 L.J.Q.B. 482; 50 L.T. 774; 32 W.R. 890, C.A.; 7 Digest (Repl.) 62, 330.

Re Townsend, Ex parte Parsons (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest (Repl.) 55, 286.

Re Williams, Ex parte Pearce (1883), 25 Ch.D. 656; 53 L.J.Ch. 500; 49 L.T. 475; 32 W.R. 187; 7 Digest (Repl.) 61, 328.

Re Morritt, Ex parte Official Receiver (1886), 18 Q.B.D. 222; 56 L.J.Q.B. 139; 56 L.T. 42; 35 W.R. 277; 3 T.L.R. 266, C.A.; 7 Digest (Repl.) 69, 389.

Furber v. Cobb (1887), 18 Q.B.D. 494; 56 L.J.Q.B. 273; 56 L.T. 689; 35 W.R. 398; 3 T.L.R. 456, C.A.; 7 Digest (Repl.) 66, 367.

Collyer v. Isaacs (1881), 19 Ch.D. 342; 51 L.J.Ch. 14; 30 W.R. 70, C.A.; 7 Digest (Repl.) 164, 878.

Joseph v. Lyons (1884), 15 Q.B.D. 280; 54 L.J.Q.B. 1; 51 L.T. 740; 33 W.R. 145; 1 T.L.R. 16, C.A.; 7 Digest (Repl.) 152, 840.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., FRY and LOPES, L.J.J.), reported sub nom. *Kelly v. Kellond Thomas, claimant*, 20 Q.B.D. 569, affirming a decision of the Divisional Court (LORD COLERIDGE, C.J., and DENMAN, J.), on an appeal from a county court upon a case remitted under s. 17 of the Supreme Court of Judicature Act, 1884.

In August, 1886, Kellond, a grocer and oil and colour merchant, mortgaged to the appellant Thomas, for £40, all the goods scheduled to a bill of sale,

"together with all other chattels and things the property of the [assignor], now in and about [his] premises . . . and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor . . . whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned, by way of security for the payment of the £40 and interest . . ."

It was stipulated that, if the mortgagee should become entitled to seize the goods assigned, he might enter upon any premises where the goods might be, and might remove and sell them. In January, 1887, Kelly and Baker having recovered

A judgment against Kellond, the sheriff seized the goods in question under a writ of execution in satisfaction of such judgment. Thomas claimed the goods from the sheriff by virtue of his bill of sale, whereupon the sheriff took out an interpleader summons, and an issue was directed between the claimant Thomas and the execution creditors Kelly and Baker. Upon the trial of the issue JUDGE STONOR, at Marylebone County Court, found in favour of the execution creditors upon the ground that the bill of sale was void for non-compliance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, inasmuch as it included substituted or after-acquired goods, and barred the claimant. The Divisional Court affirmed that judgment, and gave leave to appeal to the Court of Appeal, which dismissed the claimant's appeal.

C *Sir Horace Davey, Q.C., Jelf, Q.C., W. H. Clay, and C. C. Scott* for the appellant.

Lumley Smith, Q.C., and Rose Innes for the respondents.

Their Lordships took time for consideration.

July 16, 1888. The following opinions were read.

D **LORD HALSBURY, L.C.**—I cannot say that any construction of this obscure statute seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument. I certainly do not mean to express any opinion upon the numerous cases which have been brought under review, except so far as may be necessary to determine this case. I do not think it can be seriously doubted that the statute did intend to make void absolutely, and not merely against all but the grantor, every bill of sale given by way of security for money unless it was made in accordance with the form in the schedule to the Act. Some faint effort was made in the argument to suggest that the word "void" in s. 9 must be read as a repetition of the same word in ss. 4 and 5, and that, therefore, we must by construction add the words "except as against the grantor." That such a construction add the words "except as against the grantor." That such a construction would involve the necessity of adding words, and that it would involve the necessity of supposing that the legislature meant to express the same thing in the same statute by two wholly different sets of phrases, would be enough to condemn it as untenable.

G But whatever else is obscure in the statute, this is plain, that it did intend to place a restriction upon the *form* of a bill of sale, and that it did intend to make a departure from the form fatal to the bill of sale which should contain it. Further, I think that s. 9 must be construed to enact not only what a bill of sale must contain, but also what it must not contain, so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate. It is, however, true that the form given is so far elastic that the statute does not make every word imperative, but provides that no form shall be permitted except one made "in accordance with the form in the schedule." The degree of latitude involved in these words it would be difficult, perhaps impossible, to define. It is, in my view, only necessary to apply them to the concrete case, and, applying the test of the statute as a test, to see whether the bill of sale challenged is within or without the line prescribed by the statute. No one, of course, can be insensible to the difficulties so acutely pressed upon your Lordships by both the learned counsel who argued the case for the appellant; and undoubtedly the only answer that I can find is that suggested by FRY, L.J., [that a form of bill of sale which would be different in its operation and effect from a bill in the form in the Schedule to the Act was not in accordance with that form]. That answer has this to recommend it, that if adopted it does give a meaning to each part of the statute, and that the distinction between the body of the deed and the schedule is one well warranted by a comparison of the wording of ss. 4, 5, and 9 in which certainly the bill of sale is distinguished from the schedule to which the earlier sections refer.

I own I have had great difficulty in dealing with sub-s. (2) of s. 6. It undoubtedly seems to indicate that goods not capable of specific description, and to be afterwards supplied, may nevertheless be so included in the security as yet not to make the bill of sale void. But if one supposes the assignment to be of all such goods as are the subject of the provision in question, and that in the schedule they were properly described, but added thereto were the words which give rise to the argument, namely, such goods as should be in substitution thereof, the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles. I have come to the conclusion, not without great difficulty, that it is possible to suppose a present assignment to apply to goods properly described as presently existing goods, but which, when one looks to the schedule, one finds are nevertheless not presently assigned but are to be substituted for them. It is to be observed that ss. 4 and 5 are only referred to in s. 6, and the statute must be supposed to have some meaning in this specific reference.

Applying the principles I have suggested, there can be no difficulty in the decision of this case. An essential condition of the deed appears to me to be a present assignment of goods capable of specific description and present assignment (see definition in the Act of 1878). It is obvious that a bill of sale which purports to assign after-acquired property, whether in the form of a covenant (its true legal effect) or as stated specifically in words as part of the security is not in accordance with the "form," and, therefore, void. I doubt whether the reason why it is void is adequately given when it is said that such property is incapable of specific description. I think it also introduces a covenant not in accordance with the form; and the form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed. This bill of sale purports to assign all the chattels specifically described, and then

"all other chattels and things the property of the mortgagor now in and about the premises known as 119 Shirland Road, Paddington, in the county of Middlesex; and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things, or any part thereof, may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned, by way of security for the payment of the said sum of £40 and interest thereon at the rate of 60 per cent. per annum."

It would be impossible to imagine words apparently more designedly contrived to sweep up everything of which the mortgagor might at any time thereafter become possessed. It appears to me that, whatever else was permitted by the bills of sale contemplated by the statute, it never could have been intended that words so wide, whatever legal effect may be given to such words, could have been permitted so as to render it possible for a lender of money to have a claim against all future property, either on the premises upon which the assigned goods then were or on any other premises upon which those goods, or any part of them, might thereafter be—any goods, not only in substitution for or renewal of, but in addition to, any goods that the mortgagor was then possessed of.

I have, therefore, no difficulty whatever in saying that this bill of sale is absolutely outside the limit of interpretation which can be properly given to the language in the form prescribed by the statute, and, consequently, in holding that this bill of sale is void. I, accordingly, move your Lordships that the order appealed from be affirmed, and that this appeal be dismissed with costs.

LORD FITZGERALD.—The bill of sale on the validity of which your Lordships are called on now to decide has written thereon a schedule containing an inventory of some, but not all, "of the personal chattels comprised in it," and though objections have been raised to that schedule on the allegation that in some par-

A particulars it is insufficient, yet we assume for the purposes of the present case that, so far as it extends, the personal chattels "are specifically described in the said schedule." The instrument, however, professes to assign other goods not described in the schedule—viz., (i) in the passage which the Lord Chancellor has just read,

3 "all other chattels and things the property of the mortgagor now in and about the premises known as 119 Shirland Road;"

and (ii), which may be called an attempt to assign after-acquired property,

C "and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things, or any part thereof, may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned, by way of security for the payment of the said sum of £40 and interest thereon at the rate of 60 per cent. per annum."

D The schedule does not include any description of the personal goods comprised in (i) and does not, and it obviously could not, give any specific description of the subjects which might come within (ii) as after-acquired property. We assume for the purposes of the present decision that, if it had not been for the assignment in the bill of sale of the goods mentioned in (i) and (ii), the instrument and the schedule to it would have been sufficient within the provisions of s. 9 of the Act of 1882 and the bill of sale in accordance with the form given in the schedule to that Act.

E The question is whether those additional matters which are not to be found in the statutable form render it invalid as not being "made in accordance with the form in the schedule." Thirty-four years have elapsed since the passing of the Bills of Sale Act, 1854. It was amended by the Bills of Sale Act, 1866, and the two were repealed by the Act of 1878, which is still the leading Act, though altered and amended in some particulars by the Act of 1882. The title and preamble of the Act of 1854, carried on as they are by the subsequent Acts, still afford some light. The whole code is designed to prevent frauds on creditors (i.e. the public), and also to protect the borrower from the exercise of oppressive powers on the part of the lender. The Act of 1854 seems to have dealt only with bills of sale of existing goods capable of being seized and taken possession of, which might be the subjects of "ostensible ownership." It does not seem to have contemplated that a bill of sale as such could apply to goods not in existence, and which might never exist. The definitions in that Act of "bills of sale" and "personal chattels" and the exclusions from these definitions lead to that conclusion.

H The definition of "bill of sale" in the Act of 1878 is very large, and intended to meet the devices by which the previous Acts had been evaded; but, according to judicial decision, it was interpreted to include as bills of sale instruments which, departing from the old simplicity of the common law, professed to assign after-acquired property. The amending Act of 1882 was probably intended (inter alia) to limit the evils arising from attempts to bind future-acquired property. The Bill which eventuated in the Act of 1882 received the most critical consideration from the most capable men of the day, both in 1881 in the House of Commons and in 1882 in Select Committees of both Houses of Parliament, aided by the answers to a circular sent to judges and registrars as to the operation of and defects, if any, in the Act of 1878. It was apparently intended to put an end to the almost interminable controversies which had arisen on the previous Acts.

I The Act of 1882 has not had in the latter respect the effect which the legislature intended. We have now to consider some of the provisions of that Act. It is an

amending Act, and so far as is consistent with the tenor thereof is to be construed as one with the principal Act (the Act of 1878). By s. 3 :

"The expression 'bill of sale' have the same meaning as in the [Act of 1878] except as to bills of sale or other documents mentioned in s. 4 of the [Act of 1878], which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply."

It leaves such instruments to the Act of 1878; the Act of 1882 is not to apply to them. We thus see that the provisions of the Act of 1882 which your Lordships have now to interpret are limited to the ordinary and simple transactions of everyday life specified in s. 9.

A sale of goods, or grant or mortgage of goods, could at common law be effected without writing, but it should be accompanied by possession and an assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative. If, however, it was for value it was in equity regarded as a contract of which specific performance might be enforced when (if ever) the thing came into actual existence. The bill of sale before your Lordships is one "made by way of security for the payment of money," which s. 9 declares "shall be void unless made in accordance with" the statutory form. The bill of sale is to be between the parties directly—that is to say, between, on the one hand, the borrower, and, on the other, the lender; and the "form" seems to have been intended to attain, first, certainty and simplicity; secondly, the statement of the consideration—a sum in moneys numbered, and (reading the language of the form) "now paid to" the grantor, the receipt of which the grantor thereby acknowledges; thirdly, that the assignment is confined to the chattels and things specifically described in the schedule thereto annexed; fourthly, that it shall be by way of security for the same sum then advanced with interest at a specified rate to be repaid to the grantee, with the interest then due, by equal payments on fixed days; fifthly, the insertion of the terms which the parties have agreed to for the maintenance of the security or its defeasance; and sixthly, the incorporation by reference of the provisions of s. 7, which restrict the right of the grantee to take possession.

Does the bill of sale before your Lordships conform to the provisions of the statute? Is it in accordance with the "form"? I do not think that the legislature intended by the words "in accordance" a literal conformity with the statutable form of the bill of sale. I adopt the view of BOWEN, L.J., that it is sufficient if the bill of sale is substantially in accordance with and does not depart from the prescribed form in any material respect. I concur in the opinion expressed by the Lord Chancellor (and on this I have never had any doubt) that this bill of sale is not in conformity with the statute and varies from the "form" in material and substantial particulars to which I have already alluded, and the noble and learned Lord has stated them in detail. The result follows, that it is void against all parties.

In *Ex parte Stanford* (1), BOWEN, L.J., in laying down a rule of construction as the judgment of the whole six judges of the Court of Appeal, says (17 Q.B.D. at p. 270) :

"A divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned."

He adds (*ibid.* at p. 271) :

"We must consider whether the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form."

That he states to be the rule of construction. I should hesitate to criticise a proposition coming from a tribunal so important and so weightily constituted. I am not now called on to do so; nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction as affording an inclusive as well as an exclusive test. As to the question whether the general words of s. 9 are to be restrained by the language of ss. 4 and 5, I have only to say that I agree with your Lordship and with the reasoning of FRY, L.J., in the present case. The bill of sale in the present case is on a printed form, and contains in print the passages which have raised the objection. It seems like a sweep-net adopted after the decision in *Roberts v. Roberts* (2) in 1884; but now the decision of the Court of Appeal in this case, affirmed by your Lordships, prohibits in effect the assignment of future-acquired property in bills of sale coming within s. 9 of the Act of 1882; and I may add that it accomplishes a most desirable result.

LORD MACNAGHTEN.—To say that the Bills of Sale Act (1878) Amendment Act, 1882, is well drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and one which seems to be contradicted by the mass of litigation which the Act has produced and is producing every day. For my own part, the more I have occasion to study the Act, the more convinced I am that it is beset with difficulties which can only be removed by legislation. At the same time, I cannot help thinking that some of the puzzles which were presented in the course of the argument disappear if the scope of the Act is steadily kept in view.

The Act of 1882, as well as the Act of 1878, is concerned only with assurances of personal chattels. The expression “personal chattels” is strictly defined in the Act of 1878 [s. 4]. The Act says:

“The expression ‘personal chattels’ shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops. . . .”

Then follows an enumeration of things which, subject to one exception in the case of trade machinery, are not included in the expression “personal chattels.” The Act of 1882 adopts the definition in the earlier Act [s. 3], but deals with it in certain particulars by way of explanation or modification. As regards growing crops, it explains, with perhaps unnecessary caution, that the expression is confined to crops actually growing at the time when the bill of sale is executed [s. 6 (1)]. As regards fixtures separately assigned or charged (with which the Act couples plant and trade machinery), it seems to extend the definition of personal chattels to fixtures, plant, and trade machinery, used in, attached to, or brought upon any land, factory, or other place in substitution for any of the like fixtures, plant, or trade machinery, specifically described in the schedule to the bill of sale [s. 6 (2)]. This appears to be the meaning of the Act, because s. 4 clearly imports that a bill of sale to which the Act of 1882 applies may “have effect” in respect of the chattels mentioned in s. 6 (2). That can only be if such chattels are brought into the category of personal chattels as defined by the Act.

Notwithstanding a remark made by LORD CHELMSFORD in *Holroyd v. Marshall* (3), which obviously was not required for the decision of the case, I am disposed to think that the expression “capable of complete transfer by delivery” means capable of such transfer at the time when the bill of sale is executed. That was the view of the Divisional Court consisting of BRETT and ARCHIBALD, JJ., in *Bran-ton v. Griffiths* (4). BRETT, J., there said (1 C.P.D. at p. 354):

“The Act [of 1854] only applies to things which at the moment when the bill of sale is given, and the provisions of the Act are to be applied to it, might be delivered to the assignee and are not, but are left in the enjoyment of the assignor.”

ARCHIBALD, J. concurred. He said (*ibid.* at p. 357) :

"The application of the statute must be limited to articles of which possession could have been given to the vendee, and which are capable of removal."

I am the more inclined to adopt this view of the meaning of the expression "capable of complete transfer by delivery," because the decision in *Brantom v. Griffiths* (4), was standing unchallenged when the Act of 1878 was passed, and must have engaged the attention of the framers of that Act. The Act repeats with some few alterations the definition of "personal chattels" contained in the Act of 1854. The only alterations are consequent upon the decision in *Meux v. Jacobs* (5), and the decision in this very case of *Brantom v. Griffiths* (4).

If this view be correct, the definition of "personal chattels" excludes future or after-acquired chattels, for the simple reason that they are not capable of transfer by delivery. Neither the Act of 1878 nor the Act of 1882 prohibits the assignment of future or after-acquired chattels any more than the assignment of existing personal property, which may not come within the definition of personal chattels, but the assignment of such property and the assignment of future or after-acquired property are entirely outside the scope of the Bills of Sale Acts. Under the Act of 1878 an assurance of things not within the description of personal chattels, as defined by the Act, was none the better for being in a registered bill of sale. On the other hand, a bill of sale under the Act of 1878 was none the worse for including in its terms an assurance of things not coming within the definition of personal chattels.

The question on this appeal is whether, under the Act of 1882, a bill of sale is void which includes in the body of the instrument an assignment of future or after-acquired chattels, as well as an assignment in general terms of existing chattels in or about the mortgagor's premises other than those specifically described in the schedule. In the present case the future or after-acquired chattels do not seem to be within the protection of s. 6. But, in my view of the Act, nothing turns upon that circumstance. The Act of 1882 gives a form of bill of sale, and declares (s. 9) :

"A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

This section seems to me to deal with form and form only. So purely is it, I venture to think, a question of form, that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to s. 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody.

It has been held, and I think rightly, that s. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are, "in accordance with the form" not "in the form." But then comes the question : When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form. It seems to me that, if there is any one thing which is plainly and obviously a characteristic of the statutory form, it is that in the body of the instrument there is no substantive description of the things intended to be assigned. Following the directions contained in s. 4, the statutory form relegates to a schedule the description of the personal chattels intended to be comprised in the bill of sale. It probably would not be difficult to suggest reasons more or less satisfactory why the legislature should require an inventory of the personal chattels comprised in a bill of sale, and require that inventory to be contained in a schedule. It is convenient to have the things which are the subject of assignment specified in a list,

A so that one may see at a glance what is and what is not included. Besides, it has become very much the practice to use printed forms of bills of sale. An illiterate person might naturally take it for granted that everything that was in print was right, and then he might afterwards find himself bound to terms which were never really brought to his notice, especially since the Act of 1882 has repealed the provision requiring the attestation of a solicitor and a certificate by the solicitor that he had explained the effect of the bill of sale to the grantor. However that may be—whatever reasons may have influenced the legislature—it seems to me clear that the Act of 1882 does require that the schedule to a bill of sale shall contain, and that the body of the bill of sale shall not contain, a description of the personal chattels comprised therein.

C There was a very formidable argument urged on behalf of the appellant against this view, which it is impossible to pass over in silence. It was to this effect: s. 4 does not avoid a bill of sale as against the grantor in respect of personal chattels not specifically described in the schedule. Section 5 does not avoid a bill of sale as against the grantor in respect of personal chattels specifically described in the schedule of which the grantor was not the true owner at the time of the execution of the bill of sale. Such assignments are, therefore, permissible as against the grantor in a bill of sale. Room then must be found for them somewhere—either in the schedule or in the body of the instrument—you cannot put them in the schedule if you follow the statutory form. Besides, the body of the deed is the natural and proper place, it was said. If the statutory form does not make provision for including that which may be lawfully included, you must adapt the form to meet the particular case. That, it was urged, was common sense. This, I think, was the substance of the argument.

F For the present purpose it is only necessary to determine that the description of all the chattels intended to be comprised in a bill of sale must be found in the schedule. I desire not to be understood as expressing an opinion on any question not immediately and directly before the House. But I am inclined to think that the difficulty suggested is more apparent than real, and that the range of the exceptions in ss. 4 and 5 is extremely limited. The Act, as I have said, deals only with personal chattels as defined by the Acts of 1878 and 1882. That definition, if I am right, excludes from the category of personal chattels future or after-acquired chattels, except in the one case mentioned in s. 6 (2). Chattels falling within that case are referred to in s. 5 as “specifically described,” though the description of such chattels cannot be made more specific than it is in s. 6, except that the articles for which they may be substituted would of course be specified. The Act, therefore, seems to recognise the description in s. 6 as a specific description. It seems to follow that chattels which come under the description contained in s. 6 would find their proper place in the schedule. The other personal chattels referred to in s. 5, of which the grantor may not be the true owner, must be chattels actually in existence, in reference to which the expression “true owner” is more appropriate than to things of which there can be no owner true or apparent. They are, therefore, certainly capable of being specifically described. They, too, would find their place in the schedule. The exception in s. 4 only extends to personal chattels which admit of specific description, but by some mistake or inadvertence are not so described. The schedule seems to be the proper place for I them, though it may be that possibly some very slight variation would have to be made in the language in the operative part of the instrument in order to carry out the intention of the Act. Possibly such a variation, being in furtherance of the provisions of the Act, would not be held fatal.

Whether a bill of sale overlaid in its schedule with a description of things for which the statutory form has no room, and for which the Act makes no provision, would or would not be held to be in accordance with the statutory form is a matter on which I express no opinion. The explanation I have offered may possibly be a solution of the difficulty on which the argument of the learned

counsel for the appellant was mainly founded. There may be other explanations. But even if the difficulty should seem insoluble that circumstance would not, in my opinion, authorise a departure from the comparatively clear provisions of the Act in regard to the form of the bill of sale. For the reasons I have given I concur in thinking that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors : *Paul Vanderpump & Eve; Montagu Scott & Baker.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

HILTON v. TUCKER

[CHANCERY DIVISION (Kekewich, J.), June 12, 13, 1888]

[Reported 39 Ch.D. 669; 57 L.J.Ch. 973; 59 L.T. 172;
36 W.R. 762; 4 T.L.R. 618]

Pledge—Delivery—Need for delivery to be contemporaneous with advance of money—Delivery made in fulfilment of contract of pledge.

In a transaction for the pledge of goods it is essential that there should be a delivery of the goods, but it is not essential that the delivery should be contemporaneous with the advance of the money so long as it is made in pursuance of the contract and in fulfilment of it.

In November, 1883, the plaintiff agreed to advance to T. the sum of £2,500 on the security of a collection of prints and other chattels. The first instalment of the advance was paid and it was agreed that the collection should be housed in a room of the Archæological Society, of which both parties were members, the key being placed at the disposal of the plaintiff and T. having unlimited access. The rest of the advance was made in December, 1883, and on Jan. 11, 1884, T. wrote to the plaintiff acknowledging receipt of the advance of £2,500, authorising the plaintiff to retain possession of the collection deposited in the room, the key of which was in the plaintiff's possession, and acknowledging that the plaintiff was to retain possession of the collection until the money had been repaid. T. died intestate. In an action brought by the plaintiff against T.'s personal representative asking for a declaration that he was entitled to retain possession of the collection as security for his advances, the defendant claimed that the transaction was not a pledge and that the letter of Jan. 11, 1884, was a bill of sale but void as not complying with the requirements of the Bills of Sale Acts.

Held: the delivery of the key to the plaintiff was equivalent to delivery of possession of the collection; the pledge was completed even though the delivery was not contemporaneous with the advance; and, therefore, the action was one of pledge.

Notes. Referred to: *Bowker v. Williamson* (1889), 5 T.L.R. 382; *Mills v. Charlesworth* (1890), 25 Q.B.D. 421; *Wrightson v. McArthur and Hutchisons* (1919), Ltd., [1921] All E.R. Rep. 261.

As to the contract of pawn, see 29 HALSBURY'S LAWS (3rd Edn.) 211 et seq.; and for cases see 37 DIGEST 4 et seq.

A Cases referred to :

- (1) *Re Hardwick; Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490; 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Morr. 246, C.A.; 37 Digest 13, 83.
- (2) *Meyerstein v. Barber* (1866), L.R. 2 C.P. 38; 36 L.J.C.P. 48; 15 L.T. 355; 12 Jur.N.S. 1020; 15 W.R. 173; 2 Mar. L.C. 420; on appeal (1867), L.R. 2 C.P. 661, Ex. Ch.; 37 Digest 168, 111.
- (3) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- (4) *Reeves v. Capper* (1838), 5 Bing. N.C. 136; 1 Arn. 427; 6 Scott, 877; 8 L.J.C.P. 44; 2 Jur. 1067; 132 E.R. 1057; 37 Digest 5, 13.

Also referred to in argument :

- Re Hall, Ex parte Close* (1884), 14 Q.B.D. 386; 54 L.J.Q.B. 43; 51 L.T. 795; 33 W.R. 228; 7 Digest (Repl.) 21, 93.
- Re Townsend, Ex parte Parsons* (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest (Repl.) 23, 104.
- Re Cunningham & Co., Ltd., Attenborough's Case* (1885), 28 Ch.D. 682; 54 L.J.Ch. 448; 52 L.T. 214; 33 W.R. 387; 1 T.L.R. 227; 7 Digest (Repl.) 21, 95.
- Ancona v. Rogers* (1876), 1 Ex.D. 285; 46 L.J.Q.B. 121; 35 L.T. 115; 24 W.R. 1000, C.A.; 7 Digest (Repl.) 117, 691.
- Ellis v. Hunt* (1789), 3 Term. Rep. 464; 100 E.R. 679; 39 Digest 618, 2167.
- Chaplin v. Rogers* (1800), 1 East, 192; 102 E.R. 75; 39 Digest 375, 130.
- Gough v. Everard* (1863), 2 H. & C. 1; 2 New Rep. 169; 32 L.J.Ex. 210; 8 L.T. 363; 11 W.R. 702; 159 E.R. 1; 7 Digest (Repl.) 116, 688.
- Whitehead v. Clifford* (1814), 5 Taunt. 518; 128 E.R. 791; 31 Digest (Repl.) 580, 7008.
- North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 35 Ch.D. 191; 56 L.J.Ch. 609; 56 L.T. 755; 35 W.R. 443; 3 T.L.R. 206, C.A.; affirmed sub nom. *Manchester, Sheffield and Lincolnshire Rail. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; 58 L.J.Ch. 219; 59 L.T. 730; 37 W.R. 305; 4 T.L.R. 728, H.L.; 7 Digest (Repl.) 11, 43.

Action brought by the plaintiff, a pledgee, against the defendant, the personal representative of the pledgor, for a declaration that the plaintiff was entitled to hold and retain possession of certain chattels as security for advances.

The plaintiff agreed to advance to S. J. Tucker the sum of £2,500, to be secured by the bonds and certain title deeds of Tucker. It was afterwards, and before the advance was made, arranged that in place of the title deeds Tucker should deposit with the plaintiff certain prints and other chattels. The first instalment of the advance, namely, £1,250, was made on Nov. 19, 1883. The plaintiff and Tucker were both connected with the Archæological Society, who occupied premises at Oxford Mansions in Oxford Street, London. Shortly after Nov. 19, 1883, Tucker hired a room on the same premises, and there deposited the prints and chattels mentioned. Tucker paid the rent of the room and for its being kept in order. The key of the room was in charge of the steward of the premises. Tucker had unlimited access to the room, which he visited from time to time for the purpose of having a catalogue of the prints made by a Mr. Larkin, and from the evidence given at the trial it appeared that Tucker in fact had a second key to the room. On Dec. 21, 1883, Tucker wrote to the plaintiff saying :

"The collection was moved in today, and I have arranged with Larkin to spend (subject to your approval, for I thought it would be better for you to have one already in a sense under your own control) a certain time in the room every day in making a list . . . Larkin has the key, which I place entirely at your disposal."

The rest of the advance, namely, £1,250, was made on Dec. 24, 1883, and on Jan. 11, 1884, Tucker wrote to the plaintiff as follows :

"Dear Sir,—You having advanced to me the sum of £2,500 on two bonds for £1,250 each executed by me, I hereby request and authorise you to retain possession of my collection of engraved portraits, prints, and all other property now deposited by me in a certain room in Oxford Mansions, Oxford Street, the key of which room is at present in your possession or power, and I hereby acknowledge that you are to retain possession of such portraits, prints, and property until the whole of the said sum of £2,500 with interest thereon . . . shall have been repaid to you.—(Signed) STEPHEN J. TUCKER."

The plaintiff never had physical or exclusive possession of the prints and chattels until after the death of Tucker in January, 1886, when he took possession of the property. This action was brought by the plaintiff on April 1, 1887, against the personal representative of Tucker, claiming a declaration that the plaintiff was entitled to hold and retain possession of the prints and chattels as security for his advances. The defendant, by her statement of defence, denied that the prints and chattels were ever delivered to or pledged with the plaintiff. She submitted that the plaintiff's only right or title to the articles was under the letter of Jan. 11, 1884, which she submitted was a bill of sale within the Bills of Sale Acts, and was void under ss. 8 and 9 of the Bills of Sale Act (1878) Amendment Act, 1882.

Henn Collins, Q.C., and *Bradford* for the plaintiff.

Barber, Q.C., and *Rowden* for the defendant.

KEKEWICH, J.—It would not be right to say that this is a bill of sale case, because to say so would be to conclude the real question which arises. If it were a bill of sale case, that is to say, if there were any bill of sale at all, there is none which has been registered, or can be registered under the Act of 1882. The plaintiff's case is that there has been a pledge of the goods, namely, pictures and engravings, and such articles, and the defendant's case is that there has been no pledge. What is a pledge is common knowledge, and it is scarcely necessary to say what it is, but I will take the words of *BOWEN, L.J.*, in *Ex parte Hubbard* (1). He says (17 Q.B.D. at p. 698) :

"There is another entirely distinct transaction, which was known to the Romans, and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights—the general property in the goods remaining in the pledgor."

The pledge, therefore, consists in the delivery; at any rate, a delivery is an essential part of the pledge, and, as stated by *WILLES, J.*, in *Meyerstein v. Barber* (2) (L.R. 2 C.P. at p. 51) :

"With respect to a pledge, according to the law of this country, a mere contract to pledge even specific goods, and even although the money is actually advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods."

It is unnecessary for me to examine the Bills of Sale Act, 1878, or the amendment Act of 1882, but I certainly understand that neither of those Acts was intended to be applied or is applicable to a parol contract, or to anything in the character of a pledge. That is left to be dealt with by the common law, and is outside the statute altogether. I certainly also understand these cases to go this length. If you have a pledge, that is to say a contract, involving the advance of money and the delivery of the goods, that can no doubt be enforced quite irrespective of any authorities decided on the statute or the statute itself.

The question, to my mind, therefore, is whether there has here been a pledge of that character. What was the bargain I have no doubt at all. Mr. Hilton, the plaintiff, agreed in the autumn of 1883 to make an advance to Mr. Tucker on certain security, which security was afterwards by agreement between them, and before the date of the advance, changed to the security now in question. No money was advanced until Nov. 19, 1883, but £1,250, part of the £2,500, was then advanced, and there was a further advance about a month later. Before the first advance there had been no delivery: that is common ground. About the date of the next advance there was a delivery. There can be no question that the second advance and the delivery were for all practical purposes contemporaneous, but the first advance was made before the goods were delivered, supposing them to have been delivered.

There was a contract, therefore, binding in honour (but whether binding in law is the question which I have to decide between the plaintiff and the defendant), that the money should be charged on these goods. That would be a contract on which possibly the plaintiff might have had an action. It is a contract which might possibly give rise to an equitable right of specific performance, according to the authority of LORD WESTBURY in *Holroyd v. Marshall* (3), but it did not by itself constitute a pledge, nor pass any property in the goods generally or specially. The goods were afterwards dealt with in a peculiar manner. They were up to that time under the control and in the possession of Mr. Tucker, the borrower. Then they were not delivered in the sense in which one ordinarily sees goods delivered to the lender, the plaintiff, that is to say, they were not taken to his house, they were not taken to any warehouse, and entered in his name. No receipt was given to him by any wharfinger, or any person of that character, admitting his right of ownership, or the right of delivery to be in him, but they were deposited in a house which seems to have been selected only because the borrower and lender were connected with the Archæological Society, whose museum was in this house in Oxford Street. There a room was taken for the deposit of those goods. The room was taken by Mr. Tucker, the borrower. Mr. Tucker not only paid the rent for it, but he paid what was necessary from time to time for keeping the room in order, for dusting and so forth; so that in no sense, according to the ordinary use of the word, could it be called the plaintiff's room. The key—or one of the keys, for there seem to have been two—seems to have been hung up in the way in which one knows the keys of a large house let off in flats are hung up, in some hall, or porter's or steward's office, where the proprietor of the room could come and get possession of the room from time to time.

If it stopped there, I should unhesitatingly hold that possession had not been given to the plaintiff, but there was something more than that. On Dec. 21, 1883, Mr. Tucker writes a letter to the plaintiff, in which he refers to the collection having been moved in pursuance of the agreement, and he refers there to the arrangement which he determined to make, and to which I must take it for granted the plaintiff assented, that there should be a list made of these goods; but in the letter he says, "Larkin has the key, which I place entirely at your disposal." The key was there. I think it is immaterial whether the key was in the actual manual possession of Larkin, or some other officer of the establishment. It was there, and Mr. Tucker says, "It is entirely at your disposal." It was also to a great extent at the disposal of Mr. Tucker himself, and those he employed to make the list and to do what he thought right.

At this point, let me notice that it is proved by the evidence that two pictures were carried away. No doubt, that was put in evidence to show that Mr. Tucker had control. I attach no importance to that fact one way or the other. The plaintiff might very well, having regard to the large amount placed there, and the valuable character of the collection, be disposed to allow Mr. Tucker to carry away any small selection or number from the whole bulk; but Mr. Tucker might have done it wrongfully—not that I suggest he did, but either supposition would explain that,

and I do not think very much importance ought to be attached to that evidence.

This state of things went on for some time longer, and on Jan. 11, 1884, Mr. Tucker wrote the letter, which is said to be a bill of sale—that is to say, in this sense, that it ought to have been registered, or, being incapable of registration, it avoids the whole transaction.

“You having advanced to me the sum of two thousand five hundred pounds on two bonds for one thousand two hundred and fifty pounds each executed by me, I hereby request and authorise you to retain possession of my collection of engravings, portraits, prints, and all other property.”

I admit the accuracy of counsel for the defendant's criticism that an authority to retain possession does not necessarily imply that the possession has been given, and that it may refer to a possession to be hereafter had, or to be had at the date of the letter; but he goes on,

“now deposited by me in a certain room in Oxford Mansions, Oxford Street, the key of which room is at present in your possession or power, and I hereby acknowledge that you are to retain possession of such portraits, prints, and property until the whole of the said sum of £2,500, with interest thereon at 5 per cent. per annum from the date of the said bonds respectively shall have been repaid to you.”

To my mind that is a statement by Mr. Tucker entirely consistent with his letter of Dec. 21, the statement that those goods are deposited by him in that room at present in the possession of the plaintiff.

Is there anything inconsistent with the plaintiff's possession in Mr. Tucker having this right of ingress and egress to make lists, and cleaning the place and so on? To my mind there is not. It would be more satisfactory, no doubt, in a case of this kind, and avoid all dispute, if they had been deposited in a room under the exclusive control of the plaintiff; but assuming, as I do, on the facts not disputed, the entire bona fides of both parties, and the absence of any intention to defraud either one another or any outside party, it seems to me that it is quite consistent with the honesty of the transaction that there should be some laxity in the control of the room, Mr. Tucker from the first to the last acknowledging that whatever power he might have it was a power subject to the plaintiff's paramount control.

I do not rely on the fact of the key having been handed over. There are several cases cited on the interesting question of the effect of delivery of the key. I think when they are examined they all really come to this, that the delivery of the key, in order to give constructive possession, must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key, as for instance that case where timber was deposited in a warehouse. One might, of course, enter by force in other ways, but the key of the warehouse being delivered, the only way of getting to the contents of the warehouse was the ordinary way. Possibly possession would be obtained by using the key and opening the door, and the key being delivered it is the symbol of possession where the possession itself is practically impossible. A man being unable to carry about with him, or conveniently to move to his own warehouse adjoining, a large quantity of timber, the delivery of a key giving exclusive control is regarded as delivery of possession itself. I think that runs through all the cases on the delivery of the key as equivalent to delivery of possession.

That being so, I must decide this question of law which has been raised—whether it is essential to a pledge, not that there should be a delivery, because that is admitted to be essential, but that delivery should be actually contemporaneous with the advance of the money. When I say actually contemporaneous I am not proposing to discuss such a case as I put to counsel for the defendant, where delivery has followed within an hour or a day afterwards, so that in support of the honesty of the transaction one might assume them to be practically contem-

poraneous, though not identical in point of time, but where an advance is made, as here, in November, and the delivery is not given until, say, a month later, but then comes in pursuance of the contract and in fulfilment of the contract. I have pointed out that until delivery is made there is nothing but a contract, and the contract does not pass the property without such incidents as I have already mentioned; but I am not aware of any authority which goes so far as to say that the delivery must be contemporaneous so long as it is in honest fulfilment of the contract, and *Reeves v. Capper* (4) certainly is an authority the other way. Counsel for the defendant says that *Reeves v. Capper* (4) would not be decided in the same way now as it was decided by the full Court of Common Pleas in 1838. That may or may not be. To me it is sufficient to know that it was decided by the Court of Common Pleas fifty years ago, or nearly so, and that until overruled it is binding upon me. I, of course, must follow that decision as it stands, but I think it right to add, irrespective of that decision, that I am at a loss to understand why actual delivery should be contemporaneous with the advance. It seems to me that the transaction may be divided into two parts, and that though fraud may intervene in any case, however careful lawyers may be, still, remembering that in the meantime there is no property passed, and that unless the dictum of LORD WESTBURY is applicable, which I prefer, there is no property in the lender until he has got the goods, it seems to me a very small opening for fraud to hold that the actual delivery need not be contemporaneous with the pledge.

My view of the law certainly is, that if money is advanced, as here, on a contract that goods shall be delivered, and those goods are delivered in pursuance of that contract, the same legal results follow as if the money was handed over with one hand and the goods received with the other. That is the view on which I decide the case. It is a matter of some importance and apparently of some novelty, but that being so, I must hold the plaintiff entitled to the relief which he asks.

Solicitors : *Curtis & Hilton ; Hugh C. Godfray.*

[*Reported by F. GOULD, Esq., Barrister-at-Law.*]

CLAYTON *v.* LEECH

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), March 22, 1889]

[Reported 41 Ch.D. 103; 61 L.T. 69; 37 W.R. 663]

Landlord and Tenant—Lease—Mistake as to length of lessor's term—Compensation

The lessors, believing that their term had thirty years to run, agreed to grant an underlease for twenty-one years to the lessee, nothing being said about compensation for misdescription. The lessee did not investigate the lessors' title, but took an underlease for twenty-one years. A year later he discovered that the lessors' term had only fourteen years to run, and he then claimed rectification of the lease and compensation.

Held: since the lessee claimed in respect of a defect in the title which, by investigating the title, he might have discovered before he took the lease, he was not entitled to any compensation.

Besley v. Besley (1) (1878), 9 Ch.D. 103, not overruled by *Palmer v. Johnson* (2) (1884), 13 Q.B.D. 351.

Notes. Referred to: *Baynes v. Lloyd*, [1895] 1 Q.B. 820.

As to contracts for leases, see 23 HALSBURY'S LAWS (3rd Edn.) 440 et seq.; and for cases see 30 DIGEST (Repl.) 511.

Cases referred to:

- (1) *Besley v. Besley* (1878), 9 Ch.D. 103; 38 L.T. 844; 42 J.P. 806; 27 W.R. 184; 30 Digest (Repl.) 511, 1510.
- (2) *Palmer v. Johnson* (1884), 13 Q.B.D. 351; 53 L.J.Q.B. 348; 51 L.T. 211; 33 W.R. 86, C.A.; 30 Digest (Repl.) 218, 611.
- (3) *Re Turner and Skelton* (1879), 13 Ch.D. 130; 49 L.J.Ch. 114; 41 L.T. 668; 28 W.R. 312; 40 Digest (Repl.) 107, 825.
- (4) *Manson v. Thacker* (1878), 7 Ch.D. 620; 47 L.J.Ch. 312; 42 J.P. 485; sub nom. *Manson v. Thacker, Ex parte Croshaw*, 38 L.T. 209; sub nom. *Manson v. Thacker, Thacker v. Manson*, 26 W.R. 604; 40 Digest (Repl.) 107, 823.
- (5) *Allen v. Richardson* (1879), 13 Ch.D. 524; 49 L.J.Ch. 137; 41 L.T. 615; sub nom. *Allen v. Richardson, Richardson v. Allen*, 28 W.R. 313; 40 Digest (Repl.) 108, 826.

Also referred to in argument:

- Burrow v. Scammell* (1881), 19 Ch.D. 175; 51 L.J.Ch. 296; 45 L.T. 606; 46 J.P. 135; 30 W.R. 310; 30 Digest (Repl.) 430, 731.
- Preece v. Corrie* (1828), 5 Bing. 24; 2 Moo. & P. 57; 6 L.J.O.S.C.P. 205; 130 E.R. 968; 30 Digest (Repl.) 510, 1492.
- Pascoe v. Pascoe* (1837), 3 Bing. N.C. 808; 3 Hodg. 188; 5 Scott, 117; 6 L.J.C.P. 322; 132 E.R. 656; 30 Digest (Repl.) 508, 1484.

Appeal from an order of KEKEWICH, J., dismissing an action brought by the lessee for compensation.

By a letter, dated Mar. 19, 1886, the lessors offered to let to the lessee a certain house on a lease at a yearly rent of £40, payable quarterly on the usual quarter days, the lessee paying all rates, taxes and outgoings, except property tax on the rent, the term to commence on Mar. 25 next; the lease to contain the usual covenants, with the usual proviso for re-entry on nonpayment of rent; the tenant to be at liberty to end the term at seven or fourteen years on the usual six months' notice. The lessee signed an unconditional acceptance of this offer, written on the same paper. On April 19, 1886, the lease was granted for twenty-one

years from Mar. 25, 1886, determinable by the lessee at the end of seven or fourteen years. It contained the usual covenant for quiet enjoyment,

"without any lawful interruption, disturbance, or denial of, from, or by, the lessors, or any person or persons rightfully claiming from or under the lessors."

The lessors held the property under a lease, and were under the impression that, when they granted the lease, their term had thirty years to run. They in fact held under a lease for eighty-one years from Oct. 11, 1819, so that, at the time when they granted the under-lease to the lessee, only little more than fourteen years of their lease was unexpired. The lessee did not call for production of the original lease, and the mistake was not discovered until March, 1887, when the lessee desired to purchase the leasehold reversion, and the original lease was shown to him. He then declined to purchase, and in June, 1887, demanded compensation from the lessors. The lessors' solicitors wrote to the lessee, saying they would advise their clients to grant at their own expense a fresh lease for the residue of their term less three days, but no reply was made to this letter. On Sept. 22, 1887, the lessee's solicitors wrote to the lessor's solicitors claiming compensation. The lessors' solicitors replied refusing to give any compensation, and, on Oct. 24, 1887, the writ in this action was issued. By the statement of claim, the lessee claimed rectification of the lease and compensation.

Candy, Q.C., and *McConnell* for the lessee.

Cock, Q.C., and *Daniel Jones* for the lessors.

COTTON, L.J.—This is an appeal from a decision of *KEKEWICH, J.*, who has dismissed an action brought by a lessee for compensation. The lessors, who are the leaseholders, thought that they had a longer term than they had, and, under that erroneous impression, granted to the lessee what purported to be a lease for twenty-one years. They had in fact only a term of which about fourteen years were unexpired. This was a defect of title which the lessee could have discovered if he had called for inspection of the original lease. It may be that it is not usual for a person taking a lease at a rack rent to investigate the title; still, the fact remains that the lessee might at once have discovered this defect of title. On discovering the defect some time after he had taken his lease, he applied for compensation. Is he entitled to it? It is conceded that fraudulent intention cannot be alleged, and that there is no ground for an action on the covenants in the lease; but it is contended that the lessee is entitled to compensation for misrepresentation.

In *Besley v. Besley* (1) it was held by *MALINS, V.-C.*, in very similar circumstances that there was no right to compensation. But it was urged that *Besley v. Besley* (1) was disapproved of by the Court of Appeal in *Palmer v. Johnson* (2), and that the present case is governed by *Re Turner and Skelton* (3), which was there approved. But *Besley v. Besley* (1) was quite a different case from *Re Turner and Skelton* (3). There was in *Re Turner and Skelton* (3) an express stipulation in the contract that, if any error or mis-statement should be found in the schedule, it should not annul the sale, but compensation should be made in respect thereof. The vendors contended that this stipulation was put an end to by the conveyance. The court there said that the defect was one of quantity which the purchaser discovered after conveyance, and which he could only have discovered previously by leave of the vendors, which they were not bound to give. *SIR GEORGE JESSEL, M.R.*, thought that it would be wrong to hold the contract for compensation to be put an end to by the conveyance, when the mistake was one which he could not by due diligence discover before conveyance, and he referred to the decision of *MALINS, V.-C.*, in *Manson v. Thacker* (4) as being at variance with the prior authorities. In that case, there was an express contract for compensation, and *MALINS, V.-C.*, had refused to give compensation after conveyance. It was from

this, and not from the decision in *Besley v. Besley* (1), that the Master of the Rolls expressed his dissent. I do not consider that either *Besley v. Besley* (1) or *Allen v. Richardson* (5) can be considered as overruled by *Palmer v. Johnson* (2), for that case went on an express contract for compensation which did not exist in the other cases. In my opinion, therefore, the authorities do not support the lessee's case.

The case, then, is simply this. The lessee after completion has discovered a defect of title which, if he had chosen to investigate the title, he would have discovered before completion, and there was no contract to make compensation for defects. Under these circumstances, I am of opinion that the lessee has no right to compensation, and there is no authority which decides that he has. The appeal must, therefore, be dismissed.

LINDLEY, L.J.—There is no doubt here that the lessors made a mistake and thus misled the lessee, but, unless he can show that an action for damages will lie on the ground of that mistake he cannot succeed. The covenants in the lease give him no remedy. He brings his action for rectification of the lease and compensation. Rectification of the lease was offered him free of expense before action, but he was not satisfied with that. I think that he has sustained some loss, but has he any legal remedy for it? *Besley v. Besley* (1) is an express authority that he has not. He contends that the decision in that case has been overruled in *Palmer v. Johnson* (2), but, in my opinion, that is not so. *Besley v. Besley* (1) is perfectly consistent with *Palmer v. Johnson* (2), which only decided that a contract for compensation was not put an end to by the conveyance. I am, therefore, of opinion that the appeal fails.

BOWEN, L.J.—At law, the lessee could not recover damages, for there is no covenant, express or implied, which the lessors have broken. The implied covenant which would have arisen from the demise is excluded by the express qualified covenant for quiet enjoyment. Then, how does the case stand as a demand for compensation for a defect of title? I believe that it is not usual in taking leases in the metropolis at a rack rent to call for the lessor's title, but it does not follow that the lessee could not, as a matter of right, have claimed to have the title shown, and, if he had taken that precaution, he would have found out the mistake. He has chosen to complete without investigating the title, and cannot have any right to compensation unless there is some stipulation entitling him to claim it, and there is none.

Besley v. Besley (1) is directly opposed to the lessee's claim. It was contended that that decision had been overruled by *Palmer v. Johnson* (2), but I am of opinion that it was not so overruled. The point decided in *Palmer v. Johnson* (2) was that an agreement to make compensation for a misdescription of the things sold was not extinguished by taking a conveyance unless the agreement was so expressed as to limit it to defects discovered before the conveyance. The language of all the judgments in *Palmer v. Johnson* (2) appears to treat *Besley v. Besley* (1) as wrong, but that is erroneous. All that was intended, as I think, was to decide that any expressions in *Besley v. Besley* (1) which laid down a principle inconsistent with that laid down in *Palmer v. Johnson* (2) were wrong. It had been cited as an authority for the proposition that, in the absence of fraud, no relief for misdescription could be given after conveyance; perhaps the language in it may have been too wide, and so far, if at all, as it supported that proposition it was overruled. When, however, the fact is looked at that, in *Besley v. Besley* (1) there was no agreement for compensation, the decision in that case is not inconsistent with *Palmer v. Johnson* (2), and, in my opinion, it was rightly decided.

Appeal dismissed.

Solicitors: *Graham & Chater; Allen & Edwards.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

DARLEY MAIN COLLIERY CO. v. MITCHELL

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Blackburn, Lord Bramwell and Lord FitzGerald), July 9, 10, 13, 14, 1885, February 8, 1886]

[Reported 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882;
51 J.P. 148; 2 T.L.R. 301]

*Limitation of Action—Land—Right to support—Surface let down by mining—
Payment of compensation—Further subsidence 14 years later—Right to
maintain action.*

In 1868 the appellants worked out the coal under land belonging to the respondent without leaving proper support, in consequence of which the surface subsided and some cottages belonging to the respondent were injured. The appellants made compensation for the injury, and did not work the minerals after 1868. In 1882 a further subsidence occurred from the combined effect of the previous workings of the appellants and workings under adjoining land. In an action brought by the respondent later in 1882 to recover compensation for the injury he had sustained as the result of this further subsidence,

Held (LORD BLACKBURN dissenting): a new cause of action arose in respect of the second subsidence, and, therefore, the respondent's right to maintain an action for the injury he had sustained in consequence of it was not barred by the Statute of Limitations.

Backhouse v. Bonomi (1) (1861), 9 H.L.Cas. 503, applied.

Lamb v. Walker (2) (1878), 3 Q.B.D. 389, overruled.

Notes. Applied: *Crumbie v. Wallsend Local Board*, [1891] 1 Q.B. 503. Considered: *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q.B. 301; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q.B. 165. Applied: *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; *Harrington v. Derby Corp.*, [1905] 1 Ch. 205; *West Leigh Colliery Co. v. Tunnicliffe and Hampson, Ltd.*, [1904-7] All E.R. Rep. 189. Distinguished: *Manley v. Burn*, [1916] 2 K.B. 121; *London and North Eastern Rail. Co. v. B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51; *Maberley v. Peabody & Co. of London, Ltd.*, [1946] 2 All E.R. 192. Referred to: *Hall v. Norfolk*, [1900] 2 All E.R. 493; *Markey v. Tolworth Joint Hospital District Board* (1900), 69 L.J.Q.B. 738; *Carey v. Bermondsey Borough Council* (1903), 2 L.G.R. 219; *Nash v. Rochford R.D.C.*, [1916-17] All E.R. Rep. 299; *Boyton v. Ancholme Drainage and Navigation Comrs.*, [1921] 2 K.B. 213; *Kennard v. Cory* (1922), 91 L.J.Ch. 452; *Huyton and Roby Gas Co. v. Liverpool Corp.*, [1925] All E.R. Rep. 153; *Conquer v. Boot*, [1928] All E.R. Rep. 120; *H. E. Daniels, Ltd. v. Carmel Exporters and Importers, Ltd.*, [1953] 2 All E.R. 401; *Cartledge v. E. Jopling & Sons, Ltd.*, [1961] 3 All E.R. 482.

As to limitation of actions for tort, see 24 HALSBURY'S LAWS (3rd Edn.) 220-225; and for cases see 32 DIGEST 320, 340 et seq. For the Limitation Act, 1939 (s. 2 of which now provides the limitation of an action for tort), see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Bonomi v. Backhouse* (1858), E.B. & E. 622; 27 L.J.Q.B. 378; 32 L.T.O.S. 156; 4 Jur.N.S. 1182; reversed (1859), E.B. & E. 646; 28 L.J.Q.B. 378; 33 L.T.O.S. 331; 5 Jur.N.S. 1345; 7 W.R. 667; 120 E.R. 652, Ex. Ch.; on appeal sub nom. *Backhouse v. Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 32 Digest 340, 237.
- (2) *Lamb v. Walker* (1878), 3 Q.B.D. 389; 47 L.J.Q.B. 451; 38 L.T. 643; 42 J.P. 532; 26 W.R. 775, D.C.; 17 Digest (Repl.) 87, 77.
- (3) *Rowbotham v. Wilson* (1857), 8 E. & B. 123; 3 Jur.N.S. 1297, Ex. Ch.; affirmed (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 33 Digest (Repl.) 735, 131.

- (4) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 33 Digest 869, 1173.
- (5) *Nicklin v. Williams* (1854), 10 Exch. 259; 23 L.J.Ex. 335; 24 L.T.O.S. 61; 2 C.L.R. 1304; 156 E.R. 440; 17 Digest (Repl.) 86, 74.
- (6) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 1 Digest (Repl.) 16, 123.
- (7) *Littleboy v. Wright* (1662), 1 Lev. 69; 1 Keb. 328; T.Raym. 63; 1 Sid. 85, 95; 83 E.R. 301; 32 Digest 342, 246.
- (8) *Birmingham Corp'n. v. Allen* (1877), 6 Ch.D. 284; 46 L.J.Ch. 673; 37 L.T. 207; 42 J.P. 184; 25 W.R. 810, C.A.; 33 Digest (Repl.) 854, 1061.
- (9) *Hodsoll v. Stallebrass* (1840), 11 Ad. & El. 301; 9 C. & P. 63; 8 Dowl. 482; 3 Per. & Dav. 200; 9 L.J.Q.B. 132; 113 E.R. 429; 17 Digest (Repl.) 84, 58.
- (10) *Lord Townshend v. Hughes* (1678), 2 Mod. Rep. 150.
- (11) *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 9 W.R. 557; 142 E.R. 654; 33 Digest (Repl.) 869, 1171.
- (12) *Devery v. Grand Canal Co.* (1875), I.R. 9 C.L. 194; 32 Digest 341, f.

Also referred to in argument:

- Penruddock's Case* (1598), 5 Co. Rep. 100b; Jenk. 260; 77 E.R. 210; 36 Digest (Repl.) 303, 488.
- Roswell v. Prior* (1701), Holt, K.B. 500; 12 Mod. Rep. 635; 90 E.R. 1175; sub nom. *Roswell v. Prior*, 1 Ld. Raym. 713; 2 Salk. 460; 6 Mod. Rep. 116; 36 Digest (Repl.) 318, 640.
- Thompson v. Gibson* (1841), 7 M. & W. 456; 10 L.J.Ex. 330; 151 E.R. 845; 36 Digest (Repl.) 315, 618.
- Fetter v. Beale* (1701), Holt, K.B. 12; 1 Ld. Raym. 339; 1 Salk. 11; 90 E.R. 905; 1 Digest (Repl.) 18, 139.
- Clarke v. Yorke* (1882), 52 L.J.Ch. 32; 47 L.T. 381; 31 W.R. 62; 17 Digest (Repl.) 88, 86.
- Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 33 Digest (Repl.) 732, 94.

Appeal by the defendants in the action from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BOWEN and FRY, L.JJ.), reported 14 Q.B.D. 125, reversing a decision of HAWKINS, J., upon further consideration, of an action tried before him at Leeds.

Sir Richard Webster, Q.C., Forbes, Q.C., and G. Banks for the appellants.

Rigby, Q.C., and C. E. Ellis for the respondent.

Their Lordships took time for consideration.

Feb. 8, 1886. The following opinions were read.

LORD HALSBURY.*—In this case the plaintiff, the owner of land upon the surface, has sued the lessees of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property by causing it to subside. The defendants before and up to the year 1868 have worked, that is to say, excavated, the seams of coal of which they were the lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability and made satisfaction. There were other subsidences after this, and as the case originally came before your Lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now, by an admission at your Lordships' Bar, placed the matter beyond doubt. It has been agreed

* In the interval between the argument of the case and the delivery of their Lordships' opinions LORD HALSBURY resigned the office of Lord Chancellor, LORD HERSCHELL succeeding him on Feb. 6, 1886, on a change of government.

A that the owner of the adjoining land worked out his coal subsequently to 1868, that, if he had not done so, there would have been no further subsidence, and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm.

Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidence. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged not the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained. The words "cause of action" are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a court of law in this case is the damage to his land, and by the damage I mean the damage which has in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted. Since the decision of this House in *Backhouse v. Bonomi* (1) it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In *Rowbotham v. Wilson* (3) (8 E. & B. at p. 157) CRESSWELL, J., said the owner of the mines might have removed every atom of the minerals, without being liable to an action, if the soil above had not fallen, and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbour; can it be contended that when the bitten man brings his action he must assess damages for all possibility of any future bites? A man stores water artificially, as in *Rylands v. Fletcher* (4); the water escapes and sweeps away the plaintiff's house; he re-builds it, and the artificial reservoir continues to leak and sweeps it away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of future invasion of water flowing from the same reservoir?

With respect to the authorities, *Nicklin v. Williams* (5) was urged by counsel for the appellants as an authority upon the question now before your Lordships, by reason of some words attributed to LORD WESTBURY in *Backhouse v. Bonomi* (1). If LORD WESTBURY really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. PARKE, B., in that case, delivered the judgment against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in *Backhouse v. Bonomi* (1), since, if that had been law, there could have been no answer to the plea of the Statute of Limitations in that case. It is difficult to follow SIR BALIOL BRETT, M.R., when he says it was not necessary to overrule *Nicklin v. Williams* (5) by that decision. It seems to me to have been the whole point decided in *Nicklin v. Williams* (5), and how that case so decided can be an authority for anything I am at a loss to understand. I think the decision

of this case must depend as matter of logic upon the decision of your Lordships' House in *Backhouse v. Bonomi* (1), and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think COCKBURN, C.J., in his judgment in *Lamb v. Walker* (2) establishes the balance of convenience to be on the side of the law as established by *Backhouse v. Bonomi* (1). I cannot logically distinguish between a first and a second or a third or more subsidences, and after *Backhouse v. Bonomi* (1) it is impossible to say that it was wrong in any sense for the defendant to remove the coal; CRESSWELL, J., has said, I think rightly, he might remove every atom of the mineral. The wrong consists, and, as it appears to me, wholly consists, in causing another man damage, and I think he may recover for that damage as and when it occurs. For these reasons I think that the judgment appealed from should be affirmed, with costs.

LORD BLACKBURN.—This is an appeal against an order of the Court of Appeal, by which it was ordered that the judgment of HAWKINS, J., delivered, on further consideration, on Dec. 18, 1883, should be reversed, and judgment entered for the plaintiff for damages to be assessed by an arbitrator to be agreed upon, with costs.

Before this House can say whether this order is right or not, it is necessary to know what was the case on which HAWKINS, J., directed judgment, which this order reverses, to be entered for the defendant. The writ was issued on Dec. 27, 1882. There was an alternative defence that the causes of action did not, nor did any of them, first accrue to the plaintiff at any time within six years before the commencement of the action; and, therefore, it lay on the plaintiff to give evidence of some cause of action subsequent to Dec. 27, 1876. I think it sufficiently appears in HAWKINS, J.'s judgment that the defendants had worked out the seams of coal of which they were lessees as long ago as 1868, and that they had done nothing from that time. And as the defendants seem to have proved and relied on the fact that very considerable subsidences had occurred between 1868 and 1871 which injured the plaintiff's premises, and that the defendants had been called upon to do and had paid for repairs rendered necessary, it is clear that the original working was such as to give rise to a cause of action as early as 1871, and that the plaintiff had then known it.

Lamb v. Walker (2) was then cited. With a view to enable the plaintiff's counsel fully to consider that authority, it was arranged that the jury should be discharged, and that the case should be reserved for further consideration, it being expressly admitted by the plaintiff that damage was done by subsidence in 1868. On further consideration the plaintiff's counsel is stated by HAWKINS, J., to have admitted that judgment must be entered for the defendants unless *Lamb v. Walker* (2), which he intended to question in a Court of Appeal, was overruled. I think it convenient here to see what was the decision in *Lamb v. Walker* (2), so as to see whether, while it stands unreversed, it was decisive of the case before HAWKINS, J. MANISTY, J., quotes so much of the plaintiff's statement of claim as was material in that case. There was a first claim, on which the referee gave a farthing, which I do not notice. I think that paras. 5 and 6 are in effect the same as the amended statement of claim in the action now at Bar. But the only plea in *Lamb v. Walker* (2) was payment into court of £150, and the issue joined was whether that was enough. That was referred, and it was on the award that the question was raised. The two material findings on the award are stated:

"2. I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action . . . at £400. 3. I estimate the future damage which will be sustained by the plaintiff . . . at £150."

He, therefore, directed judgment to be entered for £400, deducting the £150 paid into court from those two sums, amounting together to £550. The question was raised

on a rule to reduce the damages, and was, "whether the plaintiff was in point of law entitled to recover the sum of £150 which the referee finds will be sustained by the plaintiff by reason of the defendants' acts." The decision in *Lamb v. Walker* (2) was that he was so entitled. And I think it was rightly thought that, if damages subsequent to a writ issued in 1871, could be recovered in an action on that writ, they were included in the cause of action then existing, and consequently that decision, which was binding on HAWKINS, J., was at that stage of the proceedings conclusive against the plaintiff.

In *Lamb v. Walker* (2), COCKBURN, C.J., differed from the majority of the court. He said (3 Q.B.D. at pp. 399, 400):

"Taking the view I do of [*Backhouse v. Bonomi* (1)], I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say, anticipated damage expected to occur, but which has not actually occurred, and which may never arise."

He enters into elaborate reasoning to support this opinion, which I shall examine presently. I think, if that opinion had prevailed in *Lamb v. Walker* (2) and a judgment had been given accordingly, that decision would have been, not only not an authority against the plaintiff in this case, but an authority in his favour as far as the defence of the Statute of Limitations is concerned. There must have been some understanding between counsel for the plaintiff and for the defendants in this case as to what was to be done in case the final decision on this very important question was in conformity with the opinion of COCKBURN, C.J. And I think, though I wish it had been expressly stated, it must now be taken that the defendants' counsel agreed that he would not, on the evidence then before the court, ask for a verdict on any of the other defences, but would in that case consent to have the damages settled by arbitration. COCKBURN, C.J., could not, in *Lamb v. Walker* (2), have meant to go so far as to say that if a house had been shaken, and was evidently going to fall, but had not yet completely fallen when the writ was issued, the plaintiff could only recover for what had already occurred, and would have to bring a fresh action when a further chimney fell. He has not quite sufficiently guarded himself from saying so.

As the facts here were different, it was, somewhat late in the day, but with the assent of this House, agreed to add this further admission:

"That if the owner of the adjoining land (one Cooper) had not worked his coal, there would have been no further subsidence; but the appellants (defendants) admit that if the coal under the respondent's (plaintiff's) land had not been taken out, or if the appellants (defendants) had left sufficient support under respondent's (plaintiff's) land, then the working of the adjoining owner would have done no harm."

I do not understand this to be an admission that the subsidence was occasioned by the removal by the defendants of coal other than that the removal of which occasioned the subsidence in 1871. Such an admission would have raised a different question, and one the solution of which might have required a further investigation as to the facts.

I will now proceed to consider the case exactly as if it was an appeal from *Lamb v. Walker* (2). I must first observe that MANISTY, J., in that case, says (3 Q.B.D. at p. 394):

"It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all."

And it is not disputed by COCKBURN, C.J., that the rule is established that

"damages resulting from one and the same cause of action must be assessed and recovered once and for all."

He joins issue with MANISTY, J., on the application of this rule to cases arising from subsidence occasioned by mining so as to remove support. I think that this rule is established as the general rule of law. I do not think it is one of those rules of law which depend upon natural justice. I think it is an artificial rule of positive law introduced on the balance of convenience and inconvenience. I think that if it were *res integra* a great deal might be said against the expediency of the rule. I know no place where the objections to the expediency of the rule are more clearly and forcibly stated than by COCKBURN, C.J., in that case. But I think it was not disputed in the argument that at all events, when the act complained of is one which would entitle the plaintiff to maintain an action, and recover, as a matter of law, at least nominal damages, without any proof of damage in fact, the rule is firmly established, and I think all three judges in the court below agree that the question is what was the cause of action in the present case.

They adopt the reasoning of COCKBURN, C.J., in *Lamb v. Walker* (2), that it logically follows, from *Bonomi v. Backhouse* (1), that there are independent and distinct causes of action, on each fresh distinct cause of damage, though arising from the same act of disturbing the soil. FRY, L.J., puts this very clearly. He does not think that it is concluded by authority, and says:

"I think we are bound to determine this question on principle. Now, with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry what is the cause of action in a case of this description."

In this I completely agree, but I have not been able to agree with the reasoning by which it is sought to be made out that it logically follows, from the decision in *Backhouse v. Bonomi* (1) in this House, that there are fresh causes of action at each fresh subsidence, arising from the old disturbance of the strata, occasioning fresh damage to the same property. I decide nothing on a question which does not here arise, viz., whether, if the same person has two separate tenements, say, A. on the north of the seam worked by the defendant and B. on the south of it, and damage has actually occurred to A., and he sues for the damage done to it, he is bound to join in the action any claim which he has or hereafter may have as to B. While the recent decision of *Brunsdon v. Humphrey* (6) in the Court of Appeal stands unreversed, and I do not mean to cast any doubt on it, it would seem that he is not.

It is desirable to see what *Bonomi v. Backhouse* (1) really was. The writ was issued on May 20, 1856. The declaration alleged that the plaintiffs, as reversioners of certain buildings in the occupation of Parkin, were entitled to have the said messuages and buildings supported by the mines and soil "contiguous and near to and under the said messuages and buildings," and then in the usual way alleged working by the defendant, disturbing the support, by which the walls of the said messuages were cracked and injured, and the ground on which the said messuages and buildings stood subsided. The pleas were: (i) not guilty; (ii) denial of Parkin's occupancy as tenant as alleged; (iii) denial of the reversion being in the plaintiffs as alleged; (iv) that the plaintiffs were not entitled to have the said messuages and buildings or either of them supported, to wit, by the mines, earth, and soil underground contiguous; (v) that the said alleged causes of action did not accrue within six years before this suit. The verdict was entered for the plaintiffs, subject to a Special Case.

One very important question raised in and decided by that case was as to the rights of buildings to support, as distinguished from the rights of the natural soil to the support: with that we are not now concerned. The arbitrator in detail stated very clearly, and I have no doubt very accurately, the way in which the cleety coal in the Auckland coal-field was worked. I doubt if this account would be found to be applicable in most coal-fields. I think I may say that it would not in some. I do not know what is the nature of the strata in the Yorkshire coal-field

A where the present coal lies. But it appeared quite clear on his statement of the case that, though it was apparent in 1850, more than six years before the action, that unless steps were taken to stop the progress of the thrust then in operation the plaintiffs' houses would be injured by the thrust, yet no actual injury was sustained till 1854, less than six years before the action; he also found that the thrust would continue and would produce damage in future. There was also a finding that
 B it was possible to stop the thrust, "but the expense of so doing would have been very great, and would on the whole have amounted to a much larger sum than the value of the property injured."

He then proceeded to find in detail the facts on which it was to depend how the issues should be entered, and then proceeded as follows:

C "If the verdict is to be entered for the plaintiffs upon the issues joined on the first, fourth, and fifth pleas, another question for the court is (iv) whether the defendant is responsible for all the damage which has been sustained by the plaintiffs by reason of the injuries to their said messuages and buildings above described, or for any or what part of that damage, *and whether he is responsible in any and what respect for the probable future damage which may be occasioned in manner above described*, or for the damage occasioned by the diminution in value of the said messuages and buildings by reason of their insecure state and condition, or the injuries which will probably be hereafter occasioned by the further progress of the thrust as above mentioned."

D Had this question, and more especially the part of it I have marked in italics, been answered, it would have decided the question afterwards raised in *Lamb v. Walker* (2). But, as the majority of the Queen's Bench decided that the issue on the fifth plea should be entered for the defendant, the fourth question required no answer from those three judges, and received none. WIGHTMAN, J., does give an answer which, I think, so far as it goes, is in favour of COCKBURN'S, C.J., view in *Lamb v. Walker* (2). The defendant does not appear to have thought the fourth question of importance, for nothing whatever was said in the argument in the
 E Exchequer Chamber about it; and though the expression in the judgment indicates approval of *Nicklin v. Williams* (5), so far as regarded the principle

F "that no second or fresh action can, under such circumstances, be brought for subsequently accruing damage, all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord,"

G and seems in favour of the view taken by the majority in *Lamb v. Walker* (2), yet I do not think it can be properly said that the Court of Exchequer Chamber in their judgment put their minds to that question, which was not much, if at all, argued before them. Before the case was taken into this House the damages were agreed on at £500, how or on what principle we do not know. And that being so, the House had no occasion to decide anything on that fourth question. There seems
 H to have been no allusion to it in the argument, and I think no one of the Lords makes any reference to it.

I I think that *Backhouse v. Bonomi* (1) does decide that there is no cause of action until there is actual damage sustained. and does decide that the Court of Exchequer erred when in *Nicklin v. Williams* (5) they said that there was an injury to the right as soon as the support was rendered insufficient, though no damage had occurred. But I do not think that it at all follows from this that the act of removing the minerals to such an extent as to make the support insufficient is an innocent act rendered wrongful by the subsequent damage. That would be a great anomaly, for I think there is no other instance in our law where an action lies in consequence of damage against a person doing an innocent act. There are many where no action lies against the doer of an improper act, unless and until damage accrues. One is alluded to by LORD CRANWORTH. The cause of action against the speaker of words not actionable per se consists in the speaking of the words and the damage. It was, therefore, held in *Littleboy v. Wright* (7),

on error from the Palace Court, that an inferior court had no jurisdiction over an action for calling the plaintiff a whore, whereby the plaintiff lost her marriage, unless both the speaking of the words and the loss of the marriage were averred and shown to have occurred within the jurisdiction. But the cause of action was as much the speaking of the words as the damage. It is quite clear that, if the words were spoken under such circumstances as to be privileged, no amount of damage could give rise to an action. So where a man beats another's servant, no action arises to the master until there is damage by the loss of the service, but no amount of damage would give the master an action if the beating was justifiable. And if a man in breach of the duty to take reasonable care in the management of a horse in a public street gallops along it, no action lies except at the instance of a person who has suffered damage. But no amount of damage will give a cause of action against the owner of the horse unless a breach of duty is shown.

I think that there is a duty in the owner of land on which his neighbour's land rests to respect it, and take care that he does not injure that support. This is subject to many qualifications, some of which were considered in *Birmingham Corp'n. v. Allen* (8). All I think that is really decided in *Backhouse v. Bonomi* (1), at least in this House, is that where there is a breach of duty, followed by damage, there is a cause of action; and that until there is damage there is no more cause of action for the breach of duty than there would be in a person who saw the breach of duty in the reckless rider of a horse, but was not damaged, though in peril. LITTLEDALE, J., said in *Hodsoll v. Stallebrass* (9) (11 Ad. & El. at pp. 305, 306), speaking of an action by a master for beating his servant per quod servitium amisit :

"It is argued that a fresh action might be brought from time to time, but that is not so, the action being founded not upon the damage only, but upon the unlawful act and the damage. Without the special damage, this action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act, and fresh damage."

This, I think, indicates the real principle. No authority was cited on the argument against this, except a dictum of NORTH, C.J., in *Lord Townshend v. Hughes* (10), where he is reported to have said (2 Mod. Rep. at p. 150) :

"This is a civil action, brought by the plaintiff for words spoken of him, which if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain, but if a particular averment of special damage makes them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action."

NORTH, C.J., was a great lawyer, and, though at the moment engaged in maintaining what seems a very bad cause, no dictum of his is to be slighted. But this, if he did say it, was utterly irrelevant, for his opinion was that the words spoken were actionable without any special damage such, in the case before him, being neither averred nor proved. I cannot, therefore, attach much weight to this dictum, and it has never, I think, been acted upon.

I come, therefore, to the conclusion that the opinion of the majority in *Lamb v. Walker* (2) was the better opinion. I should say that I take a very different view of *Whitehouse v. Fellowes* (11) from that taken by SIR BALIOL BRETT, M.R. I think that was an action for maintaining a nuisance, which from time to time caused fresh damage. What WILLIAMS, J., there says is

"The true answer to this objection, as it seems to me, is that no fresh cause of action arises from each fresh damage, but that where there is not only a fresh damage, but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action."

This was how the court of error in Ireland understood that case in *Devery v. Grand Canal Co.* (12). So understanding it and approving of it, PALLES, C.B., in that

case gave judgment for the plaintiff. How that case is in any way in conflict in principle with *Nicklin v. Williams* (5) I am unable to perceive. BOWEN, L.J., says

"Applying the reasoning in *Whitehouse v. Fellowes* (11), it seems to me that there has really been not merely an original excavation or act done, but a continual withdrawal of support."

If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts. One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked-out seam lay would be liable to an action for continuing a nuisance. Surely, the facts cannot be such as would produce that effect. And unless they are, I do not think that they can make the defendant responsible on this ground. I, therefore, think that the order appealed against should be reversed, and the judgment of Dec. 18, 1883, restored.

LORD BRAMWELL.—Laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted. Moreover such propositions are often and justly called obiter. With these fears before my eyes I shall nevertheless venture on some abstract propositions. It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him.

I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libelled by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for actionable slander, another for the personal loss—certainly if *Littleboy v. Wright* (7) is right. But it is not necessary to decide this. I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. Such a thing may be. A bargain between A. and B. that B. should call C. a swindler would be unlawful, though neither actionable nor indictable, except perhaps as a conspiracy. But it would not be enforceable, though the bargain was made out of the jurisdiction, and so not indictable. In such a case it would seem that, as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act. For example, A. says to B. that C. is a swindler, B. refuses to enter into a contract with C., C. has a cause of action against A.; D., who was present and heard it, also refuses to make such a contract; surely another action would lie. And so one would think if B. subsequently refuses another contract. Of course, one can see that frauds might be practised. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. Perhaps one might apply the same test. Would not the first right of action pass to the trustees of C. if he became bankrupt? If the second loss was after the bankrupt's discharge, it would not.

There is still another class of cases to be considered, viz., those where the act causing damage is not in itself wrongful. No easier case can be taken than the above-ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury

was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and 50 feet of the neighbouring soil fell in, the right of action would be in respect of those 50 feet, and not only in respect of what had fallen in, but what would in future fall in along the 50 feet. But if afterwards the other 50 feet fell in, there would be a fresh cause of action. Surely this must be so. If 10 feet at one end fell in, and afterwards 10 feet at the other, it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. Counsel for the appellants denied this, and was driven to do so. But suppose A. owned the adjoining property on one side, and B. that which was at right angles to it, there must then be two causes of action. Apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the acts, including in that word omissions, of the defendants. One a removal of coal and non-providing of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including perhaps the coal which caused the first subsidence, but doubtless also a removal of coal extending to a greater distance, and not immediately under the plaintiff's land, and the non-providing against the consequences, which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action.

I think, therefore, that the judgment was right. It seems to me not to matter that the subsidence was of the same spot, nor that the immediate cause of the second subsidence was the non-existence of coal underneath that spot. Two damages have been occasioned to the plaintiff, one directly and immediately by the removal of the coal under his surface; the other by that and removal of other coal, and consequent creeping and further subsidence. Counsel for the appellants, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested. Of course, one can see the danger and inconvenience that will follow. This damage accrues many years after the defendants' act which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way. For if the defendants are right, it follows that on the least subsidence happening a cause of action accrues once and for all, the Statute of Limitations begins to run, and the person injured must bring his action, and claim and recover for all damage actual, possible, or contingent, for all time. As to the authorities, *Backhouse v. Bonomi* (1) seems clearly in the plaintiff's favour. Indeed, I have thought of limiting my judgment to the following remark on it. It decided that the excavation of the coal was not wrongful, and that the cause of action accrued when the damage arose. The damage now complained of arose at the last subsidence. That subsidence was no part of or continuance of the former subsidence, therefore, no cause of action in respect of it arose till it happened.

LORD FITZGERALD.—The real, though not the formal, question for your Lordships' determination is whether *Lamb v. Walker* (2) was correctly decided. LORD BLACKBURN rightly deals with this appeal in the same light as if it was an appeal from *Lamb v. Walker* (2). I do not propose to follow him in his instructive examination of that case and *Backhouse v. Bonomi* (1) and his criticisms on those cases, but I think that we may deduce from the authorities some propositions as now settled in law, and applicable to the circumstances of the appeal now before your Lordships' House, and to similar cases.

I proceed to state those propositions, though in doing so I am conscious of the danger pointed out by LORD BRAMWELL. (i) That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence

A of any binding agreement to the contrary. (ii) That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface. (iii) That the excavation and removal of the minerals do not per se constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface.

B (iv) But that when, in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the rights of the owner of the surface, and constitutes his cause of action. The foundation of the plaintiff's action, then, seems to be that, although the excavations of the minerals were acts by the defendants in the lawful enjoyment of their own property, yet when subsequently damage arose therefrom to the plaintiff in the

C enjoyment of his property, the defendants became responsible. For although the law encourages a man to the free use of his own property, yet, if in doing a lawful thing in the enjoyment of that property he occasions damage to his neighbour which might have been avoided, he will be answerable for that damage whenever it occurs. As to the cause of action in 1868, there is no doubt that the mere excavation prior to or in 1868 was legitimate, and not of itself alone the foundation of any right of

D action; but when the subsidence of that year took place, and caused damage to the plaintiff's houses, then the defendants became liable to make good that loss, because, though their acts were in the lawful use of their own property, yet the injurious consequences to the plaintiff might have been avoided. It is the disturbance then, when it arises, that is the cause of action, and not the prior legitimate act of the owners of the minerals in the lawful enjoyment of their own

E property.

But although this be true, yet still the question which arose in *Lamb v. Walker* (2), and was not expressly decided by this House in *Backhouse v. Bonomi* (1), remains now to be considered and finally decided. There was a subsidence in 1868 causing special damage, giving the plaintiff a cause of action, and in respect of that damage he accepted compensation, which, it seems agreed, is equivalent to a recovery of damages in an action if such action had then been instituted. In

F 1882 a fresh and distinct subsidence took place, causing special damage to the plaintiff. It was admitted before your Lordships

"that after the partial subsidence in 1868 the strata remained practically quiescent until the working of the coal in the next adjoining land by the owner thereof in the year 1881, which working caused a creep, and a further sub-

G sidence."

And further:

"that if the owner of the adjoining land had not worked his coal there would have been no further subsidence, and that if the coal under the respondent's land had not been taken out, or if the appellants had left sufficient support under the respondent's land, then the working of the adjoining owner would

H have done no harm."

It will be observed on these admissions that the partial subsidence of 1868 had practically ceased, and that a fresh creep and subsidence took place in 1882, which would not have taken place if the defendants had left sufficient natural support under the plaintiffs' land, or, we may add, had substituted adequate artificial support. There can be no doubt that, though there has been no act of commission

I by the defendants since the completion of the excavation of 1868, yet, if there had been no subsidence causing damage to the plaintiff prior to that of 1882, the present action could be maintained; but it is alleged that, as the plaintiff had a complete cause of action in 1868, arising from the prior excavation and the subsidence of 1868, the Statute of Limitations then began to operate, and has barred the present action. It was further argued that in 1868 the plaintiff could and ought to have insisted on recovering once and for all any damage that might arise prospectively from the excavation of 1868, according to the rule of law which, in order to prevent

a multiplicity of actions, provides that damages resulting from one and the same cause of action must be assessed and recovered once and for all. A.

That rule was applied by the majority of the court in *Lamb v. Walker* (2), and is not controverted. It is not inflexible, and admits of exceptions. We have to consider what was the cause of action in 1868, and whether the cause of action of 1882 is one and the same cause of action as that of 1868. If it is so, then the defendants are entitled to succeed on the defence of the Statute of Limitations. B. This appeal represents a class of cases peculiar and exceptional, to meet which, and to avoid grave inconvenience, if not injustice, our flexible common law has somewhat moulded itself. I deprecate discussing some of the arguments addressed to us, which seemed to me to be too fine, such as, for instance, whether the original act of the defendants was "innocent" or "perfectly innocent." The question here is not whether the original act of the defendants was "innocent," but whether they C have occasioned damage to the plaintiff without any inevitable necessity. I am of opinion that COCKBURN, C.J., in *Lamb v. Walker* (2), and the Court of Appeal in the case before us, were right in resting on *Backhouse v. Bonomi* (1), and deducing from it a principle which governs the question. *Backhouse v. Bonomi* (1) is not satisfactorily reported. We gather from the report in your Lordships' House with some difficulty what was actually decided. Mr. Manisty in his argument in that D case at your Lordships' Bar puts it thus (9 H.L.Cas. at pp. 509, 510):

"The act done was a perfectly innocent act at the time it was done; the argument on the other side is that it must be treated as having been injurious, because it might afterwards become so. If the action had been brought when the act was first done, the answer would have been that the defendant had a right to do the act, and that no damage had been occasioned." E.

LORD WESTBURY says (*ibid.* at p. 512):

"I think it is abundantly clear, both on principle and authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and the action may then be maintained." F.

LORD CRANWORTH adds (*ibid.*):

"It has been supposed that the right of the party whose land has been interfered with is a right to what is called the pillars or the support. In truth his right is to the ordinary enjoyment of his land, and until that ordinary enjoyment is interfered with he has nothing of which to complain. That seems the principle on which the case ought to be disposed of." G.

It seems to me that *Backhouse v. Bonomi* (1) did decide that the removal of the subjacent strata was an act (I will not say an innocent act) done in the legitimate exercise of ordinary ownership, which per se gave no right of action to the owner of the surface, and that the latter had no right of action until his enjoyment of the surface was actually disturbed. The disturbance then constituted his right of action. In the present case there was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted this state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action. If this view is correct, then it follows that the cause of action now insisted on by the plaintiff is not the same cause of action as that of 1868, but is in point of law, as it is physically, a new and independent cause of action arising in 1882, to which the defence of the Statute of Limitations is not applicable. The necessary conclusion is that *Lamb v. Walker* (2) was not correctly decided, and that the able reasoning of COCKBURN, C.J., in that case ought to have prevailed. H. I.

Appeal dismissed.

Solicitors: S. B. Somerville, for *Baxter & Co.*, Doncaster; *Ridsdale & Son*, for *Saunders, Nicholson & Reeder*, Wath, near Rotherham.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

SPICER v. MARTIN

[HOUSE OF LORDS (Lord Watson, Lord FitzGerald and Lord Macnaghten), July 2, 9, December 18, 1888]

[Reported 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546;
53 J.P. 516; 37 W.R. 689]

Landlord and Tenant—Covenant prohibiting use of premises for carrying on business—Consideration of transactions between landlord and tenant as a whole.

The appellant purchased various houses from the Commissioners of the Exhibition of 1851, the conveyance of each of them containing a covenant that he would not carry on, or permit to be carried on, any trade or business, but would keep the house as a private dwelling-house. The appellant let one of the houses to the respondent, to whom his solicitor sent a draft lease, with a letter in which he said that the draft was in the form used for all the houses on the appellant's estate. The draft contained a restrictive covenant similar to that in the conveyance to the appellant, with a note to the effect that there was a covenant to that effect in the conveyance. Some time afterwards the respondent entered into negotiations with the appellant for a long lease of the same house at a ground rent, he paying a premium, and a draft agreement was sent which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in leases of his other houses. The respondent's solicitor thereupon wrote for the form of lease used by the appellant, a copy of a lease containing the restrictive covenant was sent, and a lease containing a similar covenant was granted to the respondent. The appellant afterwards entered into negotiations for the sale of some of his houses to a company for the purpose of their being converted into a hotel. In an action by the respondent for an injunction to restrain the appellant and other defendants from carrying on or permitting to be carried on upon any part of the appellant's property the trade or business of a hotel,

Held: in view of the terms of the documents evidencing the transactions between the appellant and the respondent the respondent was entitled to the benefit of the restrictive covenant, and to the injunction which he claimed.

Renals v. Cowlishaw (1) (1879), 9 Ch.D. 125, applied.

Piggott v. Stratton (2) (1859), 1 De G. F. & J. 33, distinguished.

Notes: Considered: *Mackenzie v. Childers* (1889), 43 Ch.D. 265. Applied: *Hudson v. Cripps*, [1895-9] All E.R.Rep. 917. Considered: *Osborne v. Bradley*, [1900-3] All E.R.Rep. 541. Applied: *Elliston v. Reacher*, [1908-10] All E.R.Rep. 612. Distinguished: *Reid v. Bickerstaff*, [1908-10] All E.R.Rep. 298. Considered: *Kelly v. Barrett*, [1924] All E.R.Rep. 503; *Lawrence v. South County Freeholds, Ltd.*, [1939] 2 All E.R.Rep. 503. Referred to: *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; *Davis v. Leicester Corpn.*, [1894] 2 Ch. 208; *Knight v. Simmonds* (1896), 65 L.J.Ch. 583; *Rogers v. Hosegood*, [1900-3] All E.R.Rep. 915; *Jaeger v. Mansions Consolidated, Ltd.*, [1900-3] All E.R.Rep. 533; *Formby v. Barker*, [1900-3] All E.R.Rep. 445; *Willé v. St. John*, [1908-10] All E.R.Rep. 325; *Browne v. Flower*, [1908-10] All E.R.Rep. 545; *Wilkes v. Spooner*, [1911] 2 K.B. 473; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Swan v. Sinclair*, [1924] All E.R.Rep. 277; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225; *Newman v. Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131; *Kelly v. Battershell*, [1949] 2 All E.R. 830.

As to restrictive covenants, see 23 HALSBURY'S LAWS (3rd Edn.) 647-651; and for cases see 31 DIGEST (Repl.) 160 et seq.

Cases referred to:

- (1) *Renals v. Cowlishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 880; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.

- (2) *Piggott v. Stratton* (1859), 1 De G.F. & J. 33; 29 L.J.Ch. 1; 1 L.T. 111; 24 A
J.P. 69; 6 Jur.N.S. 129; 8 W.R. 13; 45 E.R. 271; 31 Digest (Repl.) 587,
7066.
- (3) *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 15 Q.B.D. 261;
54 L.J.Q.B. 545; affirmed, 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444;
34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 106, 801.

Appeal from a decision of the Court of Appeal (COTTON, LINDLEY and LOPES, B
L.JJ.), reported 34 Ch.D. 1, affirming a decision of BACON, V.-C.

Rigby, Q.C., and *E. Ford* for the appellant.

Sir Horace Davey, Q.C., *Millar, Q.C.*, and *A. R. Kirby* for the respondent.

Their Lordships took time for consideration.

Dec. 18, 1888. The following opinions (except that of LORD WATSON) were read. C

LORD FITZGERALD.—In dealing with the questions in this case your Lord-
ships may look at the title of Mr. Spicer as disclosed on the agreement and con-
veyances before us, and appearing on the abstract of title submitted to the solicitors
who represented the respondent Martin in the negotiations with Mr. Spicer, and
also at the occurrences of 1874 on the negotiations for the lease for fourteen years. D
That lease is directly connected with the lease for eighty years which was made
during the continuance of the lease for fourteen years. Both leases are between
the same parties and negotiated between the same solicitors. The solicitors for
Mr. Martin had apparently the same information and the same representations
before them on both negotiations. The estate in fee had been in the Exhibition
Commissioners, who, acting as a public body and apparently in the interests of the E
public, in their preliminary agreement with Mr. Spicer, and in their subsequent
conveyances to him, imposed an obligation,

“that he, his heirs or assigns, would not exercise or carry on, or permit or
suffer to be exercised or carried on, by any person whomsoever upon any part
of the premises thereby conveyed, any trade or business whatsoever, but shall F
keep and use the same premises as and for private dwelling-houses only.”

The original agreement of the commissioners with Spicer was in fact a building
contract, and provided that Spicer was to prepare a block or plan laying out the
ground and showing its appropriation, and it was to be devoted to the erection
of “seven good and substantial dwelling-houses” according to specified plans, and
sometimes described in the agreement as “first class.” G

I can entertain no doubt that the commissioners made those provisions in the
interest of the local authority, and of those who might afterwards become the
owners or lessees of the several houses so to be erected. The fourteen years' lease
of No. 2 to George Martin, the respondent, is preceded by an agreement which
provides that the lease should (inter alia) contain “such other covenants as are
usual and comprised in the lessors' lease.” By “lessors' lease” is meant the H
conveyance from the commissioners to Spicer. It was in the course of the negotia-
tions for that lease that the present appellant, then acting as solicitor for his late
father, John Spicer, in sending the draft of the lease for fourteen years to George
Martin for approval, writes: “I may perhaps add that the draft is the form used
for the other houses in Cromwell-gardens.” That draft lease contains a covenant
on the part of the lessee that the demised premises should not be used “for any I
purpose whatsoever other than as a private dwelling-house,” with a marginal
observation by the present appellant in these words: “There is a covenant to this
effect in the conveyance of these premises to Mr. Spicer. G. J. S.” That lease
was executed in the terms of the draft.

In 1880 Mr. Martin, availing himself of a provision in the lease of 1874 (that is
the fourteen years' lease), gave notice of his intention to surrender in 1881, but
there never was a surrender in fact of that lease. Negotiations were entered on
for the purchase of a lease for eighty years, which, when completed by the execution

A of the new lease, created a surrender by operation of law of the earlier lease. Your Lordships have not before you the earlier portion of these negotiations, but we may look at the position of the parties and the circumstances of the sale. The parties were the same, the solicitors were the same, and Martin was then still in possession under the lease of 1874. There is a letter from Martin to John Spicer relating apparently to the notice of surrender, in which he quotes, and sends to B him, a letter from his solicitors in which they ask him to get Mr. Spicer's acknowledgment of the receipt of that notice, "and then we can put it up with our papers." This passage seems to indicate that Ashurst & Co. retained the papers connected with the lease of 1874, and had before them the representation C contained in the letter of Feb. 26, 1874. The terms of the new contract appear to have been substantially arranged before Sept. 21, 1880, for on that day the present appellant writes to Ashurst & Co.: "I send you the draft contract for sale No. 2, Cromwell Gardens." That draft agreement deserves the special attention which was given to it in argument, and will be given to it in the opinion which LORD MACNAGHTEN will read after me. I have read his opinion, and I concur in the observations which will be made by him, and in the inferences he will deduce. It will be seen that the agreement for the lease for eighty years D was subsequently carried into effect by a lease prepared by the present appellant.

It seems to me that these two transactions run into each other and are not to be separated, and that each was subject to and brought about by the same representation that the whole of this property of the seven dwelling-houses was and was to continue to be on the part of both the landlord and his lessees subject to the same restriction, that the houses were to be used as dwelling-houses only and for E no other purpose, and that the purchaser Martin was to be subject to and to have the benefit and protection of that restriction. I cannot doubt that both parties so intended in honesty and good faith. The transaction of 1880 was really that Martin purchased the larger term of eighty years commencing from a date then three years past, at a lesser rent, but for which he paid a premium of £11,000. It was but the extension of the same relation of lessor and lessee for a longer F term and at a reduced rent, and the representations which affected the first were, as it appears to me, equally applicable to the second lease. There is every ingredient in this case from which we may reasonably infer an intention that the lessees or purchasers were to be protected by and have the benefit of the restrictive covenant as between Spicer and the commissioners, and to be bound by a similar obligation entered into by each on his own behalf. It can make no difference that G Spicer's original single obligation to the commissioners was split up by the adoption of a separate conveyance in fee of each of the seven building lots.

The deed of March 25, 1867, which is the completion of that arrangement, seems to me to be a persuasive piece of evidence. The seven houses had been before then erected, and the seven conveyances made to Spicer by the commissioners: The deed recites all this, and that each of the seven conveyances contained the H restrictive covenant which it sets out in terms:

"and that it was also agreed that, for the purpose of saving expense, the commissioners would, in lieu of requiring counterparts of the seven indentures, accept a covenant from the said John Spicer, by a separate deed in the form of the covenant on his part contained in the same indentures, but applicable I to the whole of the premises comprised in the said several indentures respectively."

The deed witnessed that, in pursuance of the said lastly mentioned agreement, the said John Spicer did

"thereby for himself, his heirs, appointees, and assigns, covenant with the said Exhibition Commissioners, that he the said John Spicer, his heirs, appointees; and assigns, will not exercise or carry on, or permit or suffer to be exercised or carried on, by any person or persons whomsoever, upon any part of the premises by the said several indentures or any of them respectively granted

and released, or intended so to be, any trade or business whatsoever, but will keep and use the said premises as and for private dwelling-houses only."

The restrictive obligation, it will be seen from the last deed, was one single and undivided, applicable to the whole, and to each and every of the seven houses; and Mr. Spicer has himself, while giving notice to his lessees and assigns of the obligation he had undertaken, stipulated that they severally should enter into a similar covenant as to his own holding. I cannot entertain any reasonable doubt that, as between the appellant and the respondent, the latter was, according to right and justice, entitled to the full benefit and protection of the restrictive covenant which the vendor had entered into with the commissioners. The appellant Spicer alone contests the respondent's claim. The lessees or purchasers of two other of the seven houses were made defendants, but offered no opposition, and other defendants, one Brett [who was promoting the formation of the hotel company] and the intended hotel company, have vanished.

In my opinion, the decision of the Court of Appeal should be affirmed, and so affirmed on the ground and for the reasons which I have given, namely, that the lessee, while he was on the one hand subject to the obligation of the restrictive covenant contained in his lease, was also on the other hand entitled to the benefit of the covenant entered into by Spicer with the commissioners to the same effect. The decision of the Court of Appeal proceeded on a question somewhat different, being one of mixed fact and law, which may be thus expressed, viz., whether the representations alleged to have been made by or on behalf of Spicer were so made, and were such, that the court ought to deduce from those representations a collateral contractual obligation on his part with Mr. Martin that the tenants of the other six dwelling-houses should be severally bound to use the houses as and for private dwelling-houses only, and not otherwise, and that he, Mr. Spicer, would not permit his property to be used save in accordance with that obligation. The houses 3, 4, 5, and 7 had been dealt with by John Spicer prior to 1874, and the leases each contained that restrictive covenant. In 1876 Hammersley acquired No. 6, but subject to the same restriction. The same observation applies to the dealing with Shafto as to No. 3 in 1876. In the view which I have expressed as to the proper ratio decidendi, it is not now necessary to express an opinion on the difficult question on which the Court of Appeal acted. I desire to say, however, that if I had been called on now to express an opinion on it, the inclination of my mind would be in favour of the view on which the judgment of the Court of Appeal rested. The temptation of a large price was unfortunately sufficient to induce the appellant to become active in assisting to defeat the arrangement he had so entered into. It is not necessary here to examine in detail the action of the appellant. He was not only active in promoting the design of Mr. Reginald Brett, but he has maintained at the Bar here his right to do so. It makes no difference that the actual project has come to an end since the institution of the suit, and possibly because of its institution. The suit became necessary because of the action of the appellant, and the respondent is entitled to an injunction in the modified form adopted by the Court of Appeal. I move your Lordships, therefore, that the decision of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN.—The learned counsel for the respondent put their case in two ways. Adopting the arguments which seem to have found most favour with the Court of Appeal, they contended that the communications addressed to Mr. Martin and his solicitors by Mr. Spicer's solicitor involved representations which amounted to a collateral contract by Mr. Spicer as to the future management of the estate on which Mr. Martin was induced to purchase a residence. They also contended that, under the circumstances of the case, and having regard to the nature of the transaction which resulted in that purchase, Mr. Martin was entitled to the benefit of the restrictive covenant which the

A Commissioners for the Exhibition of 1851 imposed on Mr. Spicer, and through Mr. Spicer on all persons deriving title from him to any portion of the estate.

Certainly the communications which passed between the parties are not to be disregarded. They form part of the transaction. They serve to record some facts which otherwise might have been left to inference or conjecture; but still, if the true view were that "this case really turns on the correspondence," to use the language of one of the learned judges, or "really depends upon the construction of the letters which passed between the plaintiff and the defendant Spicer," as another member of the court sums up the question, I should have had a difficulty in advising your Lordships to affirm the decision under appeal. Mr. Martin's connection with the estate began in 1874. On that occasion no correspondence of any sort or kind appears to have passed between the parties until Mr. Martin had entered into a binding agreement to take a lease of No. 2, Cromwell Gardens. The lease was to be for a term of fourteen years, determinable by the lessee at the end of the first seven years. One of the conditions of the agreement was, that the lease should contain such "covenants as are usual and comprised in" the conveyance to the lessor. Shortly afterwards a draft lease, on a lithographed form, with some alterations in writing, was sent to Mr. Martin. It was accompanied by a letter, which stated that the draft was "the form used for other houses in Cromwell Gardens, and, in fact, for all the houses on Mr. Spicer's estates." In the margin of the draft, opposite to a written addition, there was a note in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer." In due course the draft was approved, and the lease was executed in May, 1874. This lease was terminated by notice in 1880 at the end of the first seven years.

Then there were negotiations for a new lease of the same premises for a long term of years, at a premium of £11,000. A draft agreement was sent by Mr. Spicer's solicitor to the solicitors who acted for Mr. Martin, which originally contained this clause:

"The said lease shall contain such covenants, conditions, and agreements, on the part of the purchaser or lessee, as are usually contained in leases granted by the said vendor of his other houses in Cromwell Gardens."

Mr. Martin's solicitors asked for "a copy of the form of lease referred to in the draft agreement as in use on the estate." They said they could not settle the draft without it. They also suggested that the shortest plan would be for Mr. Spicer's solicitor to prepare and send to them the draft lease, which might then be annexed to the agreement. A form of lease was accordingly sent, which apparently was a copy of a lease actually granted to a tenant of one of the other houses in Cromwell Gardens. Accompanying this document there was a letter in these words, "As promised I beg to forward draft of proposed lease herein." The draft was approved, and scheduled to the agreement, which was altered in the clause I have quoted, so as to make it refer to the draft lease as the form of lease to be granted in pursuance of the agreement.

I have now stated the whole of the communications which passed between the parties from the very beginning to the end of the transaction, so far as they are relevant to the present question. Whatever construction may be placed upon the communications which passed in 1874, I much doubt whether they are so connected with the transactions that took place seven years afterwards as to entitle Mr. Martin to rely upon them as a representation inducing the contract of 1880. But, however that may be, I must confess that I am unable to see any difference, as regards the question now before your Lordships, between the communications which took place in 1874 and those which took place in 1880. On the first occasion the information was furnished in fulfilment of an antecedent obligation contained in the agreement for a lease. On the second occasion the information was supplied in compliance with a request by Mr. Martin's solicitors who wanted it in order to enable them to settle the draft then before them. In each case the

representation which was made was nothing more than a simple statement as to the terms of the restrictive covenant which, for himself and his sequels in right, Mr. Spicer had contracted to observe. In itself the statement was admittedly accurate. It was not, in my judgment, designed or calculated to put Mr. Martin off his guard. It was not intended, or apparently understood, to convey any assurance as to the continuance of the existing state of things.

In this respect the present case is altogether different from *Piggott v. Stratton* (2), on which the judgment of the Court of Appeal seems to be founded. In *Piggott v. Stratton* (2), one Stratton had taken a building lease of two plots of ground in the Isle of Wight. There was a restrictive covenant in respect of plot A., with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot B. Stratton granted an underlease of plot B. During the negotiations for the underlease he had told the under-lessee that he was prevented by the terms of his lease from building so as to obstruct the sea view. On this assurance the underlease was taken, and villas were built which were afterwards acquired by Piggott. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. But it was held that the obligation of the covenant still remained. What was actually said by Stratton may have been nothing more than a representation, accurate in itself, of an existing fact. But it was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the currency of the lease, and that so long as the underlease lasted, the under-lessee would be safe from the apprehended obstruction. That was a case of bad faith, and LORD CAMPBELL, L.C., denounced Stratton's conduct in terms which would be absurdly extravagant if applied to the conduct of the commissioners, or to the conduct of the appellant. There is no room for any charge of bad faith in the present case. Strange as it may seem, I have no doubt that both the commissioners and the appellant honestly thought that they were not even acting unreasonably or unfairly to Mr. Martin.

Although the correspondence of itself would not, as I venture to think, give the respondent a right to the interposition of the court, the question still remains whether Mr. Martin was not, under all the circumstances, entitled to the benefit of the restrictive covenant. On this branch of the case COTTON, L.J., apparently would have been in favour of the respondent. But the point did not form the ground of his decision. The law on the subject has never been stated more clearly than it was by HALL, V.-C., in *Renals v. Cowlishaw* (1). The opinion of that learned judge on any question relating to conveyancing and real property law, owing to his great experience as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal, where JAMES, L.J., expressly concurred in every word of the vice-chancellor's judgment. It has also, I may observe, been approved and followed in the Queen's Bench Division: *Nottingham Brick Co. v. Butler* (3). The learned counsel on both sides accepted the statement of HALL, V.-C., as an accurate exposition of the law. I should be disposed to hesitate if I were invited to extend the principles recognised in *Renals v. Cowlishaw* (1). But, at the same time, I think those principles, as defined by the vice-chancellor, are perfectly sound, consistent with the authorities and consistent with good sense. I think they apply to the present case, and I think they must govern it. If the site of the houses now known as Cromwell Gardens had been put up for sale by auction in building lots according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers inter se.

What difference is there in substance between the case I have supposed and the case which has occurred? The site was laid out by the commissioners in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose; a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it, or let it again. The houses were actually built as private houses, and offered to the public as such. Their character was unmistakable; and every person who took one of the houses was required to enter into the same restrictive covenant. Every lessee in ordinary course must have had the same information as Mr. Martin had. Every lessee must have known that every other lessee was, or would be, bound to use his house as a private residence only. This restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation. As regards the appellant, the case, I think, is doubly clear. It seems to me that, when Mr. Spicer put his houses in Cromwell Gardens on the market, he invited the public to come in and take a portion of an estate which was bound by one general law, a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the thing he sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole? For these reasons I think the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed with costs.

LORD WATSON.—In this case I have had the advantage of considering in print the opinion which has just been delivered by LORD MACNAGHTEN, and finding there all that I could desire to say myself, I shall simply express my concurrence.

Appeal dismissed.

Solicitors: *Foster & Spicer; Ashurst, Morris, Crisp & Co.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

COLONIAL BANK v. WHINNEY

[HOUSE OF LORDS (Lord Blackburn, Lord Watson, Lord FitzGerald, Lord Halsbury and Lord Ashbourne), May 21, 24, 28, 31, June 1, 29, 1886]

[Reported 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362;
34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207]

Bankruptcy—Property available for distribution—Property in reputed ownership of bankrupt—Goods—"Things in action"—Shares in limited company.

By s. 44 of the Bankruptcy Act, 1883 [re-enacted by Bankruptcy Act, 1914, s. 38]: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . shall comprise the following particulars. . . (iii) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." By s. 168 (1) [s. 167 of Act of 1914]: "'Goods' includes all chattels personal."

B. and T., who carried on business in partnership, purchased shares in a railway company with moneys belonging to the firm. The shares were registered in the name of B., and he deposited the certificates, together with a transfer in blank, with the appellant bank as security for a loan for the purposes of the partnership business. The partners having become bankrupt,

Held: (i) shares in a limited company, transferable by deed, were personal chattels and so "goods" within the meaning of s. 44 (iii), but they were also "things in action" and so within the exclusion from the operation of the section provided by the proviso; (ii) goods belonging to a third party were not within s. 44 (iii) unless they were left with the bankrupt in such circumstances that he, as reputed owner, could sell them or obtain credit on them in the course of his trade or business; anyone who was about to purchase the shares from the bankrupts in the present case, or was about to give credit to them as being the owners of the entire interest in the shares, would require that the share certificates be produced or accounted for, and that, in the absence of fraud on the part of the partners (which the House had no right to assume might take place), would lead to disclosure of the fact that the shares had been pledged; and, therefore, the partners were not reputed owners of the shares within s. 44 (iii) and the bank were entitled to retain them as against the trustee in bankruptcy.

Notes. Considered: *Sharman v. Mason*, [1899] 2 Q.B. 679. Referred to: *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29; *Tennant v. Howatson* (1888), 13 App. Cas. 489; *Re Harrison, Ex parte Official Receiver* (1892), 10 Morr. 1; *Re Goetz, Jonas & Co., Ex parte Trustee* (1898), 78 L.T. 399; *Rainford v. Keith and Blackmore Co.*, [1905] 1 Ch. 296; *Hollinshead v. Egan*, [1913] A.C. 564; *Lamb v. Wright*, [1924] All E.R.Rep. 220; *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K.B. 672; *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1933] All E.R.Rep. 52; *I.R.Comrs. v. Crossman, I.R.Comrs. v. Mann*, [1936] 1 All E.R. 762; *Re Fox, Ex parte Oundle and Thrapston R.D.C. v. Trustee*, [1948] 1 All E.R. 849.

As to property in the reputed ownership of a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 438-447; and for cases see 5 DIGEST (Repl.) 801 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Sketchley, Ex parte Boullon* (1857), 1 De G. & J. 163; 26 L.J.Bcy. 45; 29 L.T.O.S. 71; 3 Jur.N.S. 425; 5 W.R. 445; 44 E.R. 685; 5 Digest (Repl.) 803, 6794.
- (2) *Re Shelley, Ex parte Stewart* (1864), 4 De G.J. & Sm. 543; 5 New Rep. 200; L.J.Bcy. 6; 11 L.T. 554; 11 Jur.N.S. 25; 13 W.R. 356; 46 E.R. 1029; 5 Digest (Repl.) 828, 6990.
- (3) *Re Richardson, Ex parte Richardson* (1839), 3 Deac. 496; Mont. & Ch. 43; 8 L.J.Bcy. 27; 5 Digest (Repl.) 834, 7038.
- (4) *Re Worcester, Ex parte Agra Bank* (1868), 3 Ch. App. 555; 37 L.J.Bcy. 23; 18 L.T. 866; 16 W.R. 879; 5 Digest (Repl.) 835, 7039.
- (5) *Ryall v. Rolle* (1750), 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 9 Bli.N.S. 377; 27 E.R. 1074; 5 Digest (Repl.) 809, 6840.
- (6) *Cole v. North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, 501.
- (7) *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 21 W.R. 530; 5 Digest (Repl.) 861, 7230.
- (8) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; 55 L.J.Q.B. 169; 54 L.T. 389; 34 W.R. 662, H.L.; 8 Digest (Repl.) 603, 462.
- (9) *Dundas v. Dutens* (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E.R. 298; 21 Digest (Repl.) 570, 655.
- (10) *Humble v. Mitchell* (1839), 11 Ad. & El. 205; 2 Ry. & Can. Cas. 70; 3 Per. & Dav. 141; 9 L.J.Q.B. 29; 3 Jur. 1188; 113 E.R. 392; 9 Digest (Repl.) 231, 1502.
- (11) *Joy v. Campbell* (1804), 1 Sch. & Lef. 328; 3 Bli.N.S. 110, n.; 5 Digest (Repl.) 857, *3368.
- (12) *Simmons v. Edwards* (1847), 16 M. & W. 838; 11 Jur. 592; 153 E.R. 1431; 5 Digest (Repl.) 817, 6904.
- (13) *Re Hickey* (1875), L.R. 10 Eq. 117; 10 I.L.T. 123; 5 Digest (Repl.) 839, *3334.
- (14) *Re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (1885), 15 Q.B.D. 441; 54 L.J.Q.B. 601; 2 Morr. 131, D.C. 5; Digest (Repl.) 843, 7102.

Also referred to in argument:

- Re Medley, Ex parte Harrison* (1838), 3 Deac. 185; 3 Mont. & A. 506; 7 L.J.Bcy. 48, Ct. of R.; 5 Digest (Repl.) 834, 7036.
- Morris v. Cannan* (1862), 4 De G.F. & J. 581; 31 L.J.Ch. 425; 6 L.T. 521; 8 Jur.N.S. 653; 10 W.R. 589; 45 E.R. 1310, L.C.; 5 Digest (Repl.) 829, 6996.
- Re Reay and Reay, Ex parte Arbouin, Ex parte Gonne* (1846), De G. 359; 5 Digest (Repl.) 820, 6917.
- Re Lake, Ex parte Dorman* (1872), 8 Ch. App. 51; 42 L.J.Bcy. 20; 27 L.T. 528; 21 W.R. 94; 5 Digest (Repl.) 820, 6918.
- Re Jackson, Ex parte Union Bank of Manchester* (1871), L.R. 12 Eq. 354; 40 L.J.Bcy. 57; 24 L.T. 951; 19 W.R. 872; 5 Digest (Repl.) 829, 6998.
- Re Price, Ex parte Bank of England* (1867), 2 Ch. App. 662; 36 L.J.Bcy. 24; 16 L.T. 760; 15 W.R. 1066; 5 Digest (Repl.) 1169, 9440.
- Re Moore, Ex parte Ibbetson* (1878), 8 Ch.D. 519; 39 L.T. 1; 26 W.R. 843, C.A.; 5 Digest (Repl.) 803, 6799.
- M'Carthy v. Goold* (1810), 1 Ball & B. 387; 8 Digest (Repl.) 545, *12.
- Honner v. Morton* (1828), 3 Russ. 65; 38 E.R. 500; 21 Digest (Repl.) 332, 858.
- Curtis v. Sheffield* (1836), 8 Sim. 176; 5 L.J.Ch. 337; 59 E.R. 70; 5 Digest (Repl.) 797, 6744.
- R. v. Capper* (1817), 5 Price, 217; 146 E.R. 587; 8 Digest (Repl.) 544, 15.
- Re Pryce, Ex parte Rensburg* (1877), 4 Ch.D. 685; 36 L.T. 117; 25 W.R. 432; 5 Digest (Repl.) 829, 7000.

- Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch.D. 218; 47 L.J.Bey. 70; 38 L.T. 229; 26 W.R. 439; 5 Digest (Repl.) 820, 6919.
- Re Leech, Ex parte Davenport* (1832), 1 Deac. & Ch. 397; Mont. & B. 165; 1 L.J.Bey. 101; 5 Digest (Repl.) 836, 7055.
- Great Eastern Rail. Co. v. Turner* (1872), 8 Ch. App. 149; 42 L.J.Ch. 83; 27 L.T. 697; 21 W.R. 163; 5 Digest (Repl.) 817, 6906.
- Re Ord, Ex parte Ord* (1835), 2 Mont. & A. 724; 1 Deac. 166; 4 L.J.Bey. 84; 5 Digest (Repl.) 829, 6992.
- Re Lashmer, Ex parte Vallance* (1837), 2 Deac. 354; 3 Mont. & A. 224; 6 L.J.Bey. 52; 1 Jur. 359; 5 Digest (Repl.) 829, 6999.
- Re Grehan* (1867), 1 I.L.T.Jo. 66; 5 Digest (Repl.) 833, *3316.
- Shropshire Union Railways and Canal Co. v. R.* (1875), L.R. 7 H.L. 496; 45 L.J.Q.B. 31; 32 L.T. 283; 23 W.R. 709, H.L.; 10 Digest (Repl.) 1219, 8539.
- Hamilton v. Bell* (1854), 10 Exch. 545; 24 L.T.O.S. 118; 18 Jur. 1109; 3 W.R. 62; 3 C.L.R. 308; 156 E.R. 554; sub nom. *Bell v. Hamilton*, 24 L.J.Ex. 45; 5 Digest (Repl.) 855, 7188.
- Re Pearse, Ex parte Littledale* (1855), 6 De G.M. & G. 714; 24 L.J.Bey. 9; 24 L.T.O.S. 318; 1 Jur.N.S. 385; 3 W.R. 307; 43 E.R. 1410; 5 Digest (Repl.) 828, 6989.
- Re Loosemore, Ex parte Wood* (1843), 3 Mont.D. & De G. 315; 12 L.J.Bey. 42; 1 L.T.O.S. 263; 7 Jur. 521; 5 Digest (Repl.) 827, 6980.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (COTTON and LINDLEY, L.JJ., FRY, L.J., dissenting), reported 30 Ch.D. 261, affirming a decision of BACON, V.-C.

Sir Richard Webster, Q.C., Rigby, Q.C., and Northmore Lawrence for the appellants.

Sir Horace Davey, Q.C., Marten, Q.C., and Buckley for the respondent.

Their Lordships took time for consideration.

June 29, 1886. The following opinions (except that of LORD HALSBURY) were read.

LORD BLACKBURN.—This is an appeal against an order of the Court of Appeal affirming a judgment of BACON, V.-C., dated July 28, 1884, and orders that the plaintiffs, the Colonial Bank, do pay the costs. The judgment of July 28, so far as it is material, was as follows:

"This court, being of opinion that the plaintiffs are not entitled to the relief prayed by the statement of claim in this action, doth order that the action stand dismissed out of this court, with costs, to be paid by the plaintiffs."

The facts are not in dispute, and, as far as material in the view I take of the case, may be briefly stated. The firm of P. W. Thomas, Sons & Co. consisted of two persons, W. E. Blakeway and Perry William Thomas. The firm bought and paid for 7,108 £10 shares in the Forth Bridge Railway, a company incorporated by an Act of Parliament incorporating the Companies Clauses Consolidation (Scotland) Act, 1845. The name of W. E. Blakeway was entered in the register of shareholders as entitled to the 7,108 shares, and certificates were delivered in his name, but the shares belonged to the firm. The certificate of the shares (as to the form and legal effect of which I will say a word a little later) were deposited with the Colonial Bank as a security for advances made to the firm by that bank. They were accompanied by what is commonly called a blank transfer signed and sealed by W. E. Blakeway. That, not being a deed, was inoperative as a transfer. It was, however, I think, evidence that the deposit of the certificates was intended to be as a security. There was ample evidence, independent of this, to show that this was the real nature of the transaction, and that, so long as the firm continued *sui juris*, the Colonial Bank had a right to detain these certificates till the advances for which they were pledged were paid off; and it is not disputed

now that, while the pledgors remained sui juris, the pledgee would be entitled to the relief which the Colonial Bank have prayed by the statement of claim in this action against the defendant. Some doubt which might seem to be thrown on this by *Ex parte Boulton* (1) was removed by the decision in *Re Shelley, Ex parte Stewart* (2). But, though this was so, the firm were still entitled to what, for want of a better term, I may (not quite accurately) call the equity of redemption in the shares. It was not contested that, as it has turned out, the value of the shares was not sufficient to meet the unpaid advances, so that this property remaining in the firm has turned out not to be of any value. Still it was their property. Both partners became bankrupt in January, 1884, and the defendant was, on Feb. 1, 1884, appointed trustee under the bankruptcy.

LORD WESTBURY, in *Re Shelley, Ex parte Stewart* (2), points out that the general rule in bankruptcy was that the assignee took the property of a bankrupt subject to the equities which affected it in his hands, and consequently that the only question under the bankruptcy laws then in force (Bankruptcy Law Consolidation Act, 1849) was whether the case was brought within s. 125 of that Act. The only question in the present case is whether the case is brought within s. 44 (iii) of the Bankruptcy Act, 1883, which comprises among the property of the bankrupt divisible among his creditors "all goods," which by the interpretation clause (s. 169) in this Act, "unless the context otherwise requires," includes

"all chattels personal being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section." [See now Bankruptcy Act, 1914, s. 38 (b), s. 167.]

There can, I think, be no doubt that shares in a railway company, though not goods in the ordinary sense of the word, are personal chattels, and, I think, as little doubt that the Colonial Bank are the true owners of the equitable right which they had acquired in the shares. But for the proviso, therefore, I think the chief question would have been whether this equitable interest was in the possession, order, or disposition of the bankrupts, who were the pledgors and true owners of the equity of redemption, by the consent and permission of the Colonial Bank, under such circumstances that they (the bankrupts) were the reputed owners of the equitable interest. A further point was made founded on the words "in his trade or business." I fear I did not quite appreciate the argument, and, as the words which are new may be important in other cases, I prefer to consider the case as if those words were not here.

I think that the owner of chattels personal not passing by delivery, though he can create a good equitable title in a pledgee for the purpose of securing a debt, may still continue to be reputed owner of the whole property. It was argued that there was an inexorable rule that he must so continue, unless the persons to whom anyone who took a subsequent conveyance from the person once the owner of the property would have to apply in order to perfect that title had knowledge of the pledge. I think that such knowledge in them is one way in which it may be shown that the pledgor is not to be considered as reputed owner. If the decisions were confined to cases of notice, that is, notice given to those persons by the pledgee, as distinguished from mere knowledge acquired by them otherwise, it might be said that the cases only showed that the pledgee, having given that notice and done all that was in his power to make the pledge known, could not be said to consent to the apparent ownership. But *Ex parte Richardson* (3); *Re Shelley, Ex parte Stewart* (2); and *Re Worcester, Ex parte Agra Bank* (4) all show that knowledge in those persons, though not derived from the pledgee, is a sufficient circumstance to prevent reputed ownership. I do not think there

is either authority or principle for saying it is the only circumstance that can have that effect. A

LORD HARDWICKE, who thought that the statute only applied where the bankrupt had been originally owner, says, in *Ryall v. Rolle* (5) (1 Ves. Sen. at p. 372):

"It appears that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit, by a false appearance of substance to mislead those who should deal with them." B

In *Cole v. North Western Bank* (6), in the judgment of the Exchequer Chamber, it is said (L.R. 10 C.P. at p. 362):

"At common law, a person in possession of goods could not confer on another, either by sale or pledge, any better title to the goods than he had himself. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced bona fide to act on that apparent authority, from denying that he had given that authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited." C D

The policy of the Bankrupts Act, 1731, as explained by LORD HARDWICKE, went a good deal further. It took, in the event of bankruptcy, the property of the person who had left it in the hands of the trader to pay the general creditors of the bankrupt, though no credit had actually been obtained upon it; but I think it never was so unjust as to take his property, unless it was left by him in such circumstances as that credit might have been obtained upon it. E

This principle seems to have been lost sight of in some cases. I think, however, it was fully recognised and restored in *Re Couston, Ex parte Watkins* (7). That was as to the claim of one who had bought and paid for wine, but left it in the custody of the vendor, who afterwards became bankrupt as to goods, not as to chattels such as shares. But the principles explained by LORD SELBORNE, are, I think, equally applicable to both. He says (8 Ch. App. at p. 528): F

"There is no inflexible rule of law that, because a man who was once an owner of goods and has sold them remains in possession of them, he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his trustees. But it is always a question of fact whether or no the circumstances are such as to create that reputation. . . . It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. . . . So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything about particular goods one way or another. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession." G H I

MELLISH, L.J., says (*ibid.* at p. 533):

"Reputed owners of the goods so left in their possession, which surely must mean reputed to be the owners by the persons who have dealings with them, and who might be deceived. . . . I must also say that it is extremely desirable that, as far as can be done reasonably and consistently with the rules of law, the rules of law should be interpreted so as to be in accordance with the customs of trade."

I now return to the form of the certificates in this case, which contain in them this note:

"Note, in the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered, or a new certificate issued."

I may deal with this more briefly because a very analogous case, *Société Générale de Paris v. Walker* (8), has recently been decided in this House, and I see no reason to alter any part of what I then said. It was argued in the present case that a person remaining on the register and executing a transfer, or the transferee, would have a right to bring an action against the company who acted upon this note, and declined to register the transfer until the certificate was produced. I do not think so; if the company declined to do so after the non-production of the certificate was accounted for, as by proof that it was lost or destroyed, or that it was wrongfully withheld by some one who had had no right to withhold it, I suppose a court would, on proof of those facts, order registration, probably requiring as a condition that an indemnity should be given. But I continue to think that it is not wrong in the directors to act in the way which by this note they hold forth that they will act; and I think it at least doubtful whether, if they hastily and without inquiry registered the transfer, they might not incur responsibility to a pledgee who had the certificates with that note upon them if he suffered loss from their so acting.

The custom of trade, at least as far as regards the Stock Exchange, has always been that before the buyer of shares pays his money he is entitled to have delivered to him a transfer accompanied by certificates showing that the person who executes the transfer was the registered holder of the shares. I think, therefore, it is clear that anyone who was about to give credit to the bankrupts as being the owners of the entire interest in those shares ought to know that he had no legitimate ground for believing that they were such owners of the whole interest unless the certificates were produced or accounted for. Any inquiry as to what had become of the certificates would (unless the bankrupts were fraudulent liars, which we have no right to assume) have led to the disclosure of the fact that they were pledged. I think, therefore, it is shown that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the Colonial Bank in the shares, and that the order appealed against is wrong on that ground. The judges below had not in *Société Générale de Paris v. Walker* (8) perceived the importance of the production of the certificates, and they decided this case before this House had given their judgment on appeal in that case. They did not, therefore, notice this point.

On the construction of the proviso, I think that FRY, L.J., put the right construction on it. The question, I think, is correctly said to be whether the expression "things in action," as used in this enactment, is intended to include shares in a railway company, which clearly are personal chattels, the property in which does not pass by mere delivery, but does pass by a deed of transfer duly stamped (Companies Clauses Consolidation (Scotland) Act, 1845), when delivered to the secretary and by him entered in the registry:

"and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not

be entitled to receive any share of the profits of the undertaking or to vote in respect of such share."

The principal argument used by counsel for the respondent, and it seems to have prevailed both with COTTON, L.J., and LINDLEY, L.J., was that choses in action, of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There always was a difference between personal property such as to be capable of being stolen, taken, and carried away, and so as to be the subject of larceny at common law, and to be capable of being seized by the sheriff under a fi. fa., and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property, like stock in the Funds, or, in more modern times, shares in the companies, were created, questions arose whether they were within the principle of being in possession or not; but till the phrase was used in the Companies Clauses Act, 1869, it never became important to inquire whether they were to be called things in action or not. But it is noticeable that in *Dundas v. Dutens* (9), LORD THURLOW, L.C., speaking of stock or the Funds, said (1 Ves. at p. 198):

"Those things, such as stock, debts, &c., being choses in action, are not liable. They could not be taken upon a levavi facias."

The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But LORD THURLOW thought choses in action an apt expression to use with respect to such things. Again, shares are not within the [repealed] s. 17 of the Statute of Frauds, because they do not pass by delivery. LORD DENMAN, in *Humble v. Mitchell* (10), thought choses in action a proper phrase to express that idea. Again, in *Re Worcester, Ex parte Agra Bank* (4), WOOD, L.J., in speaking of an assignment of shares, uses the phrase "whether in an assignment of a chose in action." He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had before done to LORD THURLOW and LORD DENMAN, that the phrase expressed the idea. And I think it was hardly disputed that, in modern times, lawyers have accurately, or inaccurately, used the phrase choses in action as including all personal chattels that are not in possession.

In what sense, then, is it used in s. 15 of the Bankruptcy Act, 1869, from which the present enactment is taken? It is not disputed that these words show that the legislature intended to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind. For this reason, also, I think that the judgment is wrong, and that the judgment of the vice-chancellor ought to have been that the plaintiffs are entitled to the relief prayed by the statement of claim. I, therefore, propose that the judgment appealed against and the judgment of July 28, 1884, therein affirmed be reversed; and that the costs of the appellant in this House and in the Court of Appeal be borne by the respondent.

LORD WATSON.—I am of opinion that the judgments appealed from ought to be reversed. The principle which appears to me to be deducible from the authorities is that goods belonging to a third party are not within s. 44 (iii) of the Bankruptcy Act, 1883, unless they were left with the bankrupt in such circumstances that he, as reputed owner, could have sold them, or otherwise obtained credit upon them, in the course of his trade or business. I do not think the 7,018 shares in the Forth Bridge Railway Co. were left in that position at the commencement of the bankruptcy of the firm of P. W. Thomas, Sons & Co., and its individual partners. The appellants had at that time become the equitable

owners of the shares, and were lawful holders of the certificates issued by the railway company, which bore upon the face of them an intimation that

"in the event of sale or transmission, this certificate must be surrendered with the deed of transfer, whether the deed transfers all or any of the shares, before the transfer can be registered or a new certificate issued."

That is, in my opinion, an assurance by the company upon which a lawful holder of the certificate is entitled to rely, to the effect that, according to their usual practice, the company will decline to register any transfer of shares until the relative certificates are produced or their non-production is satisfactorily accounted for. *Société Générale de Paris v. Walker* (8), as decided by this House, is, in my opinion, a clear authority for holding that a transfer of these 7,018 shares by William Evan Blakeway, after the certificates were deposited with the appellants, would not have been "in order." In other words, the transfer would not have been registered until some inquiry was made and some evidence submitted to the railway company showing that the certificates had been lost or destroyed. A truthful explanation would at once have revealed the equitable ownership of the appellants; so that the transfer could not have been made effectual unless Mr. Blakeway had chosen to commit fraud, and possibly perjury as well. In that state of matters I do not think Mr. Blakeway was in a position to obtain credit upon the shares in question from any prudent customer. I cannot, therefore, hold that the shares in question were in his order and disposition in such circumstances that he was the reputed owner thereof.

Owing to my want of familiarity with the terms of English law, I have had considerable difficulty in making up my mind upon the other question of importance raised in this appeal. But, on consideration, I have come to be of opinion with your Lordships that such shares as these are "things in action," within the meaning of the proviso in s. 44 (iii) of the Bankruptcy Act, 1883.

LORD FITZGERALD.—The two questions necessarily involved in this appeal are so important commercially and in relation to advances of money on the security of shares in public companies, that I feel called on to express my reasons for concurring in opinion with my noble and learned friends. These questions arise on s. 44 (iii) of the Bankruptcy Act, 1883, which now represents the order and disposition clause in bankruptcy, and it may be expedient to glance for a moment at the early history of the provision in the bankruptcy law in this respect. A somewhat ancient writer tells us that,

"although originally merchants were much favoured in our law, soon their number and cunning and their crafty dealings had so much increased, that it fell out we had more need to make laws against them than for them."

Whether this is accurate or not in the present day, I do not know. We find in the earlier statutes bankrupt traders are dealt with very much as if criminals. The Statute of Bankrupts, 1542, was enacted "against" such persons "as do make bankrupt." The Bankrupts Act, 1571, in dealing with who is a bankrupt, and how and by whom his body, lands and goods shall be ordered for payment of the creditors, recites that "those kind of persons do still increase and are like more to do if some better law be not made for their repression." We find in the preamble of the Bankrupts Act, 1603, "For that frauds daily increase among those who live by buying and selling by such as wickedly and wilfully become bankrupts." We next come to the Bankrupts Act, 1623 which is (inter alia) "for inflicting corporal punishment on bankrupts" in some defined cases. That statute contained, in s. 11, the first enactment on the subject of reputed ownership, and extended to "goods left in the possession, order, and disposition of the bankrupt with the consent of the true owner." It seems to have been intended by this section to repress dealings of third parties with traders which were in their nature fraudulent, or were at least calculated to defraud creditors by obtaining for the trader credit on false and delusive appearances.

Section 11 does not appear to have been put into actual operation for a long period after its enactment. It had almost become obsolete, and was first really expounded by LORD HARDWICKE more than a century afterwards. It was on s. 11 of that statute that he decided *Ryall v. Rolle* (5), and *Joy v. Campbell* (11) arose before LORD REDESDALE in 1804 on similar words in the Irish Bankruptcy Act, 1872. In the latter case LORD REDESDALE, L.C., observed (1 Sch. & Lef. at p. 336):

"Now that clause refers to chattels in possession of the bankrupt 'in his order or disposition with consent of the true owner,' that means, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner. . . . In all those cases in which that clause in the Act has been permitted to have the effect of divesting the right of the person who had a right to the property, the nature of the possession has always been considered, and whether it was according to right. . . . It has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader in whose possession it ought not to be."

It was of *Joy v. Campbell* (11), that PARKE, B., more than once observed that it contained "the best exposition of the law": see *Simmons v. Edwards* (12).

The order and disposition section of the statute of James I. [of 1621] remained in substance unaltered down to 1869. In 1861 an Act passed which for the first time applied to non-traders the provisions of the bankruptcy statutes, but it made no alteration in the law as to the doctrine of reputed ownership, which, in consequence, became applicable to goods in the order and disposition of non-traders. Whether this was designed or whether it arose from oversight in not appreciating its full effect, I do not know. My impression is that there was no provision in any of the prior Insolvent Debtor Acts similar to the order and disposition clause. The decisions on reputed ownership had not been uniform, and some of them worked great injustice. A very distinguished Irish judge, CHRISTIAN, L.J., of whom I may also say that he was a master both in law and in equity, in *Ex parte Hickey* (13), dealing with a case arising under the order and disposition clause, thus very vigorously expresses himself (I.R. 10 Eq. at p. 129):

"No interest whatever in the policy passed to the assignees by the vesting operation of the Bankruptcy Act. The assignees stepped into the shoes of the bankrupt. Nothing passes to them but what was beneficially the bankrupt's own at the time of bankruptcy. Nevertheless the assignees assert that the order and disposition clause (s. 313 of the [Irish Bankrupt and Insolvent Act, 1857]) enables the Court of Bankruptcy to confiscate by a special order this, the admitted property of those two men for payment of the debts of their assignor. Without going all the way with counsel for the appellant in calling that clause a penal one, we may admit that it is an exceedingly harsh if not an unscrupulous one. It is probably the only instance in our law in which, not only purposely, but avowedly, the property of one man is laid hold of to answer the debts of another. It dates back to the time of James I., if not earlier, and is an example of what most of us have occasion to note, that both the Parliaments and the judges of those older times were bolder in initiative than their modern successors. Surveying the conditions with which the exercise of this exceptional and questionable power has been hedged round by this statute, it is impossible to avoid seeing that of all its requirements the most distinctive and central is 'the consent and permission of

1 the true owner.' All the others may combine. The goods may be in the
possession of the bankrupt; they may be in his order and disposition; he
may be the reputed owner of them; but unless all this has been sanctioned by
the consent and permission of the true owner, the clause rests as a dead
letter. And it is this alone which redeems this law from the charge of naked
3 confiscation. As the mens rea is essential for incurring the punishment of
guilt, so the mens volens is essential for incurring the forfeiture imposed
by this order and disposition clause."

The alterations in relation to "order and disposition" in s. 15 (5) of the Bankruptcy
Act, 1869, and carried further by s. 44 (iii) of the Act of 1883, were probably
for the purpose of excluding its operation altogether in the case of non-traders,
and of narrowing its effect as to traders. Thus by the Act of 1869 it is limited
to cases of a bankrupt "being a trader," and in the Act of 1883 its operation is
further confined to goods in the "possession, order, or disposition of the bankrupt
in his trade or business." These expressions are capable of a different meaning
and are by no means identical. Their construction has yet to be determined:
see *Re Jenkinson* (14).

D As to the first question of fact which it is necessary to decide on this appeal,
viz., were the shares in question "in the possession, order, or disposition" of the
bankrupts, or of either of them, at the commencement of the bankruptcy, we
have to consider the position of the parties. The shares were registered in
Blakeway's name, and in that respect he was the sole legal owner, but as such
he was a trustee for his firm. Acting on behalf of the firm he pledged the whole
E beneficial interest to the Colonial Bank, and he delivered to the bank the several
certificates of the shares to be retained by them as pledgees. His name con-
tinued on the register as registered owner, but as such he was but a trustee, a
trustee for the equitable pledgees, and if there was a surplus as to that surplus for
the firm. The firm had not "the reputed ownership," and in the view that
your Lordships have expressed it will not be necessary to consider whether
F Blakeway's name being on the register placed him in "such circumstances as
that he was the reputed owner." The shares were not in the order or disposition
of the firm. Were they "in the possession, order, or disposition" of Blakeway?
The contention that they were rests entirely on his name being still on the
register, but something more is requisite. He should also have had the power
of disposal. I adhere to what I said in *Société Générale v. Walker* (8) as to the
G nature of these certificates, and the effect of parting with them, and am of
opinion that, having pledged the shares to the Colonial Bank for value and delivered
to them the certificates to be held by them as their security, Blakeway ceased
under the circumstances to have the power of disposal over the shares unless
possibly by the commission of not only a fraud, but a crime. I am of opinion
that at the commencement of the bankruptcy these securities were not in the
H possession, order, or disposition of the bankrupt Blakeway within the meaning
of the statute.

I There remains the second question. Are shares of the character in question
"things in action" within the meaning of the proviso which concludes s. 44 of
the Act of 1883? On this question I concur in opinion with my noble and
learned friends. It seems to me on a careful examination of the section and
proviso that the intention of the legislature was to narrow very much the
operation of the "order and disposition" clause so as to confine it to such goods
as might be in the order and disposition of the bankrupt "in his trade or
business," and save in the case of "debts due to the bankrupt in the course
of his trade or business" to exclude all those incorporeal rights which are not
visible or tangible or capable of manual delivery or of actual enjoyment in
possession in its ordinary sense, and which, if denied, can be enforced only by
action or suit.

LORD HALSBURY.—After the opinions which have been delivered, it is unnecessary to detain your Lordships by reading that which I had myself prepared. I concur in the motion of my noble and learned friends.

LORD ASHBOURNE.—I entirely concur in the conclusion at which your Lordships have arrived. The ordinary rule in bankruptcy is that the assignee takes the property of the bankrupt, but subject to all equities which affected it in his hands. The question in this case arises on s. 44 (iii) of the Bankruptcy Act, 1883, which includes in the property of the bankrupt,

“all goods [i.e. by s. 168 (1) all chattels personal] being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.”

The general policy of the order and disposition clauses of successive Bankruptcy Acts rests upon clear and intelligible principles. In the well-known case of *Ryall v. Rolle* (5), it is laid down

“that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who would deal with them.”

The note appended to the certificates has been rightly pressed in argument. It was, at all events, an authoritative assurance by the company of their practice and course of dealing. Anyone dealing with the bankrupts had no right to assume that they were the owners of the entire interest in the shares, unless the certificates were either forthcoming or their absence satisfactorily accounted for. Almost any inquiry would have shown the true facts of the case and prevented the bankrupts gaining on this score “any delusive credit,” and I see no valid ground for holding that the bankrupts were the reputed owners of the interest of “the true owners,” the Colonial Bank, in the shares. I cannot act on the supposition that the bankrupts could or would, by fraud or crime, have endeavoured to account for the absence of the certificates. The property of a “true owner” must not be lightly confiscated. I entirely concur in the judgment of Fry, L.J., as to the construction of the proviso and the meaning of the expression “things in action.” In the course of his judgment, he used the following words (30 Ch.D. at p. 289):

“In the case of a partnership, the real and personal property of the partnership is, or may be, vested in all the partners, and each, therefore, may have a legal interest in choses in possession. In the case of a corporation, the whole property of the concern is vested in the corporation, and the individual corporators have no direct interest in the chattels in possession, which may belong to the concern. In a partnership of seven persons, each would have a chose in action. If that partnership incorporated itself under the Companies Act, 1862, would each of the seven have ‘a chose in possession’?”

In the course of the argument in this House, I addressed that question to the learned counsel for the respondent, and failed to obtain any satisfactory reply. The special condition of the shares in question strengthens the view at which I have arrived. These shares were, at the date of the bankruptcy, divorced from their certificates, and must, in any event, to my mind, be regarded as clearly things in action.

Solicitors: *Druces & Attlee; Lawrance, Baker & Waldron.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re MOON. Ex Parte DAWES

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), April 2, 1886]

[Reported 17 Q.B.D. 275; 55 L.T. 114; 34 W.R. 753;
2 T.L.R. 506; 3 Morr. 105]

Deed—Construction—Consideration of recitals—Operative part of deed ambiguous—Control by recitals—General rules.

In construing a deed the following rules are to be observed: (i) If the recitals are clear and the operative part of the deed is ambiguous, the recitals govern the construction; (ii) if the recitals are ambiguous and the operative part is clear, the operative part must prevail; (iii) if both the recitals and the operative part are clear, but are inconsistent with each other, the operative part is to be preferred.

Consideration of the provisions of a deed, it being held that the operative part, being ambiguous, was controlled by the recitals.

Settlement—Forfeiture—Determination of husband's life interest—Assignment of income—Bankruptcy—Petition filed by husband—Composition deed.

By a post-nuptial settlement, under which the husband was entitled to a life interest in the income of a sum of £50,000, it was provided that if he "shall assign, charge, or otherwise dispose of the said income, or any part thereof, or shall become bankrupt, or do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person then and in such case" the trust declared in his favour should cease, and there was a gift over. The husband, having got into financial difficulties, filed a petition in bankruptcy and executed a composition deed reciting that he was possessed of or entitled to the property specified in the deed, and that, in accordance with his desire to pay his creditors twenty shillings in the pound, he had agreed to assign to a trustee all the property set forth in the schedule upon certain trusts. His life interest under the post-nuptial settlement was not included in the schedule. On an application by the trustee of the deed for an order that the income to which the husband was entitled should be paid to him (the trustee),

Held: to bring the forfeiture clause in the settlement into operation there had to be an actual assignment by the husband of his interest either by some instrument or by operation of law, as by adjudication as a bankrupt, which would deprive him of that interest; in the circumstances no such assignment had taken place; and, therefore, the forfeiture clause did not apply and the husband was entitled to retain the income.

Notes. Distinguished: *Re Sartoris's Estate, Sartoris v. Sartoris*, [1892] 1 Ch. 11. Considered: *Re Riggs, Ex parte Lovell*, [1901] 2 K.B. 16; *Crouch v. Crouch*, [1912] 1 K.B. 378; *Re Griffiths, Jones v. Jenkins*, [1926] All E.R.Rep. 639. Applied: *Lazard Bros. & Co. v. Brooke* (1932), 37 Com. Cas. 224. Considered: *Re F. D. Sassoon, I.R.Comrs. v. Raphael, Re R. E. D. Sassoon, I.R.Comrs. v. Ezra*, [1934] All E.R.Rep. 749. Referred to: *Re James, Clutterbuck v. James* (1890), 62 L.T. 454; *Re Gates* (1895), 39 Sol. Jo. 331.

As to the effect of recitals in deeds and forfeiture clauses in settlements, see 11 HALSBURY'S LAWS (3rd Edn.) 418-423, and *ibid.*, vol. 34, pp. 503-509. For cases see 17 DIGEST (Repl.) 370-378, and 40 DIGEST (Repl.) 602-609.

Case referred to:

(1) *Re Amherst's Trusts* (1872), L.R. 13 Eq. 464; 41 L.J.Ch. 222; 25 L.T. 870; 20 W.R. 290; 5 Digest (Repl.) 714, 6217.

Also referred to in argument:

Phipps v. Lord Ennismore (1829), 4 Russ. 131; 38 E.R. 754; 25 Digest (Repl.) 248, 567.

Higinbotham v. Holme (1812), 19 Ves. 88; 34 E.R. 451; 5 Digest (Repl.) 706, 6169.

Re Throckmorton, Ex parte Eyston (1877), 7 Ch.D. 145; 47 L.J.Bey. 62; 37 L.T. 447; 26 W.R. 181, C.A.; 5 Digest (Repl.) 715, 6222.

Knight v. Browne (1861), 30 L.J.Ch. 649; 4 L.T. 206; 7 Jur.N.S. 894; 9 W.R. 515; 5 Digest (Repl.) 707, 6174.

Brooke v. Pearson (1859), 27 Beav. 181; 34 L.T.O.S. 20; 5 Jur.N.S. 781; 7 W.R. 638; 54 E.R. 70; 5 Digest (Repl.) 713, 6208.

Jenner v. Jenner (1866), L.R. 1 Eq. 361; 35 L.J.Ch. 329; 12 Jur.N.S. 138; 14 W.R. 305; 17 Digest (Repl.) 376, 1823.

Walsh v. Trevanion (1850), 15 Q.B. 733; 19 L.J.Q.B. 458; 15 L.T.O.S. 433; 14 Jur. 1134; 117 E.R. 636; 17 Digest (Repl.) 370, 1768.

Re Gowen, Ex parte Young (1839), 4 Deac. 185.

Re Medley, Ex parte Glyn (1840), 1 Mont.D. & De G. 29; 9 L.J.Bey. 41; 4 Jur. 395; 35 Digest 250, 96.

Hagget v. Giles, 2 Roll. Abr. 49, 145.

Ingleby v. Swift (1833), 10 Bing. 84; 3 Moo. & S. 488; 2 L.J.C.P. 261; 131 E.R. 837; 7 Digest (Repl.) 189, 226.

Special Case stated by the judge of the Salisbury County Court for the opinion of the High Court pursuant to the Bankruptcy Act, 1883, s. 97 (3).

On Jan. 20, 1885, William Moon filed a bankruptcy petition in the Salisbury County Court. On the same day a receiving order was made, and Frederick Aston Dawes became official receiver of the estate. The first meeting of creditors was held on Feb. 23, 1885, and a resolution was then come to that a proposal by Moon to assign his property to a trustee to secure the payment of a composition of 20s. in the pound, as embodied in the draft deed of arrangement and assignment produced at the meeting, should be accepted in satisfaction and discharge of the debts provable under the proceedings; and that F. A. Dawes should be appointed trustee for the carrying out of the terms of the deed. The public examination was held and concluded on Mar. 13, 1885. The second meeting was held on Mar. 16, 1885, at which meeting the resolution passed on Feb. 23, 1885, was confirmed. On Mar. 26, 1885, the deed of composition was executed by Moon and by Dawes, and on the same day the resolution and the deed were approved by the court.

The deed contained recitals of the filing of the petition, and of the resolution of the creditors, and also contained the following recitals:

"And whereas the said William Moon is possessed of or entitled to all the real and personal estate specified in the schedule hereto, subject to the mortgages and charges specified in the said schedule; and whereas in accordance with the desire of the said William Moon to pay his creditors 20s. in the pound on their debts, and in order that the said composition shall be secured, the said William Moon has agreed with the said Frederick Aston Dawes to assign to him all the said property set forth in the said schedule hereto, subject to the mortgages and charges affecting the same, upon the trusts and subject to the provisoes, declarations, and agreements hereinafter contained."

The operative part of the deed was as follows:

"Now this indenture witnesseth that, for effectuating the said desire, and in pursuance of the said agreement, and in consideration of the premises, he, the said William Moon, doth hereby, subject to the mortgages and charges affecting the same, grant, bargain, assign, transfer, and set over unto the said Frederick Aston Dawes... all and singular the several properties and chattels and effects set forth in the said schedule hereto, and all the estate,

right, title, interest, claim, and demand of him the said William Moon, in, to, and upon the said properties, chattels, and effects, and all other the estate (if any) of the said William Moon, upon the trusts and for the intents and purposes, and with and subject to the powers, provisoes, agreements, and declarations hereinafter declared, expressed, and contained concerning the same."

A question subsequently arose whether a life interest in the income of a sum of £50,000, to which Moon was entitled under the trusts of a post-nuptial settlement, dated July 14, 1882, and made between Moon, of the first part, Kathleen Amelia Bellair Moon, his wife, of the second part, and William Henry Wilson, Charles Martin Wade, and Edmund Phipps of the third part, which was not mentioned in the deed, was included in the deed of composition. The settlement provided among other things, that the trustees thereof should invest the sum of £50,000 therein mentioned, and expressed to be thereby settled in manner therein specified, and out of the interest, dividends, or income of such sum of £50,000, and the investments thereof, should pay to Kathleen A. B. Moon the annual sum of £500 during the joint lives of herself and W. Moon, so that the same annual sum should be for her sole and separate use, without power of anticipation, payable by equal half-yearly payments; and subject to, and after the payment of such annual sum of £500, should from time to time pay the interest, dividends, and income of the sum of £50,000, and of the investments for the time being representing the same, to, or permit the same to be received by, W. Moon. The settlement contained a proviso in the following terms:

"...if the said William Moon shall assign, charge, or otherwise dispose of the said income, or any part thereof, or shall become bankrupt, or do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person, then and in such case the trust hereinafter declared in favour of the said William Moon shall, so far as the law will permit the same, cease, and during the remainder of the life of the said William Moon, the said trustees or trustee may at their or his own discretion, apply the whole or any part of the said income, subject to the said annuity, for the support and benefit of the said Kathleen Amelia Bellair Moon, and the issue of the marriage (if any) or any one or more of them, in such manner as the said trustees or trustee shall think fit, and shall pay and apply the surplus (if any) of the said income or the whole thereof, if none shall be applied in manner aforesaid, to the persons or person to whom and in which the said income would be payable or applicable under these presents if the said William Moon were dead, and if there shall be no such person, then unto the said William Moon himself."

It was also declared by the settlement that, from and after the death of W. Moon, the trustees should, subject always to the payment of the annual sum of £500, stand and be possessed of the sum of £50,000, and the income thereof respectively, in trust for the children of the marriage as therein provided.

On July 24, 1885, an application, on behalf of Dawes, was made to the judge of the Salisbury County Court, asking for an order to strike out or vary the proviso in the post-nuptial settlement of Moon (whereby upon his bankruptcy the whole of the income of the £50,000 therein mentioned became payable to his wife), and to order the payment of such income, after the payment of the sum of £500 per annum specifically settled upon his wife, to Dawes for the benefit of the estate of Moon. On the application coming on for hearing, the learned judge decided, with the consent of all parties, to refer the matter by Special Case to the High Court. The questions stated by the Case for the opinion of the High Court were (inter alia) as follows: First, whether, under the circumstances, Dawes was an encumbrancer or assignee of the life interest of Moon under the

settlement; secondly, whether the proviso for forfeiture contained in the settlement was void against Dawes; and, thirdly, if void, whether it was absolutely void, or void to a limited, and to what, extent. A

On Feb. 22, 1886, the Special Case came on for argument before CAVE, J., who held that the trustee under the deed, Dawes, was not an encumbrancer on and did not take the life interest of the debtor under the settlement. HIS LORDSHIP continued: The next question I am asked to decide is one which arises as between Mr. Moon and the trustees of the settlement, as representing the wife and children. It is whether the forfeiture clause contained in the settlement applies to what has taken place in this case—that is to say, whether there has been a forfeiture of Mr. Moon's interest. The proviso is that B

“if the said William Moon shall assign, charge, or otherwise dispose of the said income, or any part thereof, or shall become bankrupt, or do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person,” C

the trustees of the settlement are to take the income. He has not disposed of the income or any part of it, and he has not become bankrupt. It is contended that he has done or suffered some thing whereby the income—I hardly know what word to use now—“would” become vested in another person. The word is not “might.” Certainly “would” is the term used in the deed, which it seems to me is an incorrect expression. It is difficult to understand what the meaning of that phrase is—“if he shall do or suffer anything whereby the income would become vested.” It seems to me to be very indifferent English, and I can only understand it to mean, if he does anything whereby the income “will” become vested in some other person. Has he done anything whereby the income “has” become vested in any other person? Certainly not. It is said that he has done or suffered something whereby the income “might” become vested in some other person, because he has filed a petition in bankruptcy. That, to my mind, is giving a meaning the words will not bear. It is not, whereby the income “may” become vested, but “will” become vested. I cannot put any other construction on “would” than “will.” It seems to me to be an improper mood to have used. D

Is there anything in the deed which ought to lead me to put a different interpretation upon the word? If I look at the other alternatives in which there is to be a forfeiture, I see in all of them that there must be an actual assignment either by some instrument or by operation of law. If Moon “shall assign, charge, or dispose of”—which means an assignment either absolute or conditional—“or if he becomes bankrupt,” which means an assignment in law. In all the other cases there is to be an actual assignment—that is to say, the thing which he is to do is something which actually does take the property out of him. Then I think I must read the words which follow as meaning something of the same kind. I think the words “do or suffer anything whereby the income would become vested in any other person” must mean do or suffer something the effect of which is that the income does become thereby vested in somebody else. When a man files a petition in bankruptcy, his income and property do not thereby become vested in somebody else. They may become vested in somebody else if the petition is followed by an adjudication, but it is possible that no adjudication will take place, and it is equally possible that the property may not become vested in anybody else. If the words were “may become vested” there might be something to be said for the contention; but it seems to me, looking at the words as they are, nothing will satisfy them except some deed or some permission or sufferance, the effect of which is actually to vest the property in some other person. E

Is there any case which prevents me putting that interpretation on the words? I was referred to a case which seems to me distinguishable. That was *Re Amherst's Trusts* (1), where the words used were “part with the property,” a very general and loose expression. It was held by BACON, V.-C., that those words were sufficiently complied with, because there was the presentation by the tenant F

for life of a petition, upon which it was open to the court to appoint a receiver of all or any part of the debtor's property. The learned Vice-Chancellor said that that was a parting with his property, because the debtor had done something which enabled the court to take possession of all that belonged to him—that a person parts from his property if he puts it in such a position that the court can immediately order someone to take possession of it, and he, therefore, held that there had been a forfeiture in that case. It is obvious that that is a very different thing from assigning your property or vesting your property in someone else. Nor do I understand that, if the words had been what they are here, the same result would have ensued in that case. In truth, every case must be construed according to the particular words to be found in the deed; and where those words are of a loose and general character one may understand almost anything may be intended to be embraced by them. But where the words used are definite, as it seems to me they are here, then I am not at liberty to put any other interpretation than that which is the natural meaning and interpretation of the words. I cannot understand that the clause means anything more than a sweeping up, so to speak, of what has gone before. It means that the income shall not become vested in some other person. It may become vested in some other person voluntarily by alienation; it may become vested in some other person involuntarily by the act of the law, as in the case of bankruptcy; and, in order to sweep up every other possible case in which it can be vested in any other person, the words are used, "if he do or suffer anything whereby the income would become vested in any other person." It appears to me, putting the best interpretation on it that I can, that there is not any forfeiture, and Mr. Moon is entitled to retain his income. I must answer the second question by saying that the proviso has nothing to do with Mr. Dawes, and that that question falls to the ground. So, also, does the third question fall. From this decision F. A. Dawes appealed.

Rigby, Q.C., Cooper Willis, Q.C., and F. Cooper Willis for Dawes.

Montague Cookson, Q.C., Vaughan Williams, and Seward Brice for the debtor, and his wife, and infant child.

Sidney Woolf and Butcher for the trustees of the settlement.

LORD ESHER, M.R.—This is a deed of assignment or conveyance of property by way of security. The question is how it is to be construed? It is a deed which contains recitals, and also a conveyancing or assigning clause. The deed must be construed by what appears on the face of it and by nothing else. In order to construe the deed, you may, of course, look at what was the state of circumstances which existed at the time it was made; but that, in the present case, will not help us in the construction. The deed is to be construed as it stands as a deed and nothing else.

There are three rules applicable to the construction of such an instrument:

(i) If the recitals are clear, and the operative part is ambiguous, the recitals govern the construction; (ii) if the recitals are ambiguous, and the operative part is clear, the operative part must prevail; (iii) if both the recitals and the operative part are clear, but inconsistent with each other, then the operative part is to be preferred. The question here is which of those three rules this deed comes under. If it falls under either of the two last, this appeal ought to succeed. If it comes under the first, the appeal ought to fail.

That the recitals here are clear cannot be doubted, nor is it alleged that they are not as clear as they can be. They begin with reciting the property which it is said that William Moon is possessed of or entitled to. There is a declaration that he is possessed of or entitled to "all the real and personal estate specified in the schedule." The next recital is that William Moon has agreed to assign to the trustee "all the said property set forth in the said schedule hereto." Nothing can be more clear than those recitals. They show what William Moon agreed to assign. Then I come to the operative part. Is that clear? These are the words:

"Now this indenture witnesseth that for effectuating [the desire of the debtor to pay his creditors 20s. in the pound, and to secure it] and in pursuance of the said agreement [in the recital] and in consideration of the premises, he, the said William Moon, doth hereby . . . grant, bargain, assign, transfer, and set over unto the said Frederick Aston Dawes . . . all and singular the several properties and chattels and effects set forth in the said schedule hereto."

So far the operative part is clear enough. It agrees with the clear recitals, and does not go beyond them. It continues thus:

"And all the estate, right, title, interest, claim, and demand of him the said William Moon in, to, and upon the said properties, chattels, and effects."

That part is also clear; but it is manifest that the word "estate" there does not mean property. The word "estate" there means an interest. The operative part goes on, "and all other the estate (if any) of the said William Moon." It is clear that "estate" in that part ought to be read as "property." The word "estate" is not the *prima facie* word which the assignor would use to describe his property, especially where it has been just used in contradistinction to property. In this place, where he has been describing his property and the estate in his property, he then goes on to say, "all other the estate." I confess it seems to me that "estate" in the second part of that copulated clause has the same meaning as "estate" in the first part. It is very ambiguous and uncertain whether we ought to change the meaning of the word which is coupled with the former word "estate," and say that, in one part of the copulated sentences it means one thing and in the other part it means another. Moreover, if it is here to be read "property," so far from the assignment being "in pursuance of the said agreement," it would not be in pursuance of the said agreement. It must be in pursuance of some other agreement. Therefore, so far from the operative part of the deed being clear, it seems to me as ambiguous as it can be.

The recitals are perfectly clear and unambiguous. The operative part is not clear, and, consequently, is ambiguous. Therefore, the rule that, if the recitals are clear and the operative part is not clear, the recitals are to prevail, applies to this case, and the recitals are to prevail. The right claimed by Dawes to be the assignee of the life interest of the debtor under the marriage settlement is not within the rule. In my opinion the decision of the learned judge was perfectly right.

LINDLEY, L.J.—I am of the same opinion. We are in this difficulty, that the words in question will, according to the construction we put upon them, mean nothing, and become mere surplusage. I think this is one of those cases in which we are forced to face that difficulty. We have not to consider any question of rectification. If we were considering that, of course we should have to let in and consider a body of evidence which, on the question of construction, is not admissible at all. I do not pretend to speculate whether the parties really did intend to include this life interest, except so far as we can gather their intention from the recitals and the operative part of the deed, or from any other clause to be found in it. If we look at the parcels, anybody accustomed to legal documents must be very much struck with them. I never saw, and I do not suppose anybody ever did see, such an enumeration as we have here. In the parcels the description is "all and singular the several properties and chattels and effects, set forth in the schedule hereto." Those words, "in the schedule," show pretty plainly what is meant. There is no ambiguity about it. Then we have what is known as the "all the estate" clause, which is intelligible enough to persons who are accustomed to legal instruments, and then something which strikes me as being very odd and incomprehensible. Apart from the recitals, we should not know what was meant. We have after the "all the estate" clause these words: "and all other the estate (if any) of the said William Moon." It does not say what. I am assuming now that there are no recitals to throw light upon it. I

A do not know that, apart from the recitals, anybody would know what the meaning
of that was. It is argued that it must mean all the assignor's property. No
doubt "the estate" may mean lands, tenements, and hereditaments, or it may
mean property, chattels, and effects, and if there was anything to show that it
had that meaning here, it might cover these things; but there is nothing to show
it. I doubt very much whether there is anything to show that it means all the
B assignor's property. If there was nothing to explain these words, I doubt whether
I should know what they meant. I cannot help thinking the whole thing would
be extremely ambiguous. But the ambiguity is removed when you look at the
recitals. They show what is meant by the operative part of the deed, what was
intended to be conveyed, and what was in the contemplation of the parties. That
being so, there is no ambiguity about it. The parcels are in such a state that
C nobody can make head or tail of them, and, apart from the recitals, they are
perfectly ambiguous. It appears to me, therefore, looking at it as a matter
simply of construction, and saying nothing as to what might happen if there was
a question of rectification before us, I think, on the true construction of this docu-
ment, that the words "all other the estate (if any)" are surplusage.

D **LOPES, L.J.**—There are several rules applicable to the construction of deeds.
One of them is that, if the operative part of the deed is clear and the recitals are
not clear, the operative part is to prevail. Again, if the recitals are clear, and
the operative part is not clear, but ambiguous, the recitals are to control the
operative part. If, on the other hand, the operative part is clear, and the recitals
are clear, but the one is inconsistent with the other, the operative part is to pre-
vail. Those are well-established rules. We are not asked here to rectify the deed
E in question; but we are asked to put a proper construction upon it. The ques-
tion which arises under the deed is whether Dawes, the trustee, is the assignee of
the life interest of the debtor under a marriage settlement. It appears to me to
be perfectly clear, without following the reasons which have been given, that
the operative part of this deed, especially that portion of the operative part which
has been alluded to, is not clear, but is ambiguous. If that is so, then, according
F to the rule of construction to which I have alluded, it becomes necessary to look
at the recitals. The recitals are as clear as they can well be. There can only be
one possible meaning, namely, that what is intended to be assigned by the deed
is the property mentioned in the schedule. That being the case, I am of opinion
that the operative part, which is ambiguous, is controlled by the recitals, and that
this life interest did not pass under that deed. I think, therefore, that the judg-
ment of the court below was right, and that this appeal ought to be dismissed.

G [The decision of this point disposed of the appeal, the other points raised before
CAVE, J., not being argued.]

Appeal dismissed.

Solicitors: *Dawes & Son; Wade & Lyall; H. C. Smallman.*

H [Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

TAILBY v. OFFICIAL RECEIVER

[HOUSE OF LORDS (Lord Herschell, Lord Watson, Lord FitzGerald and Lord Macnaghten), April 17, 19, 20, July 30, 1888]

[Reported 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162;
37 W.R. 513; 4 T.L.R. 726]

Chose in Action—Assignment—Debt—Future book-debts—No limitation as to time, place, or amount, or to debts owing in respect of specified business.

An assignment by a trader of future book-debts, not limited as to time, place, or amount, or to debts owing in respect of a specified business, is not too vague to be effectual.

In or about 1879 one Izon got into pecuniary difficulties and made an arrangement with his creditors by which he was to pay certain instalments, the last of which was guaranteed by one Tyrrell. To secure Tyrrell, Izon, on May 13, 1879, gave him a bill of sale by which he assigned to Tyrrell all his stock-in-trade, fixtures, furniture, tools, etc., on his premises and also "all the book-debts due and owing, or which may during the continuance of the security become due and owing to the said mortgagor (i.e., Izon)." In October and November, 1884, Izon supplied a firm of Wilson Bros. & Co., upon credit, with goods to the value of £10 7s. 11d. The appellant, who had acquired Tyrrell's interest in the debt, gave notice of the assignment to that firm, and required them to make payment of it to himself, which they accordingly did. Some time after the date of the notice Izon was adjudged bankrupt, and the respondent, the trustee of his estate, sued the appellant for repayment of the amount received by him. It was assumed that the assignment comprehended every future book-debt becoming due to Izon in any profession or trade which might be followed by him in any place or at any time during the continuance of the security constituted by the mortgage.

Held: the debts referred to in the assignment were capable of being ascertained and identified when they became due, and, therefore, the assignment was valid as against the trustee in bankruptcy.

Re Clarke, Coombe v. Carter (1) (1887), 36 Ch.D. 348, approved.

Belding v. Reade (2) (1865), 3 H. & C. 955 and *Re Count D'Epineuil* (No. 2), *Tadman v. D'Epineuil* (3) (1882), 20 Ch.D. 758, overruled.

Holroyd v. Marshall (4) (1862), 10 H.L.Cas. 191, explained.

Notes. Considered: *Re Trocan* (1888), 40 Ch.D. 5; *Re Yorkshire Woolcombers' Association, Houldsworth v. Yorkshire Woolcombers' Association*, [1903] 2 Ch. 284. Explained and Distinguished: *Re Dallas*, [1904] 2 Ch. 385. Considered: *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L.J.P.C. 67; *Re Lind, Industrials Finance Syndicate v. Lind*, [1914-15] All E.R.Rep. 527; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Kursell v. Timber Operators and Contractors* (1926), 95 L.J.K.B. 569. Considered: *Re Wait*, [1927] 1 Ch. 606. Applied: *Cotton v. Keyl*, [1930] All E.R.Rep. 375. Considered: *Blakey v. Pendlebury (A Bankrupt) Property Trustees*, [1931] All E.R.Rep. 270; *King v. Michael Faraday & Partners, Ltd.*, [1939] 2 All E.R. 478. Applied: *Re Trytel, Ex parte Trustee of the Property of the Bankrupt v. Performing Right Society, Ltd. v. Soundtrac Film Co.*, [1952] 2 T.L.R. 32. Referred to: *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Ward, Lock v. Long*, [1906] 2 Ch. 550; *Re Cope, Marshall v. Cope* (1914), 110 L.T. 905; *Horwood v. Millar's Timber and Trading Co.*, [1916-17] All E.R.Rep. 847; *Performing Right Society v. London Theatre of Varieties*, [1924] A.C. 1; *Re Williams, Richards v. Williams*, [1930] All E.R.Rep. 642; *Re Gillott's Settlement, Chat-*

A *tock v. Reid*, [1933] All E.R.Rep. 334; *Re Warren, Wheeler v. Mills*, [1938] 2 All E.R. 331; *Fyfe v. Garden*, [1946] 1 All E.R. 366.

As to assignments of choses of action, see 4 HALSBURY'S LAWS (3rd Edn.) 483 et seq.; and for cases see 8 DIGEST (Repl.) 547 et seq.

Cases referred to:

- B** (1) *Re Clarke, Coombe v. Carter* (1887), 35 Ch.D. 109; 56 L.J.Ch. 642; 56 L.T. 467; 35 W.R. 388; 3 T.L.R. 410; affirmed, 36 Ch.D. 348; 56 L.J.Ch. 981; 57 L.T. 823; 36 W.R. 293; 3 T.L.R. 818, C.A.; 8 Digest (Repl.) 555, 95.
- (2) *Belding v. Read* (1865), 3 H. & C. 955; 6 New Rep. 301; 34 L.J.Ex. 212; 13 L.T. 66; 11 Jur.N.S. 547; 13 W.R. 867; 159 E.R. 812; 7 Digest (Repl.) 125, 723.
- C** (3) *Re Count D'Epineuil (No. 2), Tadman v. D'Epineuil* (1882), 20 Ch.D. 758; 47 L.T. 157; 30 W.R. 702; 7 Digest (Repl.) 125, 726.
- (4) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- (5) *Bennett v. Cooper* (1846), 9 Beav. 252; 15 L.J.Ch. 315; 7 L.T.O.S. 299; 10 Jur. 507; 50 E.R. 340; 8 Digest (Repl.) 577, 259.
- D** (6) *Lewis v. Madocks* (1803), 8 Ves. 150, L.C.; 40 Digest (Repl.) 537, 482.
- (7) *Re Hennessey* (1842), 2 Dr. & War. 555; 1 Con. & L. 559; 5 I.Eq.R. 259; 5 Digest (Repl.) 839, *3324.
- (8) *Troughton v. Gitley* (1766), Amb. 630; 27 E.R. 408; 5 Digest (Repl.) 791, 6706.
- E** (9) *Tucker v. Hernaman* (1853), 4 De G.M. & G. 395; 1 Eq. Rep. 360; 22 L.J.Ch. 791; 21 L.T.O.S. 251; 17 Jur. 723; 1 W.R. 274, 498; 43 E.R. 561; 5 Digest (Repl.) 792, 6712.
- (10) *Thomas v. Kelly* (1888), 13 App. Cas. 506; 58 L.J.Q.B. 66; 60 L.T. 114; 37 W.R. 353; 4 T.L.R. 683, H.L.; 7 Digest (Repl.) 60, 318.
- F** (11) *Clements v. Matthews* (1883), 11 Q.B.D. 808; 52 L.J.Q.B. 772, C.A.; 7 Digest (Repl.) 40, 212.
- (12) *Legard v. Hodges* (1792), 3 Bro.C.C. 531; 1 Ves. 477; 29 E.R. 684, L.C.; 40 Digest (Repl.) 531, 417.
- (13) *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.* (1873), L.R. 16 Eq. 433; 43 L.J.Ch. 131, L.C.; 28 Digest (Repl.) 831, 733.
- G** (14) *Mornington v. Keane* (1858), 2 De G. & J. 292; 27 L.J.Ch. 791; 32 L.T.O.S. 97; 4 Jur.N.S. 981; 6 W.R. 434; 44 E.R. 1001, L.C. & L.J.J.; 35 Digest 267, 262.
- (15) *Metcalfe v. Archbishop of York* (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65, L.C.; 35 Digest 524, 2534.
- (16) *Bettesworth v. Dean of St. Paul's* (1728), 1 Bro. Parl. Cas. 240; Cas. temp. King, 66; 2 Eq. Cas. Abr. 26; 1 E.R. 541, H.L.; 30 Digest (Repl.) 434, 767.
- H**

Also referred to in argument:

- Hoare v. Dresser* (1859), 7 H.L.Cas. 290; 28 L.J.Ch. 611; 33 L.T.O.S. 63; 5 Jur.N.S. 371; 7 W.R. 374; 11 E.R. 116, H.L.; 39 Digest 678, 2641.
- Fothergill v. Rowland* (1873), L.R. 17 Eq. 132; 43 L.J.Ch. 252; 29 L.T. 414; 38 J.P. 244; 22 W.R. 42; 39 Digest 679, 2655.
- I** *Harrington v. Klopogge* (1785), 2 Chit. 475; 2 Brod. & Bing. 678, n.; 6 Moore, C.P. 38, n.; 4 Doug.K.B. 5; 129 E.R. 1127; 8 Digest (Repl.) 567, 194.
- Leatham v. Amor* (1878), 47 L.J.Q.B. 581; 38 L.T. 785; 26 W.R. 739, D.C.; 7 Digest (Repl.) 125, 724.
- Greenbirt v. Smee* (1876), 35 L.T. 168; 7 Digest (Repl.) 124, 717.
- Bloomer v. Union Coal and Iron Co.* (1873), L.R. 16 Eq. 383; 43 L.J.Ch. 96; 29 L.T. 130; 37 J.P. 822; 2 W.R. 821; 10 Digest (Repl.) 751, 4889.

- Pearce v. Watts* (1875), L.R. 20 Eq. 492; 44 L.J.Ch. 492; 23 W.R. 771; 17 Digest (Repl.) 368, 1743.
- Chattock v. Muller* (1878), 8 Ch.D. 177; 1 Digest (Repl.) 522, 1549.
- Re Bamford, Ex parte Games* (1879), 12 Ch.D. 314; 40 L.T. 789; 27 W.R. 744, C.A.; 5 Digest (Repl.) 972, 7834.
- Shipley v. Marshall* (1863), 14 C.B.N.S. 566; 2 New Rep. 244; 32 L.J.C.P. 258; 8 L.T. 430; 9 Jur.N.S. 1060; 143 E.R. 567; 5 Digest (Repl.) 1038, 3386.
- Wright v. Wright* (1750), 1 Ves. Sen. 409; 27 E.R. 1111, L.C.; 8 Digest (Repl.) 561, 134.

Appeal by the defendant in the action from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), reported 18 Q.B.D. 25, reversing a decision of the Divisional Court (HAWKINS and MATHEW, JJ.), reported 17 Q.B.D. 88.

The facts are stated in the headnote, and see also the opinion of LORD MACNAGHTEN, post, p. 494.

Finlay, Q.C., and *J. V. Austin* for the appellant.

The Attorney-General (Sir Richard Webster, Q.C.), *the Solicitor-General* (Sir Edward Clarke, Q.C.), and *Muir Mackenzie* for the Official Receiver.

Their Lordships took time for consideration.

July 30, 1888. The following opinions were read.

LORD HERSCHELL.—The short point to be determined in this case is whether an assignment by way of security of certain book-debts not existing at the time of the assignment was valid, so as to give the assignee a good title to them when they came into existence.

By an indenture of May 13, 1879, Henry George Izon assigned to John Tyrrell

“all the book-debts due and owing, or which may, during the continuance of the security become due and owing to the said mortgagor.”

The debts now in question were incurred subsequently to the date of this indenture. It was not disputed by the respondent that they were book-debts which during the continuance of the security became due and owing to the mortgagor. On Nov. 14, 1884, the mortgagee's executors (under whom the appellant claims) gave notice to the debtors to pay the debts to them. The appellant having received the money, the respondent, who was the official receiver under the bankruptcy of Izon, sued in the Birmingham County Court to recover the money so received as part of Izon's estate. The county court judge gave judgment for the respondent, and the Court of Appeal have held that he was right in so doing. They based their judgment on the ground that, as the assignment included all book-debts which might thereafter become due to the assignor in any trade which he might thereafter carry on in any place, it was so vague that the court ought to hold that nothing passed under it. The Master of the Rolls said (18 Q.B.D. at p. 29):

“That there is a doctrine that the description may be too vague is, to my mind, beyond question. Every one of the cases that has been decided has assumed that there is such a doctrine, and in each case the court has tried to find whether the description in the particular case was or was not too vague; but each and every of them recognises the doctrine.”

If by “vague” he meant indefinite or uncertain, which is probably the ordinary meaning of the word, I do not think it is correct to say that the assignment in question is in that sense vague.

It appears to me to be perfectly definite. It was just as capable of proof that a book-debt became due to H. G. Izon in some business carried on by him as that such a debt became due in the particular business mentioned in the deed; and I do not understand the learned judges in the court below to doubt that if the assignment had been limited to book-debts becoming due in that business it would

have been good and effectual even as regards future debts. Nay, it is quite conceivable that it might be more difficult to identify a debt as owing in respect of a specified business than as one due in a trader's business generally. Suppose a business to expand or to have new branches added to it, there might often be a difficulty in saying whether a debt was acquired in the specified business or not. There is no doubt that an assignment may be so indefinite and uncertain in its terms that the courts will not give effect to it because of the impossibility of ascertaining to what it is applicable. But that is certainly not the case with such an assignment as that which we are now considering. If by "vague" be meant wide and covering a large area, that may certainly be said of the grant which has given rise to this controversy; and the Master of the Rolls is, I think, correct in saying that the courts have in two cases, viz., *Belding v. Read* (2) and *Re Count D'Epineuil* (No. 2) (3), acted upon the doctrine that an assignment of future-acquired property will be held invalid if in that sense it is too vague.

The learned county court judge was bound by those decisions, but it is open to your Lordships to review them, and to consider whether they rest upon any sound basis; and I conceive that you have no alternative but to consider the question apart from authority, and to review the authorities, for, to my mind, it is impossible to reconcile the decision under appeal with that of the Court of Appeal in *Coombe v. Carter* (1) without resorting to distinctions which cannot be justified on principle. In that case the mortgage security covered

"all moneys of or to which the mortgagor is, or may during the security become, entitled under any settlement, will or other document, either in his own right or as the devisee, legatee, or next-of-kin of his father or any other person or persons."

The mortgagor became entitled under a will to a share of the residuary estate. The Court of Appeal held that this share was covered by the mortgage. The decision in the case now before your Lordships was much pressed upon them in argument. The court, however, consisting of COTTON, BOWEN and FRY, L.JJ., refused to regard it as governing the case they had to decide. I can hardly say that they distinguished it except by saying that the terms of the two instruments and the subject-matter to which they related were not identical, and that, as the former case laid down no principle, it was inapplicable to that before them.

I confess I am unable to see any sound distinction between an instrument assigning future book-debts which may become due to the assignor in any business carried on by him, and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence and it is sought to enforce the security. I think that *Coombe v. Carter* (1) was correctly decided, and that the views expressed by the learned judges are equally applicable here.

That case established no new principle; it proceeded on well-settled lines. In *Bennett v. Cooper* (5), where the security included all legacies which had already or might thereafter be given or bequeathed to the assignor or his wife, by any person whomsoever, LORD LANGDALE held that legacies subsequently bequeathed to the mortgagor were bound. And few covenants are more common or have been more often given effect to than the covenant contained in marriage settlements to settle the wife's future-acquired property. It has never been doubted that these attach as soon as such property comes into existence. The only authorities that can be cited as contrary to the view I am submitting to your Lordships are those already referred to of *Belding v. Read* (2) and *Re Count D'Epineuil* (No. 2) (3). In the latter case FRY, J., avowedly followed *Belding v. Read* (2). Another point was, however, there adverted to. The charge under consideration in that case included all the present and future personalty of the person giving it. The learned judge suggested that such a charge might be invalid as depriving the mortgagor of the power of maintaining himself. In *Coombe v. Carter* (1) the Court of Appeal

left open the question whether such a disposition (which would, of course, be without effect at law so far as regarded future-acquired property) would be enforced in equity. I think your Lordships may also be content to put aside this point, which certainly does not arise in the case before you.

I cannot think that the decision in *Belding v. Read* (2) was correct so far as it turned on the same point as has now to be decided. The assignment to the extent to which it related to after-acquired chattels was undoubtedly void at law, and the question was, whether it was effectual in equity to pass the property in question. It appears to me that the view taken by the learned judges proceeded on a misapprehension of some observations of LORD WESTBURY in *Holroyd v. Marshall* (4). That learned Lord used the following language (10 H.L.Cas. at p. 211):

"If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of a class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract."

Whatever the learned Lord meant by limiting the doctrine to the class of cases in which a court of equity would decree specific performance, he certainly did not intend to exclude cases in which after-acquired property fell within general descriptive words contained in the deed, for he enforced the security in that very case against such property. Nor again, can I find any trace of the view that a court of equity would not enforce a contract relating to future-acquired property if it was vague in the sense of embracing much within its terms, for, as I have pointed out, courts of equity have frequently enforced such contracts. I think the language used referred only to that class of cases to which he had alluded in an earlier part of his opinion, where it could not be predicated of any specific goods that they fell within the general descriptive words of the grant. In my opinion, the judgment appealed from should be reversed and the judgment of the Queen's Bench Division restored, and the respondent should pay the costs in the court below and the costs of this appeal, and I move your Lordships accordingly.

LORD WATSON stated the facts and continued: It does not clearly appear whether the debt in question was incurred to the mortgagor in the business in which he was engaged in May, 1879, or in some other trade. In the argument addressed to your Lordships it was rightly assumed that the assignment comprehends every future book-debt becoming due to Izon in any profession or trade which may be followed by him in any place and at any time during the continuance of the security constituted by the mortgage. The respondent admitted that the liability of Wilson Bros. & Co., whenever it emerged, was, and until satisfied by payment continued to be, a proper book-debt, due and owing to the mortgagor. He maintained his right to it, in competition with the appellant, upon the single ground that the assignment of future book-debts, in the mortgage of 1879, is ineffectual to carry any equitable interest to the assignee. The judge of the county court of Warwickshire, before whom the suit was brought, gave judgment for the respondent. He held, in deference to the authority of *Belding v. Read* (2) and *Re Count D'Epineuil* (No. 2) (3), that an assignment of future book-debts generally without any delimitation of time, place, or amount, is too vague to be supported. His decision was reversed by **HAWKINS** and **MATHEW, JJ.**, who were of opinion that the case fell within the principle to which this House gave effect in *Holroyd v. Marshall* (4), but it was restored by the Court of Appeal.

Had there not been such a conflict of judicial opinion I should have thought that the question thus raised for decision admitted of one answer only. The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts [see Bills of Sale Act, 1878, s. 4], and, though not yet existing, may nevertheless be the subjects of present assignments. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether in esse or in posse, will not affect the assignee's right to these things which are capable of ascertainment, or are identified. LORD ELDON said, in *Lewis v. Madocks* (6) (8 Ves. at p. 156):

"If the courts find a solid subject of personal property they would attach it rather than render the contract nugatory."

In the case of book-debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee, in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid, was in any question with the respondent duly perfected by his notice to Wilson Bros. & Co. before Izon became a bankrupt.

The learned judges of the Court of Appeal were unanimously of opinion that the description of book-debts in the assignment of Tyrrell is "too vague," and it is upon that ground only that they have held the assignment to be invalid. The term which they have selected, in order to express what they conceived to be the radical defect of the assignment, is susceptible of at least two different meanings. It may either signify that the description is too wide and comprehensive, without implying that there will be any uncertainty as to the debts which it will include if and when these come into existence; or it may signify that the language of the description is so obscure that it will be impossible, in the time to come, to determine with any degree of certainty to what particular debts it was intended to apply. In the latter sense the description of future book-debts in the mortgage of 1879 does not incur the imputation of vagueness. No one has suggested that the expression "book-debt" is indefinite; and it is, in my opinion, very clear that every debt becoming due and owing to the mortgagor, which belongs to the class of book-debts (a fact quite capable of ascertainment), is at once identified with the subject-matter of the assignment. The ground of decision in the Court of Appeal was obviously that the description of future debts is "too vague" in the sense of being too wide and comprehensive, inasmuch as it embraces debts to become due to the mortgagee in any and every business which he may think fit to carry on. If it had been limited to debts arising in the course of the business of packing-case manufacturer, in which Izon was engaged at the date of the mortgage, the Master of the Rolls was, as then advised, prepared to hold that the description would not have been too vague. Upon that point the other members of the court express no definite opinion, LINDLEY, L.J., merely remarking (18 Q.B.D. at p. 31): "I do not say that an assignment of future book-debts must necessarily be too vague." All of their Lordships were evidently under the impression that they were deciding the case according to a well-established equitable doctrine, which LOPES, L.J., traced to *Belding v. Read* (2).

It is unnecessary for the purposes of this case to consider how far a general assignment of all after-acquired property can receive effect, because the assignment in question relates to one species of property only. I have been unable to discover any principle upon which the decision of the Court of Appeal can be supported, unless it is to be found in *Belding v. Read* (2). That case arose in a court of common law, and, with all deference to the very learned judges who decided it, I am bound to say that, in my opinion, they misapprehended the doctrine laid down by LORD WESTBURY in *Holroyd v. Marshall* (4), which was not new doctrine, but, as the noble Lord explicitly stated, was the mere enunciation of elementary principles long settled in courts of equity. It is possible that the learned judges were misled by the reference which the noble Lord makes to specific performance, an illustration not selected with his usual felicity. Not a single decision by an equity court was cited to us prior in date to *Belding v. Read* (2), which gives us the least support to the opinions expressed in that case, and I venture to doubt whether any such decision exists. It is true that judges on the equity side of the court have, in one or two instances, deferred to the views expressed in *Belding v. Read* (2), which they assumed to be an authoritative exposition of the law applied by this House in *Holroyd v. Marshall* (4); but these views conflict with the previous cases in equity, to which LORD WESTBURY referred as establishing a well-known and elementary principle.

In *Bennett v. Cooper* (5), LORD LANGDALE, M.R., gave effect to an equitable mortgage by a debtor of

"all sums of money then or thereafter to become due to him, and all legacies or bequests which had already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever."

I cannot understand upon what principle an assignment of all legacies which may be bequeathed by any person to the assignor is to stand good, and effect is to be denied to a general assignment of all future book-debts. As COTTON, L.J., said in *Coombe v. Carter* (1) (36 Ch.D. at p. 353):

"Vagueness comes to nothing if the property is definite at the time when the court comes to enforce the contract."

A future book-debt is quite as capable of being identified as a legacy; and in this case the identity of the debt with the subjects assigned is not matter of dispute. When the consideration has been given, and the debt has been clearly identified as one of those in respect of which it was given, a court of equity will enforce the covenant of the parties, and will not permit the assignor, or those in his right, to defeat the assignment upon the plea that it is too comprehensive. I am, accordingly, of opinion that the order appealed from ought to be reversed, and the judgment of the Divisional Court restored.

LORD FITZGERALD.—I feel great difficulty as to the reasons which I am about to give. [HIS LORDSHIP reviewed the evidence, and continued:] The case was put forward as a test case, and supposed to raise for decision the one large question on which the noble and learned Lords have just stated their conclusion. There is, however, a view of the transactions which must be disposed of. Let us assume that the instrument of 1879 was an existing security, unsatisfied and in full force at the time of the assignment of the book-debts to Tailby, and that all the steps taken by the mortgagee had been regular and effectual. The deed of 1879 had not as to the future debts any greater operation than as an agreement for value, to assign those future debts when they come into existence. I do not now pause to consider whether equity would from time to time, as debts become due, decree specific performance of that agreement. It was at least a contract which as between the immediate parties to it had certain efficacy, and was not wholly inoperative. If, for instance, as to future-acquired chattels coming within its provisions, the mortgagee had managed peaceably to gain actual possession of them, he could retain that possession as against the mortgagor; and so if, claiming

to be entitled under his deed to receive a future accruing debt, he had demanded and received payment of it from the debtor, the mortgagor could not recover the sum so received from him.

Let us see how this case stands in this respect. The deed of 1879 contains an assignment of future debts, and also that comprehensive appointment by the mortgagor of the mortgagee as his attorney, to execute for him and in his name assignments of these future rights, when and as they should arise, either to himself or to any other person, and also a power to receive those debts when and as they became payable, and give full and effectual discharges for them—a power in fact, to do for himself and in virtue of that authority all that a court of equity could do for him if there had been no difficulties in the way of obtaining relief from that tribunal. There is nothing in law to prohibit the mortgagor from conferring such an authority on the mortgagee, or to prevent parties from helping themselves if they can lawfully do so. The whole of the steps in November, 1884, were lawful and unobjectionable, and the parties were competent to take them. The deed of 1879 professed to pledge these future debts to the mortgagee, and conferred on him large and exceptional powers to enforce that pledge. His representatives availed themselves of their powers and position to enforce their rights, and did all that they could lawfully do as equivalent to taking possession and determining reputed ownership: see *Re Hennessey* (7). The mortgagor certainly did not oppose, and the proper inference is that he acquiesced. If Tailby had received the amount of Wilson's debt before the adjudication in January, 1885, his title to retain it against the receiver would not be open to any question. Does the adjudication before actual payment and the intervention of the receiver make any difference? The latter does not appear to have intervened until the following month of May, the payment was actually made by Wilson in January previous. The assignee, trustee, and receiver in bankruptcy derive their title to the estate through the bankrupt, and subject to the rights and equities which would affect it in the hands of the bankrupt, save where by statute for the protection of creditors over-reaching rights are conferred upon them. There is no allegation that the adjudication here had any retrospective operation, nor is it alleged that the transactions with Tailby were tainted with any fraud, nor can I discover any satisfactory ground on which the receiver can override the proceedings of November which were binding on the bankrupt, and recover the money actually paid over in January.

I am, therefore, of opinion that the action of the receiver in the county court fails, that he is not entitled to recover the money received by Tailby from Wilson, and that the defendant Tailby is entitled to judgment. If I am correct in this view, no further question arises—the decision of the Court of Appeal and of the county court judge should be reversed, and the judgment of the Divisional Court should be restored. In the course of the argument at the Bar some of these considerations were thrown out for discussion, but it was said in reply that this was “a test case” to elicit your Lordships’ decision on an abstract question of great public importance. The Master of the Rolls is represented to have put the question thus:

“It seems to me that, according to the ordinary rules of construction, the deed of 1879 applies to the book-debts which may become due to Izon in any trade which he may hereafter carry on anywhere; that is, any trade which it may please him during the continuance of the security, or which it may be for his benefit, to carry on in any part of England, any part of Wales, any part of Scotland, or in any part of Ireland, France, Germany, or America. That is the true reading, and is that, or is it not within the doctrine that the description of these book-debts is so vague that the court will hold that nothing passed under it?”

It is not quite certain that it is critically correct, and the question would seem rather to be whether the description of the future debts professed to be assigned

by the deed of 1879 was so wide, so vague, and so uncertain that the mortgagee could not so far actively enforce it in any court of justice. A

I decline to decide test questions merely because the case is called "a test case." What is a test case? Probably it is meant to represent a case in which some question of law necessarily arises governing some other like cases, and to which your Lordships are required to apply the crucial test of the opinion of the House. When such a case comes before the House, your Lordships must and do decide it, but it is not the province of the House to decide abstract questions which are not actually necessary as the foundation of the judgment of the House. The question has not, up to the present moment, been finally decided. It is one of no inconsiderable difficulty, and involves considerations of public policy. What construction is to be put on "future book-debts?" Does it mean the trade debts entered in the trader's books, or does it mean the net residue of those debts after satisfying the claims of those creditors by means of whose property these debts came into existence? Would an account have to be taken as in the case of the trading of a bankrupt after bankruptcy, and without certificate, and debts becoming due to him in that second trading, and claimed by the assignee as after-acquired property: see *Troughton v. Gitley* (8). The reports of AMBLER were not unfrequently questioned, but the decree taken from the registrar's book is given in the note to *Tucker v. Hernaman* (9), and the decision in *Troughton v. Gitley* (8) was adopted by TURNER, L.J. Suppose too, in the case of future debts, that the mortgagor had obtained bills and notes or other securities from his debtors, how are the rights and liabilities of the parties to be adjusted? Or, suppose a trader to become bankrupt, his assets consisting largely of recent book-debts, representing his stock-in-trade, out of which they were created, are those book-debts to go to the holder of a bill of sale, probably some years old, not registered, of which the real creditors had no notice? B C D E

I allude only to these possible contingencies as illustrating some of the difficulties that beset the question, and indicating the inexpediency of carrying the law a step further than it has hitherto gone in practice. In a case recently before the House, your Lordships considered that the policy of the Bills of Sale Act, 1882, was to prohibit, in cases coming within its provisions, bills of sale of property not in existence, but which might be acquired thereafter (*Thomas v. Kelly* (10)). Your Lordships are now asked to give effect to an instrument which, though a bill of sale of future debts of the most unlimited and undefined character, does not, as to book-debts come within the Bills of Sale code. I have listened to the weighty reasons given by my noble and learned friends, and I have read the opinion to be delivered by LORD MACNAGHTEN. That opinion is one of great learning and ability and remarkable for its boldness. I have weighed all the reasons so powerfully given, and hope your Lordships will excuse me if, for the present, I hesitate, and, for the reasons I have given, decline to express either assent to or dissent from the conclusions of my noble and learned friends. The course which I have deemed it expedient to adopt renders it unnecessary for me to consider the authorities. F G H

LORD MACNAGHTEN.—I venture to think that this case is free from difficulty when the facts are understood. Izon was a packing-case manufacturer. In 1879 he compounded with his creditors. At Izon's request Tyrrell signed promissory notes for the last instalment of the composition, taking from Izon a bill of sale as a counter security. The bill of sale is dated May 13, 1879. It assigns to Tyrrell by way of mortgage, among other property, all the stock-in-trade and effects which during the continuance of the security might be on the mortgagor's then premises, or at any other place at which during the continuance of the security he might carry on business, and also (to quote the words of the deed) I

"all the book-debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor."

Then there is a power of attorney in the most ample terms, a proviso that if the mortgagor on demand fails to pay the amount due, the mortgagee may take possession and sell the property in mortgage; and a proviso that until default the mortgagor may use and enjoy all the mortgaged premises; and, lastly, there is a covenant for further assurance.

I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation. The business in the immediate contemplation of the parties was, of course, the business in existence at the date when the bill of sale was given. But the assignment is not limited to that, it extends to any business which the mortgagor may carry on during the continuance of the security. That was an obvious, and, if not forbidden by statute, a proper precaution. A tradesman who has been unfortunate in his business is perhaps as likely to try a change as one who has been uniformly successful. The draftsman, I think, would have shown more simplicity than skill if he had left it in the power of the mortgagor to imperil or defeat the security by altering his business, or by transferring his capital to some other enterprise.

In reliance on the arrangement I have described, Tyrrell paid a large sum to Izon's creditors. But he seems to have been content with his security, and Izon continued to trade without any interference on his part, and apparently without any alteration in the character of the business. In 1885 the executors of Tyrrell, who was then dead, thought fit to call in the money due to his estate. They demanded payment. They took possession of the mortgaged premises, so far as it was practicable to do so, and they sold the book-debts. Among the book-debts which were sold was one which had recently become due from Messrs. Wilson Bros. & Co. The purchaser at once gave notice to them. The next thing that happened was that Izon became bankrupt. After that Messrs. Wilson Bros. & Co. paid the purchaser. The Court of Appeal has held unanimously that the official receiver is entitled to recover the money from the purchaser. Your Lordships have now to determine whether that decision is right. The question is not complicated by any circumstances other than those I have mentioned. The transaction between Izon and Tyrrell is not impeached as fraudulent under the Act of Elizabeth, or on any other ground. Nor is it necessary to consider the provisions of the Bills of Sale Acts. Choses in action are expressly declared not to be personal chattels within the meaning of those Acts [Bills of Sale Act, 1878, s. 4]. The grounds on which LORD FITZGERALD has founded his opinion were not discussed at the Bar, nor is there, I think, sufficient evidence before your Lordships to enable your Lordships to act on them.

The claim of the purchaser was rested on well-known principles. It has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified. The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book-debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to

Messrs. Wilson Bros. & Co. The contention of the learned counsel for the respondent was this. They asserted as a proposition of law that an assignment of future book-debts, not limited to any specified business, is too vague to have any effect. Starting from that proposition, they asked your Lordships to come to the conclusion that the assignment of book-debts in the present case was void from the beginning, as including in its terms book-debts which could not be made the subject of valid assignment. A

I do not stop to consider whether that is a necessary or a legitimate conclusion. It is a startling result, certainly, and I shall have a word to say about it by-and-by. At present I am merely inquiring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited its existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned judges who have adopted this view makes it necessary to examine the matter closely. B C

The learned counsel for the respondent gave your Lordships every assistance that ingenuity and industry could supply, and the result of their labours may fairly be summed up as follows. The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd v. Marshall* (4) no support for it can be found. Possibly it may be evolved from *Holroyd v. Marshall* (4); LOPES, L.J., seems to think so. It assumed a definite form in *Belding v. Read* (2). It was recognised by FRY, J., in *Re Count D'Epineuil* (No. 2) (3), and it received the stamp of authority from what was said or implied by two of the learned judges who decided *Clements v. Matthews* (11). No other authority or semblance of authority was produced. I have read *Holroyd v. Marshall* (4) many times, and I can discover no trace of the doctrine there. *Belding v. Read* (2), as BOWEN, L.J., points out, was founded upon a misapprehension of LORD WESTBURY's judgment in *Holroyd v. Marshall* (4). In *Re Count D'Epineuil* (No. 2) (3), the learned judge, as he stated in *Coombe v. Carter* (1), though himself bound by *Belding v. Read* (2), and simply followed the decision in that case. As for the order made in *Re Count D'Epineuil* (No. 2) (3), it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, COTTON, L.J., has himself disclaimed the hidden meaning attributed to his judgment in *Clements v. Matthews* (11). D E F

So much for authority. What foundation is there for the doctrine apart from authority? The learned counsel for the respondent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavouring to maintain the proposition that an assignment by a trader of future book-debts, not confined to a specified business, is too vague to be effectual. Why should this be so? If future book-debts be assigned, the subject-matter of assignment is capable of being identified as and when the book-debts come into existence, whether the description be restricted to a particular business or not. Indeed, the restriction may render the task of identification all the more difficult. An energetic tradesman naturally develops and extends his business. One business runs into another, and the line of demarcation is often indistinct and undefined. The linen-draper of today in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily conceive that difficult questions might arise if the book-debts assigned were limited to a particular business. It was admitted by the learned counsel for the respondent that a trader may assign his future book-debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The G H I

A limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business—on that which is admitted to be capable of assignment—in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances, I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer, which itself is founded on an erroneous view of the principles recognised in this House in *Holroyd v. Marshall* (4). I should wish to say a few words about *Holroyd v. Marshall* (4), because I am inclined to think that *Belding v. Read* (2) is not the only case in which LORD WESTBURY's observations have been misunderstood. To understand LORD WESTBURY's judgment aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd v. Marshall* (4) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd v. Marshall* (4) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim, which LORD THURLOW said in *Legard v. Hodges* (12) (1 Ves. at p. 478) he took to be universal,

"that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself and any claiming under him, voluntarily or with notice, raises a trust."

It had also been determined by the highest tribunals in the country short of this House—by LORD LYNDEHURST, as Lord Chancellor in England, and by SIR EDWARD SUGDEN, as Lord Chancellor in Ireland—that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, had recently been introduced by a decision of a most eminent common law judge, who was naturally less familiar with the doctrines of equity than with the principles of common law.

In that state of things, in *Holroyd v. Marshall* (4), in a contract between an equitable assignee and an execution creditor, STUART, V.-C., decided in favour of the equitable assignee. His decision was reversed by the Lord Chancellor (LORD CAMPBELL), in a judgment which seemed to strike at the root of all equitable titles. LORD CAMPBELL did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence; he held that the equitable assignee did obtain an interest in equity. But at the same time, he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor without the help of some new act to give it substance and strength. It was to this view, I think, that LORD WESTBURY addressed himself, and, by way of showing how real and substantial were equitable interests springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that LORD WESTBURY intended to lay down as a rule to guide or perplex the court that considerations applicable to cases of specific performance, properly so called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property.

LORD SELBORNE has, I think, done good service in pointing out that confusion is sometimes caused by transferring such considerations to questions which arise as to the propriety of the court requiring something or other to be done in specie: *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.* (13). His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance" are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants. The truth is, that cases of equitable assignment or specific lien where the consideration has passed depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained, you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated.

Take *Mornington v. Keane* (14). There Lord Mornington covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife. The Lord Chancellor did not doubt that the covenant would entitle the covenantee to have it performed in specie; but, still, it was held by the court that the covenant of itself created no lien on the covenantor's property. Take the present case. The rights of the parties are completely defined by the bill of sale. Though there is the usual covenant for further assurance, it is plain that no further deed was contemplated. Yet no one can doubt that, if Izon had attempted to receive outstanding book-debts after the mortgagee had intervened, the court would at once have lent its assistance by the appointment of a receiver.

Metcalfe v. Archbishop of York (15) is, I think, a good illustration of the argument I am presenting to your Lordships. In 1811 an incumbent charged his benefice with an annuity, and covenanted that if he should be preferred to any other benefice he would charge it with the annuity, and that in the meantime the then present benefice should stand charged therewith, and there was a covenant for further assurance. At the date of the deed the charge was not illegal, for the statute of Elizabeth [the Benefices Act, 1571 (13 Eliz., c. 20)] had been repealed. In 1814 the incumbent was preferred to another living. In 1817 charges on ecclesiastical benefices were again prohibited by the Residence on Benefices, etc., Act, 1817. No legal charge upon the new living had been executed before that Act passed. A question afterwards arose between the person entitled to the annuity and judgment creditors in possession under a sequestration. It was argued by Mr. Jacob for the judgment creditors that, as specific performance would be in contravention of the statute, the equitable title must fail. It was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge, which was prohibited by law before any attempt was made to enforce it. But the Lord Chancellor was of opinion that that was not the true construction of the deed, and that there was an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance and the right to have a legal charge. LORD COTTENHAM, however, replied: "This is by no means so," and he affirmed the Vice-

A Chancellor's judgment giving effect to the equitable charge. There the contract for a legal charge would have raised a case of specific performance. But specific performance of that contract was out of the question. The contract for an equitable charge raised no question of specific performance. A contract for value for an equitable charge is as good an equitable charge as can be. It could not be made any better, though the aid of the court might be required to protect or to give effect to it. Mr. Jacob's argument (to cite the words of the report) was this (1 My. & Cr. at p. 549):

"The whole doctrine of equitable charges rests on the right to specific performance; for a person having an equitable charge has no estate or interest."

C LORD COTTENHAM summarily rejected the proposition. LORD WESTBURY demolished the foundation on which it was put. And, oddly enough, the proposition is now supposed to be established by LORD WESTBURY's authority. It may be said that this is a question of words. To a great extent it is so; most questions are. But I venture to think that the discussion is not out of place, because I observe that LINDLEY, L.J., from whom I differ on a point of equity with much reluctance, was led to disregard the rights of the purchaser in the present case in consequence of the difficulties presented to his mind by the application of the doctrines of specific performance.

D In the course of the argument your Lordships were referred to a recent case, *Re Clarke, Coombe v. Carter* (1). In principle, I am unable to distinguish that case from the present, though others have been more fortunate. *Re Clarke* (1) was the case of a mortgage. So is this. The contest there, as it is here, was with E the mortgagor's general creditors. The assignment which gave rise to the question in that case was an assignment of any moneys to which the mortgagor might be entitled under any will. A charge on book-debts in a business not yet established, and perhaps not even thought of, is at best a doubtful security. Most people would think it speculative. Some might call it visionary. But the same terms might F be applied without any great impropriety to a charge on a possible legacy from an unknown friend or secret admirer. As to vagueness, whatever that expression may mean, I cannot see that the one can be more vague than the other. In *Re Clarke* (1) the charge was enforced against a legacy which happened to come to the mortgagor some years after the mortgage was made. The judgment of KAY, J., was read to your Lordships; and a very able and exhaustive judgment it is. No one is more familiar with the doctrines of equity than that learned judge. But I G gather from his remarks that, if he had not been pressed with the decision now under appeal, he would have treated the case as a matter of course not open to argument.

I need hardly say that I think the decision in *Re Clarke* (1) unquestionably correct, and I should add nothing more about it, but that I find that some of the learned judges have drawn a distinction which I confess I am unable to appreciate. H It was said that, both in *Clements v. Matthews* (11) and in *Re Clarke* (1), the contract was divisible; but that in the present case the contract is indivisible. I am not sure that I quite understand what is meant by saying that the contract is divisible in cases of this description. The contract is not, I think, divisible in the usual acceptation of the word. The consideration is not intended to be apportioned, nor can that for which the consideration is given be said to be divisible, except in I the sense that it consists of a collection of things capable of separation or division without destruction. To say that an assignment by a trader of all future book-debts in his present business and also of all future book-debts in any other business which he may hereafter undertake is divisible, but that an assignment of all his future book-debts is not divisible, seems to me to be attributing substance and reality to the merest verbal distinction. In the present case LOPES, L.J., says (18 Q.B.D. at p. 31): "Here the words are not capable of being read distributively." The rest of the court take the same view; and in *Re Clarke* (1) COTTON and FRY, L.JJ., both seem to think the point material. Can it really make any

difference that the several things for which the mortgagee has bargained, and on the faith of which he has advanced his money, are lumped together in one single expression, if in fact they have a separate existence, or are capable of being dealt with separately? Brevity has its dangers or its advantages, if equity will absolve a man from his bargain merely because he has packed into a sentence or compressed into a word a description of particulars which might have been set forth at large and expanded under several heads or subdivisions. This is a question, remember, between the original parties to the bargain. The contract cannot be avoided for the benefit of the mortgagor's creditors, unless it is held not binding as between the mortgagor and the mortgagee. Even in an executory contract I apprehend it is not competent for the vendor to say: "I cannot give you all I promised, and so you shall have nothing." The purchaser is entitled to take what the vendor can give him, and, as a general rule, he is also entitled to a corresponding abatement in the price. But when the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burden merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language. Surely the other party to the contract ought to have a voice in the matter. He may, perhaps, think half a loaf better than no bread, especially when he has paid for the whole and the seller is not in a position to return any part of the price.

When I find such a concurrence of opinion in favour of a view which seems to me to be contrary to equity, I may perhaps be forgiven for referring to one authority, a very old one, but none the worse, I think, for that. *Bettesworth v. Dean of St. Paul's* (16) was decided in this House in 1728. The facts are rather complicated, but the point may be stated shortly. Before the disabling statute of Elizabeth, the dean and chapter granted a lease for a long term with a covenant for renewal for ninety-nine years. In 1725 a bill was brought to enforce the covenant, or to compel the dean and chapter, who had had the benefit of the agreement, to grant a renewal for such a term as might by law be granted. The case was twice argued in Chancery. On the second occasion the Lord Chancellor was assisted by SIR JOSEPH Jekyll, M.R., LORD RAYMOND, C.J., and PRICE, J. The court (the Master of the Rolls dissenting) declared that the plaintiffs were not entitled to any relief either in law or equity, and so the bill was dismissed. On appeal, the objections which had prevailed in the court below were repealed. It was urged that the grant of a lease for ninety-nine years was prohibited by the statute, and that the covenant was one entire covenant, which could not be varied or divided. To quote the words of the report (1 Bro. Parl. Cas. at p. 245), which gives the arguments of counsel at length, but not the reasons for the judgment:

"In answer to these objections it was said to be a harsh way of reasoning, that because a person was now supposed to be prohibited from doing the whole of what he had agreed to do, he therefore should not do what was in his power and was lawful for him to perform, or to say that because part of a thing was taken away the whole must be so too, though part was still reserved; and in truth such construction and reasoning were apprehended to be inconsistent with the rules of equity."

All the judges having been consulted, the House took that view, and it was ordered and adjudged that the decree should be reversed, and that the dean and chapter should make a new lease for forty years.

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound the conclusion attempted to be drawn from it could not, as it seems to me, be maintained. I have, therefore, no hesitation in concurring in the motion which has been proposed.

LORD WATSON.—With reference to what fell from LORD FITZGERALD, I desire to explain that I do not understand the present to be a test case, in any other

sense than this, that a question of some general importance is fairly raised by the actual facts, as these have been stated by the parties, in both courts below as well as in this House. I purposely abstain from expressing any view on the matters of fact discussed in the opinion of my noble and learned friend, because I do not know that we have before us sufficient materials for their decision, and they were not referred to in the arguments of counsel.

LORD HERSCHELL.—I desire to express my concurrence with what LORD WATSON has said. I certainly did not understand this appeal to be a test case upon a question not raised by the facts. I did not enter into the discussion of the points raised by LORD FITZGERALD because they were not adverted to in the courts below, nor was any reliance placed upon them by any of the counsel at your Lordships' Bar.

Appeal allowed.

Solicitors: *Robinson, Preston & Stow*, for *J. J. Bagnall*, Birmingham; *Walter Murton*, Solicitor to the Board of Trade.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

GILES v. WALKER

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Lord Esher, M.R.),
March 27, 1890]

[Reported 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933;
54 J.P. 599; 38 W.R. 782]

Nuisance—Land—Weeds—Neglect of occupier to cut—Seeds blown on to adjoining land.

The defendant occupied land which had originally been forest land, but had been brought into cultivation. As soon as this land was brought into cultivation thistles sprang up all over it. The defendant neglected to cut these thistles, and consequently the seeds were blown in large quantities on to the adjoining land which was occupied by the plaintiff. In an action brought by the plaintiff to recover damages from the defendant for injury done to his lands,

Held: the defendant was under no duty towards the plaintiff to cut the thistles, which were the natural growth of the soil, and, therefore, was not liable for the damage caused to the plaintiff's land.

Notes. At common law an occupier of land is under no duty to an adjoining occupier of land to cut weeds naturally growing on his land. However by the Weeds Act, 1959, s. 1 (39 HALSBURY'S STATUTES (2nd Edn.) 11: "Where the Minister of Agriculture, Fisheries and Food . . . is satisfied that there are injurious weeds to which this Act applies growing upon any land he may serve upon the occupier of the land a notice in writing requiring him, within the time specified in the notice, to take such action as may be necessary to prevent the weeds from spreading."

Considered: *Pontardawe R.D.C. v. Moore-Gwyn*, [1929] 1 Ch. 656; *Rouse v. Gravelworks, Ltd.*, [1940] 1 All E.R. 26. Applied: *Selijman v. Docker*, [1948] 2 All E.R. 887. Considered: *Neath R.D.C. v. Williams*, [1950] 2 All E.R. 625. Referred to: *Stearn v. Prentice Bros., Ltd.*, [1918-19] All E.R.Rep. 495; *Edwards v. Birmingham Navigations*, [1924] 1 K.B. 341.

As to nuisances between neighbouring properties, see 28 HALSBURY'S LAWS A
(3rd Edn.) 131 et seq.; and for cases see 36 DIGEST (Repl.) 292 et seq.

Case referred to in argument:

Crowhurst v. Amersham Burial Board (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109;
39 L.T. 355; 27 W.R. 95; 2 Digest (Repl.) 90, 545.

Appeal from Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, B
but which had some years prior to the time when the defendant's occupation of
it commenced been brought into cultivation by the then occupier. The forest
land prior to cultivation did not bear thistles; but as soon as it was brought into
cultivation thistles sprang up all over it. The defendant neglected to cut down
these thistles, so as to prevent them from seeding, and, consequently, in the C
years 1887 and 1888 there was a large number of thistles on his land in full
seed. The plaintiff, who occupied land adjoining the defendant's, suffered great
damage by reason of the thistle seeds being carried by the wind in large quantities
on to his land, and brought an action in the county court to recover damages
against the defendant for the injury done to his land. The county court judge
left to the jury the question whether the defendant, in not cutting the thistles, D
had been guilty of negligence. The jury found that he had shown negligence in
the manner in which he had cultivated his land, and judgment was accordingly
entered for the plaintiff. The defendant appealed.

Toller for the defendant.

R. M. Bray for the plaintiff.

LORD COLERIDGE, C.J.—I never heard of such an action as this. There E
can be no duty as between adjoining occupiers to cut thistles, which are the
natural growth of the soil. The verdict and judgment in the county court must
be set aside, and this appeal must be allowed.

LORD ESHER, M.R., concurred.

Appeal allowed. F

Solicitors: *Field, Roscoe & Co.*; *H. B. Wade* for *Fowler, Warwick & Neale*,
Leicester.

[Reported by A. H. LEFROY, Esq., Barrister-at-Law.]

Re SMITH. BILKE v. ROPER

[CHANCERY DIVISION (Stirling, J.), July 31, August 6, 1890]

[Reported 45 Ch.D. 632; 60 L.J.Ch. 57; 63 L.T. 448; 39 W.R. 93;
6 T.L.R. 484]

Will—Re-publication—Subsequent testamentary instrument—No express intention to re-publish—Inference of intention from reference to will.

In order that a testamentary instrument should operate as a re-publication of a prior will, it is not necessary that it should express a particular intention of so doing, but it should nevertheless contain some reference to the will from which an intention of re-publication may be inferred.

The testatrix, a married woman, had, under her marriage settlement, a power of appointment over freehold estate, and a sum of £2,000 new three per cent. annuities which were comprised in the settlement. By her will, dated Dec. 27, 1878, in the lifetime of her husband, she exercised this power, and also purported to dispose of all other property over which she had any power of disposition. After her husband's death in 1884 she executed a testamentary instrument, dated July 30, 1885, in the presence of two witnesses, which purported to give to a nephew specific shares to which she was absolutely entitled, but contained no reference to her will. This instrument was admitted to probate together with her will.

Held: as the instrument contained no reference to the will from which an inference could be drawn of an intention that the will should be considered as of subsequent date, it did not operate as a re-publication of it and the testatrix died intestate except for the property subject to the power and that specifically mentioned in the instrument.

Notes. By the Law Reform (Married Women and Tortfeasors) Act, 1935, ss. 1, 2 (1) (11 HALSBURY'S STATUTES (2nd Edn.) 811 et seq., a married woman can dispose of her property by will as if she were a feme sole.

Referred to: *Re Harvey, Public Trustee v. Hoskin*, [1947] 1 All E.R. 349. As to re-publication of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 904 et seq.; and for cases see 44 DIGEST 370 et seq.

Cases referred to:

- (1) *Willock v. Noble* (1875), L.R. 7 H.L. 580; 44 L.J.Ch. 345; 32 L.T. 410; 23 W.R. 809, H.L.; 37 Digest 424, 326.
- (2) *Duppa v. Mayo* (1669), 1 Saund. 275d.
- (3) *Serocold v. Hemming* (1758), 2 Lee, 490; 161 E.R. 415; 44 Digest 366, 2000.
- (4) *Rowley v. Eyton* (1817), 2 Mer. 128; 35 E.R. 889; 44 Digest 375, 2092.
- (5) *Barnes v. Crowe* (1792), 1 Ves. 485; 4 Bro.C.C. 2; 29 E.R. 747; 44 Digest 374, 2086.
- (6) *A.-G. v. Lady Downing* (1769), Amb. 571; 2 Dick. 414; 27 E.R. 368, L.C.; 39 Digest 174, 643.
- (7) *Acherley v. Vernon* (1723), 9 Mod. Rep. 68; 1 Com. 381; 88 E.R. 321; affirmed (1725), 3 Bro. Parl. Cas. 85, H.L.; 44 Digest 324, 1560.

Also referred to in argument:

- Du Hourmelin v. Sheldon* (1854), 19 Beav. 389; 23 L.T.O.S. 339; 2 W.R. 639; 52 E.R. 401; 44 Digest 376, 2107.
- Skinner v. Ogle* (1845), 1 Rob. Eccl. 363; 4 Notes of Cases, 74; 9 Jur. 432; 163 E.R. 1067; 44 Digest 378, 2125.
- Utterton v. Robins* (1834), 1 Ad. & El. 423.
- Burton v. Newbery* (1875), 1 Ch.D. 234; 45 L.J.Ch. 202; 34 L.T. 15; 24 W.R. 388; 44 Digest 381, 2159.
- Green v. Tribe* (1878), 9 Ch.D. 231; 38 L.T. 914; 27 W.R. 39; sub nom. *Re Love, Green v. Tribe*, 47 L.J.Ch. 783; 44 Digest 381, 2160.

Follett v. Pettman (1883), 23 Ch.D. 337; 52 L.J.Ch. 521; 48 L.T. 865; 31 W.R. 779; 44 Digest 346, 1760. A

In the Goods of Steele, In the Goods of May, In the Goods of Wilson (1868), L.R. 1 P. & D. 575; 37 L.J.P. & M. 68, 72; 19 L.T. 91; 32 J.P. 791; 17 W.R. 15; 44 Digest 366, 1995.

Herbert v. Turball (1663), 1 Keb. 589; 1 Sid. 162; 83 E.R. 1129; sub nom. *Herbert v. Tuckal* (1662), T. Raym. 84; 28 Digest (Repl.) 484, 6. B

Price v. Parker (1848), 16 Sim. 198; 17 L.J.Ch. 398; 60 E.R. 849; 37 Digest 423, 322.

Adjourned Summons taken out by the plaintiff, a residuary legatee, to determine whether an instrument executed by the testatrix operated as a re-publication of her will.

By an indenture dated Nov. 14, 1864, and made prior to the marriage of Maria Smith, then Maria Rockhill, widow, with Joseph Smith, certain freehold messuages at Dunmow, in the county of Essex, and two messuages at Upway, in the county of Dorset, and a sum of £2,000 New Three per Cent. Annuities, were settled by Maria Smith in trust for herself for life, and after her decease upon trust for her husband for life, and after the decease of the survivor of them in trust for such persons as she should by deed or will appoint. By her will, dated Dec. 17, 1878, and made in the lifetime of her husband, Maria Smith, in exercise of the powers contained in the settlement, appointed the messuages at Dunmow, after the decease of herself and her husband, to R. Roper and his heirs, and as to the premises at Upway and all other real estate, if any, not thereinbefore disposed of, and comprised in the indenture of settlement, she appointed the same, after the death of the survivor of herself and her husband, to the use of the defendants R. Roper and H. C. Smith and their heirs, upon trust for sale, and to hold the proceeds upon the trusts thereafter declared; and in further exercise of the powers and of every other power enabling her thereto, she directed, limited, and appointed that the sum of £2,000 New Three per Cent. Annuities should be sold and the proceeds of the sale and the money arising from the sale of her real estate and all other, if any, her moneys, property, and effects over which she had any power of disposition, after payment of a legacy of £100 to Louisa Cleaveland, and of the expenses of proving and executing her will, should be divided among all her nephews and nieces (the children of her brother, Henry Durden, and sisters, Elizabeth Bowditch, widow, and Mary Ann Bowditch, deceased) living at her decease, and the child or children equally of every nephew and niece then dead in equal shares per stirpes, and as to the shares of married women to their separate use; and the testatrix appointed the defendants R. Roper and H. C. Smith and her nephew J. Durden her executors. Joseph Smith died on June 24, 1884, and after his death Maria Smith executed an instrument in the following form: C
D
E
F
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"Dunmow, July 30, 1885.—This is a present to Oswald Newman Roper from his aunt Maria Smith by the express wish of his late uncle, Joseph Smith, a few weeks before his death—ten shares of £10 each in the Dunmow Gas Co.—Maria Smith. Witness, Henry C. Smith; Eliza Clark." H

Maria Smith died on June 19, 1888, and her will and the instrument of July 30, 1885, were both proved in the principal registry by the executors named in the will on Sept. 26, 1888. In addition to the property comprised in the settlement and subject to the power of appointment, Maria Smith possessed other property to which she was absolutely entitled, and which consisted of the ten gas shares mentioned in the instrument of July 30, 1885, a sum of £1,000 Consols, further gas shares and certain other particulars. I

Crawley for the plaintiff.

Waggett for H. Durden, one of the next-of-kin.

Herbert Robertson, for Elizabeth Bowditch, another of the next-of-kin.

Vernon R. Smith for the executors of the will.

Cur. adv. vult.

Aug. 6, 1890. **STIRLING, J.**, read the following judgment.—This case raises a singular point, and one not entirely covered by authority. In this document of July 30, 1885, there is no reference whatever to the prior will of Dec. 27, 1878. The document is not called a codicil, and there is no attestation clause attached to it. Probate has been granted of both these instruments, and the question is whether the second testamentary instrument of July 30, 1885, constitutes a re-publication of the will of Dec. 27, 1878.

According to the decision of the House of Lords in *Willock v. Noble* (1), it is quite clear that, as regards property acquired by a married woman after the death of her husband, a will made during the coverture would have no effect, unless it was re-published after her title had accrued [see note, ante p. 503]. Apart from any statutory requirements it has long been settled that a will may be re-published either by a re-execution of it, or by a codicil to it, and according to the notes to *Duppa v. Mayo* (2) (1 Saund. at p. 278):

"Anything which showed an intent that the will should be of subsequent date was a sufficient re-publication."

Of course a codicil to a will, if it refers to the will and such an intention, would be a re-publication.

The learned author of *WILLIAMS ON EXECUTORS*, VAUGHAN WILLIAMS, J., says ((7th edn.), vol. 1, p. 215):

"A codicil will amount to a re-publication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not; and, as such, furnishes conclusive evidence of the testator's considering his will as then existing."

It must be borne in mind that the learned author was there speaking of a codicil which refers to the will, and while the long list of cases stated in the note forms an ample justification of the learned author's proposition of law, in every one of those cases, with one apparent exception with which I will deal presently, there appears to have been an express reference in the codicil to the preceding will. In most of those cases there were the usual formal words, but in some of them that did not occur.

In *Serocold v. Hemming* (3) Richard Hemming, the testator, had written at the bottom of his will, immediately under his name and seal, affixed to the last sheet, as follows:

"London, Oct. 16, 1755. I likewise give to Mrs. Lucretia Luxford £25 a year for her life, and to my black servant, Peter Savile, £10 a year for his life, the said annuities to be paid out of my estate by my executors above-named.
—Witness my hand, Richard Hemming.—Witness: John Serocold; J. Straw."

In that case, although the will was not mentioned in terms, there was a plain reference to it, and it was held by SIR GEORGE LEE that the words "my executors above named" constituted "such a reference to the first will as would revive it, at least as to the personal estate, which alone was in question."

The case, however, which approaches the most nearly of any of them to the present case is *Rowley v. Eyton* (4), and, according to the report, the testator, after making his will, purchased several copyhold estates, which he surrendered "to such uses as he should by will or any codicil thereto appoint," and he subsequently made a codicil to his will also duly executed to pass real estate in the words following:

"I give, devise, and bequeath unto my son Thomas Eyton and his heirs for ever all my copyhold estates within the manor of Wrockwardine."

Apparently, therefore, there was in the codicil no reference to any prior will. I have, however, examined the registrar's book, and I have also referred to the

original will and codicil, and I find that the report does not state the whole of the codicil, and that the codicil as a matter of fact began with the formal words, "This is a codicil to the will," etc. Consequently none of the cases which are referred to by VAUGHAN WILLIAMS, J., or have been cited to me, constitutes an authority for what I am asked to do in this case, or support the proposition that a reference to the will is unnecessary.

I think that the best statement of the law upon the subject occurs in *Barnes v. Crowe* (5). In that case the Lord Commissioner EYRE says (1 Ves. at p. 497):

"If we disentangle ourselves from the rule that there shall be no re-publication without re-execution, the principle that a codicil attested by three witnesses shall be a re-publication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three. Before the statute [Statute of Frauds, 1677] it was no part of the essence of the obligation that the will should be re-executed. Anything that expressed the testator's intention that the will should be considered as of a subsequent date was sufficient. Since the statute re-execution of the will is not necessary; but nothing more is required than a writing, according to the provisions of that statute, expressing that intent. Therefore, LORD HARDWICKE might well say he saw no great difference between the words 'I desire this codicil may be part of my will' and the words 'I re-publish,' which, it was there admitted, would have done. In *A.-G. v. Lady Downing* (6) LORD CAMDEN supposed a particular intent to re-publish ought to appear; and that annexation or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only LORD HARDWICKE's opinion cannot stand, but neither can *Acherley v. Vernon* (7); for there was no particular intent to re-publish; but the testator referred to the will, made alterations, and gave sufficient demonstrations that, when making and executing the codicil, he considered the will as his will, and from that a re-publication was implied; but it was not particularly in his thoughts to do any formal act of re-publication. Upon considering these cases I confess I am inclined to stand upon the general proposition stated by LORD HARDWICKE to show the will in the case before us was re-published."

It seems to me, then, that we must find an inference that the testator, when making the codicil, had in his mind the re-publishing of his will. If I apply that test to the present case I find nothing from which I can draw such inference, and I accordingly think that this testamentary instrument does not amount to a re-publication of the will. The application, therefore, fails upon that ground.

Solicitors: *H. S. Clutton*, for *Andrews, Son & Huxtable*, Weymouth; *Guscotte*, *Wadham & Daw*; *H. Pritchard*; *Paterson, Snow, Bloxam & Kinder*, for *E. Holmes*, Braintree.

[Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.]

PEASE v. PATTINSON

[CHANCERY DIVISION (Bacon, V.-C.), February 8, 1886]

[Reported 32 Ch.D. 154; 55 L.J.Ch. 617; 54 L.T. 209;
34 W.R. 361; 2 T.L.R. 306]

Charity—Relief of poverty—Society to provide for victims of mining accidents, relatives of deceased miners, and aged or infirm miners.

Charity—Cy-près doctrine—Scheme—Surplus sum left from colliery accident fund to be used for “the relief of suffering occasioned by colliery accidents”—Sums allocated to district committees—Transfer by district committee of whole sum allocated to it to friendly society.

After an accident at a colliery in south Durham, an accident fund was set up for the relief of sufferers and a large sum of money was raised by voluntary subscription. The committee in charge of the fund proposed to set aside a sum to provide for the widows and families of those who had suffered as a result of the accident, and to divide the surplus among twelve local mining districts in certain proportions to be handed over to local committees to be applied by them for “the relief of suffering occasioned by colliery accidents in the way which may appear to them most desirable.” A specific sum was allotted to the south Durham district in accordance with this proposal and the trustee for this district sought a declaration that the sum so allocated might be transferred to the trustees of the Northumberland and Durham Miners’ Permanent Relief Fund Friendly Society. The operations of the society were confined exclusively to the counties of Northumberland, Durham, Cumberland, and the Cleveland district, and membership was open to all mine-workers in these areas. The objects of the society were the raising of funds by voluntary subscriptions among the members and by donations to make provision for fatal accidents, for defraying funeral expenses, for the support of widows, children and other relations of a deceased member, for the support of members who were unable from age or infirmity to follow any employment, and to pay a sum of money on the death of a member.

Held: the sum should be transferred to the trustees of the friendly society, but was to be applied for the relief of suffering occasioned by colliery accidents in the south Durham district and for no other purpose.

Notes. Distinguished: *Cunnack v. Edwards*, [1896] 2 Ch. 679. Considered: *Re Hobourn Aero Components, Ltd.’s Air Raid Distress Fund*, *Ryan v. Forrest*, [1946] 1 All E.R. 501. Referred to: *Re Amos, Carrier v. Price* (1891), 39 W.R. 550; *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 18.

As to charitable purposes, see 4 HALSBURY’S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 355 et seq.

Case referred to in argument:

Re Clark’s Trust (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 355, 343.

Action by Sir Joseph Whitwell Pease, trustee for the south Durham district of the Hartley Colliery Accident Fund, against Hugh Lee Pattinson, an original subscriber to the fund, representing all the subscribers to the fund who had not assented to the application of the surplus, and the Attorney General, for a declaration that he might properly transfer the sum of £2,320 13s. 8d., and the investments thereof, to four of the trustees of the Northumberland and Durham Miners’ Permanent Relief Fund Friendly Society, for the general purposes of such society, or that proper directions might be given as to how the said trust property

ought to be applied; and that, so far as necessary, the trusts upon which the said A
property was held might be administered by the court.

Sir Arthur Watson, Q.C., and *W. C. Druce* for the plaintiff.

J. B. Leveson for the defendant Pattinson.

Stirling for the Attorney-General.

BACON, V.C.—On the whole, I am satisfied that this friendly society is a B
charity; but the fund which is in question must be confined to distinctly charitable
objects, and that gives rise to a question of some practical difficulty. I think that
provision must be made for binding and limiting the application of this fund so as
to prevent its being applied in any way for the benefit of a man who may change
his employment according to the rules of the friendly society. How that is to be
done I do not quite see, unless I direct an inquiry; and, although I am not willing C
to make any greater difficulty than is necessary in the distribution of this fund,
I think some such inquiry as to that must be made. I am disposed to postpone
any further judgment until the friendly society shall have passed such resolutions
as may be necessary to bind the application of this charitable fund to the objects
for which it may be properly applied. Counsel for the plaintiff has said that there
is no doubt that the society would readily further any plan for carrying this into D
effect, either by altering the rules of the society, or by passing any resolutions that
may be necessary. At present I only decide that the society is a charity, and
that the consent of the Charity Commissioners is not necessary to the action.
Beyond that, the subject presents, as I have already said, considerable difficulties,
as it is my duty to see that the fund is not applied to other purposes than those
for which the charitable fund was intended by the original subscribers. I think it E
must go into chambers for a scheme to be settled; that is, no doubt, expensive, and
to be avoided, but must be done, unless some other mode of settlement can be
arrived at. What will you do as to that?

Sir A. Watson, Q.C.—I should propose that, to obviate any difficulty, the fund
should be transferred to four of the trustees, not to be applied for the general F
purposes of the society, but, according to the rules of the society, exclusively for
the relief of suffering occasioned by colliery accidents, and that it should be
placed to a separate account as provided by r. 17 of the society. It would thus
be impossible for the trustees to apply the fund for any other purpose.

B. J. Leveson asked that words might be inserted limiting the application of the
fund to the south Durham district.

BACON, V.C.—I will make the order for the transfer as proposed, but the fund G
is to be applied for the relief of suffering occasioned by colliery accidents in the
south Durham district, and for no other purpose.

Solicitors: *Shum, Crossman & Prichard*, for *R. P. & H. Philipson & Cooker*,
Newcastle-upon-Tyne; *Hoare & Co.*

[Reported by *G. MACAN, ESQ., Barrister-at-Law.*] H

LEVY v. ABERCORRIS SLATE AND SLAB CO.

[CHANCERY DIVISION (Chitty, J.), November 2, 3, 1887]

[Reported 37 Ch.D. 260; 57 L.J.Ch. 202; 58 L.T. 218;
36 W.R. 411; 4 T.L.R. 34]

Bill of Sale—Debenture—"Debenture issued by any mortgage, loan, or other incorporated company"—*Agreement to repay money lent and to issue debentures to secure loan—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43), s. 17.*

By an agreement made between a company, of the one part, and a lender, of the other part, it was agreed that the company should repay the lender the sum of £600 with interest, certain hereditaments being charged with the repayment of the £600 and interest. It was also agreed that the company would at any time during the continuance of the security, at the request of the lender, execute a legal mortgage, and further would issue debentures of the company to the extent of £600, secured over all the capital, stock, goods, chattels, and effects of the company, including uncalled capital, both present and future.

Held: a "debenture" within s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882, was any document which created a liability or acknowledged it, even though it was not called a debenture; "issued" was not a technical term, and meant the delivery of the debenture by the company to the person who had the charge; the words "or other incorporated company" were not to be cut down by their context; and, therefore, the agreement fell within s. 17 of the Act of 1882 and was exempt from the provisions of the Bills of Sale Acts relating to form and registration under those Acts.

Edmonds v. Blaina Furnaces Co. (1) (1887), 36 Ch.D. 215, followed.

Notes. Approved: *Re Standard Manufacturing Co.*, [1891-4] All E.R.Rep. 1242. Considered: *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212; *Re Perth Electric Tramways*, *Lyons v. Tramways Syndicate and Perth Electric Tramways*, [1906] 2 Ch. 216; *Lemon v. Austin Friars Investment Trust*, [1925] All E.R.Rep. 255. Referred to: *Re Queensland Land and Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181; *Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187; *City of London Brewery Co. v. I.R.Comrs.*, [1899] 1 Q.B. 121; *Clark v. Balm, Hill & Co.*, [1908] 2 Ch. 528; *Dey v. Rubber and Mercantile Corpn.*, [1923] All E.R.Rep. 526; *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] 2 All E.R.Rep. 401.

As to debentures and the Bills of Sale Acts, see 3 HALSBURY'S LAWS (3rd Edn.) 272, and *ibid.*, vol. 6, p. 466; and for cases see 7 DIGEST (Repl.) 31 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 17, see 2 HALSBURY'S STATUTES (2nd Edn.) 583.

Cases referred to:

(1) *Edmonds v. Blaina Furnaces Co.*, *Beesley v. Blaina Furnaces Co. (1887)*, post p. 581; 36 Ch.D. 215; 56 L.J.Ch. 815; 57 L.T. 139; 35 W.R. 798; 7 DIGEST (Repl.) 33, 169.

(2) *Ross v. Army and Navy Hotel Co. (1886)*, 34 Ch.D. 43; 55 L.J.Ch. 697; 55 L.T. 472; 35 W.R. 40; 2 T.L.R. 907, C.A.; 7 Digest (Repl.) 33, 167.

Also referred to in argument:

Pharmaceutical Society v. London and Provincial Supply Association, Ltd. (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 42 Digest 620, 203.

Action by the plaintiff against the defendant company to enforce the agreement hereinafter set out.

In March, 1885, the plaintiff advanced to the defendant company the sum of £600, by way of loan, upon an agreement for repayment with interest at 10 per

cent. By this agreement dated Mar. 3, 1885, and made between the company of the one part, and the plaintiff of the other part, the company agreed to repay the plaintiff in June, 1885, the said sum of £600 with interest at 10 per cent., and thereby charged all the hereditaments comprised in certain deeds specified in the schedule to such agreement (which deeds were thereupon deposited with the plaintiff) with the repayment of the said sum of £600 and interest as aforesaid, and further agreed to issue a legal mortgage of the said hereditaments when called on,

"and further to issue to the plaintiff debentures of the defendant company to the extent of £600, secured over all the capital, stock, goods, chattels, and effects, including uncalled capital, both present and future, of the defendant company, and that the debentures should be payable on June 3, 1885, and should bear interest as from that date at the rate of 10 per cent. per annum."

In October, 1886, the plaintiff commenced the present action to enforce the above agreement, and claimed a charge on the hereditaments comprised in the deeds specified in the schedule, and also a charge on all the capital, stocks, goods, chattels, and effects of the company, including uncalled capital. The plaintiff in his statement of claim set out the agreement as above stated, and alleged that the sum of £600 and interest was still due. The claim was delivered on Oct. 27, 1887. No defence was put in, and the action now came on for hearing in default of pleading. Shortly before the trial of the action the defendant company had been compulsorily wound-up. The only question material for the purposes of this report was, whether the agreement, so far as it charged the goods, chattels, and effects of the company, was a debenture, and as such within the meaning of s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882. By the Bills of Sale Act (1878) Amendment Act, 1882, s. 17:

"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels, and effects of such company."

Romer, Q.C., and Ribton for the plaintiff.

Sir A. Watson, Q.C., and Byrne for the official liquidator.

CHITTY, J.—The plaintiff sues the defendant company on an instrument set out in the statement of claim, and the company take a legal objection to the action, and say that the document in question is void under the Bills of Sale Act (1878) Amendment Act, 1882, on two grounds: first, that it is one that requires registration and it has not been registered, and secondly, that it is not in the form prescribed by the schedule to the Act of 1882, and therefore void under s. 9.

In answer to these objections the plaintiff alleges that the instrument in question is in effect a debenture and, therefore, within the exception of s. 17. I need not read this section again; it was read in extenso in *Edmonds v. Blaina Furnaces Co.* (1), and I have but little to add to the general considerations to be found in the judgment in that case as to the meaning of the term "debenture" and the interpretation to be placed upon the wording of that section. In my judgment, in that case I mentioned one or two reasons as possibly governing the intention of the legislature in the formation of s. 17. After referring to the two great classes of existing companies, viz., those established by Act of Parliament incorporating the Companies Clauses Act, 1845, and those incorporated under the Companies Act, 1862, which are bound by statutory provisions to keep a register of their debentures, I said (post p. 584):

"The legislature finding these existing provisions for registration, may have considered that it was not necessary to require the registration under the Bills of Sale Act (1878) Amendment Act, 1882, of the secured debentures of an incorporated company. The legislature may have acted on this ground, or may have taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by that Act."

I would merely add that the argument today was mainly addressed to the form of the instrument before me; but beyond saying that the protection which the legislature had thrown upon instruments of this kind in favour of the grantor seems scarcely required in favour of a company, I am not able to state any grounds on which the legislature proceeded when s. 17 was inserted.

Looking at this section once more, I observe that it may be divided into four parts; it relates, first, to the thing called a "debenture"; secondly, it, the "debenture," must be "issued"; thirdly, it must be issued by a particular company, i.e., a "mortgage, loan, or other incorporated company"—the term "loan" is a little awkward, and I don't know what is meant by a "loan company," but I pass it by, as also the term "mortgage company," which is not quite clear, because I am satisfied that the words "or other incorporated company" are large enough, and must be construed as they stand, and are not to be cut down by the context; then the fourth part is, that the debenture must be "secured upon the capital, stock, or goods, chattels, and effects of such company." The material words here are "goods, chattels, and effects."

What is a "debenture?" I am unable to add anything to what I have already stated on this point in *Edmonds v. Blaina Furnaces Co.* (1). My attention has been called to extracts from SKEAT'S ETYMOLOGICAL DICTIONARY and BLOUNT'S LAW DICTIONARY as to the derivation of the word debenture, from which it appears that the term is a very old one and is derived from the Latin "debentur," because the bonds or receipts for the money lent began with the words "debentur mihi."* Bearing in mind the four divisions of s. 17 as I have just given them, I must try and find out what "debenture" means. In the course of the argument I asked counsel for the official liquidator to define a "debenture," and they did not satisfactorily do so. I do not accept the definition that a debenture must be one of a series of instruments, or issued *pari passu* with others. I have myself known an instance of a single debenture payable to one individual. In my opinion, a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a "debenture." I cannot find any precise legal definition of the term; it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be "issued," but "issued" is not a technical term, it is a mercantile term well understood. "Issue" here means the delivery over by the company to the person who has the charge. As to what "company" means, I have already said it must be by "an incorporated company," and it must be secured on the "goods, chattels, and effects" of the company. Having thus gone through the section once again, I find I cannot add anything further on this point to what I have already stated in the *Blaina Furnaces Case* (1).

I proceed to look at the particular document before me, which I find contains an agreement to pay the £600 on a certain day, a charge on certain hereditaments referred to in the schedule, and to execute a legal mortgage when called for, and then, further, according to the words of the statement of claim, which I am obliged to refer to instead of the original documents because the defendant declined to allow the claim to be amended or to put in the original agreement,

* In SKEAT'S ETYMOLOGICAL DICTIONARY (1882 Edn.) occurs the passage which was cited:

"Debenture—an acknowledgment of a debt—spelt 'debentur' by LORD BACON in the old edition of his speech to James I. touching purveyors:

'Nay, farther they are grown to that extremity, as is affirmed, though it be scarce credible, that they will take double poundage, once when the debenture [old Edn. debentur] is made, and again the second time when the money is paid.'"

BLOUNT, in his LAW DICTIONARY, has:

"Debenture was by a Rump Act, 1649, ordained to be in the nature of a bond or bill, etc., the form of which debentur, as then used, you may see in SCOBEL'S RUMP ACTS, 1649, c. 63. Lat., debentur, they are due, because these receipts began with the words debentur mihi."

"to issue to the plaintiff debentures of the defendant company to the extent of £600, secured over all the capital, stock, goods, chattels, and effects, including uncalled capital, both present and future, of the defendant company, and that the debentures should be payable on June 3, 1885, and should bear interest as from that date at the rate of 10 per cent. per annum."

This document, it seems to me, is one which creates a debt, shows the existence of a debt, and acknowledges it. Apart from the Bills of Sale Act (1878) Amendment Act, 1882, this clause would, in equity, create an immediate charge in favour of the grantee; an agreement to give a charge is a charge in equity, and that is the reasoning of *COTTON, L.J.*, in *Ross v. Army and Navy Hotel Co.* (2), when he says (34 Ch.D. at p. 53):

"If the deed [that is the covering deed] had not been executed at all, there would have been in the debenture itself a contract to give such a security as was intended to be given by the deed."

I have here a contract to give a charge which in equity is a charge; it is therefore a charge on the goods, chattels, and effects of the company; the goods, chattels, and effects therefore form a security for this debt. Reasoning the case out in this way, the result is as plain as it can be on such a section as the one before me—which is by no means plain—that this document is a debenture, and that it is issued, and that it in fact complies with the four points I mentioned above. I may add that, if the debentures had been actually issued in compliance with the agreement, it is clear that s. 17 would apply.

I have here before me a document not in form the same as a debenture in the commonly accepted interpretation of the term, but its legal effect is the same, and it would be a strange interpretation to put upon this section to assume that it said that where the legal effect of two instruments was identical, yet, because there was some slight difference in form, the one should be good and the other void. It is true that the document before me is not called a debenture, but that is no sufficient reason why it should not in effect be one. I cannot read it, as counsel for the official liquidator wanted me to do, as a contract that it should not operate as a debenture; the parties had no such idea as this in their minds at the time, and I cannot impute such an intention to them. I think therefore that a mere agreement to issue what are called debentures is not sufficient to prevent the agreement itself from operating as a debenture within the protection of s. 17. I cannot assent to the argument of junior counsel for the official liquidator that after the execution of the agreement it would have been competent for the company to issue further debentures *pari passu* with this charge. There is no ground here on the facts as they appear by this statement of claim for saying that this agreement is not within the protection of s. 17. The result, therefore, is that the plaintiff is, in my opinion, entitled to the judgment he has asked for.

Solicitors: *Edward Lee; Carr & Son.*

Reported by G. WELBY KING, Esq., Barrister-at-Law.]

Re HICKEY. HICKEY v. COLMER

[CHANCERY DIVISION (Kay, J.), November 4, 1886]

[Reported 55 L.T. 588; 35 W.R. 53]

Contempt of Court—Attachment—Executor—Failure to pay money into court—Fiduciary capacity—Debt owing to testator in lifetime—Need to prove possession or control of money—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 4, exception 3.

Where an executor makes default in payment of a sum of money which has been found due from him in an administration action and which he has been ordered to pay into court, he is within the third exception to s. 4 of the Debtors Act, 1869 (notwithstanding that the sum partly consists of a debt which was owing to the testator in his lifetime), if the executor was in a fiduciary relation to the testator in respect thereof in the testator's lifetime, provided that the money is in his possession or under his control.

Where an order directs a payment of money into court and this sum is composed of principal and interest unless it is possible to distinguish the part of the sum which represents interest from that which represents capital, a committal order cannot be made against the person ordered to make the payment in if he has defaulted, since before such an order can be made it is necessary to show that the money had been in that person's possession or under his control and so much of the sum as represents interest cannot be said to have been in his possession or control.

Notes. As to attachment and committal in general, see 8 HALSBURY'S LAWS (3rd Edn.) 30 et seq.; and for cases see 16 DIGEST (Repl.) 57 et seq. For the Debtors Act, 1869, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 293.

Cases referred to in argument:

Re Woodward, Woodward v. Woodward (1886), 30 Sol. Jo. 753; 16 Digest (Repl.) 50, 458.

Middleton v. Chichester (1871), 6 Ch. App. 152; 40 L.J.Ch. 237; 24 L.T. 173; 19 W.R. 369, L.C.; 5 Digest (Repl.) 1094, 8817.

Ferguson v. Ferguson (1875), 10 Ch. App. 661; 44 L.J.Ch. 615, L.J.J.; 5 Digest (Repl.) 1094, 8822.

Marris v. Ingram (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1094, 8818.

Evans v. Bear (1874), 10 Ch. App. 76; 31 L.T. 625; 23 W.R. 67, L.J.J.; 5 Digest (Repl.) 1097, 8848.

Street v. Hope (1878), 10 Ch.D. 286, n; 27 W.R. 470; 16 Digest (Repl.) 49, 450.

Barrett v. Hammond (1879), 10 Ch.D. 285; 48 L.J.Ch. 249; 27 W.R. 471; 5 Digest (Repl.) 1096, 8835.

Holroyde v. Garnett (1882), 20 Ch.D. 532; 51 L.J.Ch. 663; 46 L.T. 801; 30 W.R. 604; 5 Digest (Repl.) 1098, 8856.

Treherne v. Dale (1884), 27 Ch.D. 66; 51 L.T. 553; 33 W.R. 97, C.A.; 15 Digest (Repl.) 73, 733.

Motion by the plaintiff for an order that she might be at liberty to issue a writ of attachment against the defendant for his contempt in not paying into court the sum of £200 pursuant to two orders of the court in an administration action.

Colmer, the defendant in the action, which was for the administration of the estate of Hickey, was executor and trustee of the will of Hickey. He had received or been charged with personal estate not specifically bequeathed by the testator, and there was a balance remaining due from him. On the action coming on for hearing upon further consideration, it was, by an order dated Dec. 7, 1885, ordered that the defendant should, on or before Jan. 7, 1886, pay £200, "part of the balance in his hands," into court. The defendant failed to obey this order, and a further

application was made to the court, and on July 8, 1886, an order was made that the defendant should, within ten days after service thereof, make the payment into court pursuant to the order of Dec. 7, 1885. The plaintiff in the action alleged that the sum of £200 so ordered to be paid into court by the defendant was money received by or found to be due from him, and was in his possession or control as executor and trustee of the will of the testator. The money was not paid into court by the defendant, and the plaintiff moved before the vacation judge that she might be at liberty to issue a writ of attachment against the defendant for his contempt in not paying into court the sum of £200 pursuant to the two orders.

The defendant, in an affidavit, stated that the sum owing from him to the testator became due under the following circumstances. The defendant and the testator having been engaged together in various transactions concerning the sale of shares, in respect of which there was an open account between them, the defendant on one occasion sold shares in a certain company at the testator's request, and did not pay over the balance. In another affidavit the defendant denied that the sum of £200 ordered to be paid by him into court, was, or ever had been, in his possession or control. He stated that his indebtedness to the estate of the testator was of a compound character, consisting of a balance due from him to the estate in respect of various items, among which were included sums of money which he owed the testator during his lifetime, and, as he (the defendant) believed, also interest. The defendant likewise stated that these sums had never been distinguished; and that the sum of £200, mentioned in the two orders, was on account of such compound indebtedness. He further stated that, in respect of the balance, he had already paid £260 into court, and was entirely unable to make any additional payment, his means being insufficient. These statements were not contradicted in the affidavits filed on the plaintiff's behalf.

By s. 4 of the Debtors Act, 1869:

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment . . . 3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control."

Graham Hastings, Q.C., and *Bramwell Davis* for the plaintiff.
Oswald for the defendant.

KAY, J.—This motion fails on a very short ground. The order of Dec. 7, 1885, states—whether per incuriam or not I am unable to say—that the defendant must pay £200, "part of the balance in his hands," into court on or before Jan. 7, 1886. The defendant having failed to obey that order, a further order was made on July 8, 1886, and another day was fixed for payment. An application is made on behalf of the plaintiff that the defendant may be committed for contempt in not making payment as ordered.

It is said that the case comes within the third exception to s. 4 of the Debtors' Act, 1869, being a "default in payment of a sum of money by a person acting in a fiduciary capacity." One point which was raised is that part of this money was due from the defendant to the testator in his lifetime, and that, seeing it was a mere debt to the testator in his lifetime, it cannot be treated as money now due from the defendant in a fiduciary relation. It was answered that the defendant was in a fiduciary relation to the testator before he died. I am not prepared to say that is not a sufficient answer. It is familiar to us that, when this court has an executor before it, and it appears that the executor was indebted to his testator in his lifetime, the court will, instead of directing another action to be brought, make an order in that action for payment of the debt. Therefore, I think the court would be at liberty to treat the action as one to recover that debt; and if that

debt were due from the executor in a fiduciary capacity that would be sufficient to bring him within the third exception to s. 4 of the Debtors Act, 1869.

It has been decided, however, by the Court of Appeal that it must be shown that the person ordered to pay money into court had the money in his possession or under his control. Where the sum is compounded partly of interest and partly of capital, he cannot be committed for nonpayment of so much of the sum as represents interest, for he cannot be said to have had that in his possession or under his control. If the order which directs the payment into court does not distinguish the part of the sum which represents interest from that which represents capital, he cannot be committed at all. In this case the money found due is the result of a sort of account taken against the defendant which he says he believes was calculated charging him with interest. That is not denied in the affidavits made on the other side, and I must therefore take it that this sum did consist of principal and interest. The order does not distinguish between principal and interest. Consequently I am not at liberty to make the order of committal which is asked for, having regard to this technical objection. On that ground, therefore, I must refuse this motion. I order the plaintiff to pay the costs, but such costs may be set off against the amount found to be owing by the defendant.

Solicitors: *Charles Gregory; Tippetts & Son.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

WILLIS v. EARL BEAUCHAMP

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), January 27, 28, 1886]

[Reported 11 P.D. 59; 55 L.J.P. 17; 54 L.T. 185; 84 W.R. 357;
2 T.L.R. 270]

Vexatious Action—Stay—Probate action for revocation of grant made ninety years ago.

On the death of J. in 1798 administration was granted to A. and B. After their deaths administration de bonis non was in 1817 granted to the executrix of B. The executrix having died soon afterwards no further administration was granted till 1882, when administration de bonis non was granted to M. W. commenced an action against M. for revocation of the grant to him and a new grant to W., alleging himself to be next-of-kin. W. also commenced an action against X. and Y. as the legal personal representatives of A. and B. for revocation of the original grant to A. and B.

Held: under the Probate Court's general jurisdiction to stay proceedings, this action would be stayed as being frivolous and vexatious and an abuse of the court's process, for, as a grant of administration was extinguished with the death of the administrator and no succession to or authority under the grant was transmitted to his personal representatives, the defendants had been improperly joined to the action, and, even if the plaintiff obtained revocation of the original grant, any future actions by him to get in outstanding property of the intestate's estate or to recover the intestate's personal estate from the defendants would be barred by the Statutes of Limitation, and so there was no probability that any beneficial result would follow from the prosecution of the action.

Notes. As to the period of limitation of actions claiming personal estate of a deceased person see the Limitation Act, 1939, s. 20 (13 HALSBURY'S STATUTES (2nd Edn.) 1180).

Considered: *Re Coghlan (deceased), Briscoe v. Houghton*, [1948] 2 All E.R. 68. A
 Referred to: *Blair v. Cordner* (1887), 36 W.R. 64; *Barrett v. Day, Day v. Foster*
 (1890), 43 Ch.D. 435; *Remington v. Scoles*, [1895-9] All E.R.Rep. 1095.

As to the inherent jurisdiction of the High Court including the Probate Division to stay proceedings, see 30 HALSBURY'S LAWS (3rd Edn.) 407, para. 767 and 16 HALSBURY'S LAWS (3rd Edn.) 202, para. 357; and for cases see DIGEST (Pleading) 82 and (Practice) 977, and 23 DIGEST (Repl.) 292. As to revocation of grant, see 16 HALSBURY'S LAWS (3rd Edn.) 272; and for cases see 23 DIGEST (Repl.) 251. II

Appeal from an order of BUTT, J., dismissing as frivolous and vexatious an action brought by the plaintiff against the defendants.

One, William Jennens, died in June, 1798, and letters of administration to his personal estate and effects were granted in the following month to the first Earl Beauchamp and Mary, Viscountess Andover, as the next-of-kin entitled. The original administrators having died in November, 1817, letters of administration de bonis non were granted to Catherine, Countess Beauchamp, who was the executrix of the first Earl Beauchamp. She died shortly afterwards, and in May, 1882, letters of administration de bonis non were granted to Isaac Martin, no administration having been taken out in the meantime. The plaintiff claimed to be a second cousin of William Jennens, and the person really entitled to represent the next-of-kin. He had brought an action against Martin for revocation of the grant to him, and the making of a new grant of letters of administration de bonis non to himself. In 1880 the plaintiff and others had brought an action in the Chancery Division against the then legal personal representatives of the original administrators, claiming to recover portions of the estate of Jennens which were alleged to have come to the hands of the defendants, but on Nov. 3, 1880, MALINS, V.-C., allowed a demurrer to this action on the ground that the right to sue the administrators was barred by the lapse of more than twenty years by virtue of s. 13 of the Law of Property Amendment Act, 1860 (repealed). The present action was brought, in the Probate Division, against Earl Beauchamp and Mr. Coe, who were respectively the legal personal representatives of the original administrators, the first Earl Beauchamp and Viscountess Andover, claiming revocation of the original letters of administration; in this action the plaintiff did not expressly claim a new grant to himself. On July 21, 1885, BUTT, J., made an order dismissing the action as frivolous and vexatious, on the ground that even if the plaintiff should succeed in obtaining a revocation of the grant, he would not, by reason of s. 13 of the Act of 1860, be able to recover any property. From this order the plaintiff appealed. F

Inderwick, Q.C., and *Middleton* for the plaintiff.

Jeune (Edward Clarke, Q.C.), with him) for the defendants. G

COTTON, L.J.—This is an appeal from an order made by BUTT, J., dismissing the action on the ground that it was frivolous and vexatious. A reference was made to r. 4 of Ord. 25, but that, in my opinion, does not apply here; it only applies where it appears to the court on the face of the pleadings that the action is frivolous and vexatious. That is not the ground or principle upon which this case has been mainly argued before us; but the order of the court below was made in the exercise of the undoubted jurisdiction of the court, when it is proved to the satisfaction of the court that the action is frivolous and vexatious (and in either case it is an admitted abuse of the process of the court), to stay that action or to dismiss it. H

This action is of a somewhat curious nature. What is its object? The plaintiff's counsel say that it is necessary in order to enable the plaintiff to establish his right to administration to Mr. Jennens, as the plaintiff now comes forward and alleges that the former letters of administration were a mere nullity, and that he is a nearer relation to the deceased than the persons who, as next-of-kin, obtained the grant of letters of administration in 1798. But, so far as we can learn, that I

is erroneous. If the letters of administration to Isaac Martin, which are still subsisting, prevent the plaintiff from obtaining the grant of letters of administration to himself, undoubtedly he must get those letters of administration recalled and cancelled; but the power granted by letters of administration entirely ceases on the death of the person to whom the court has granted the administration. It is not transmissible in any way to their representatives; and, so far as one can see, in point of principle it cannot be in any way necessary to recall letters of administration when the persons to whom those letters of administration were granted have since died, and when all the power and authority granted to them has come to an end. Executors of administrators do not in any way derive any power whatever under letters of administration, and in no way do they represent the administrators except that they have their personal estate. So far as we can learn, although there was a difference of opinion between the counsel in the case as to what is the ordinary practice of the Court of Probate, that practice certainly does not require that any such action as this should be commenced.

But that is not all. What is its object? As far as we can learn, when this matter was before the court below it was said that, neither by obtaining letters of administration nor by revoking the previous letters of administration granted in 1798 and 1817, was there any desire on the part of the plaintiff to get any property, but that it was a matter of sentiment. But that was departed from here. I asked what evidence there was, or what ground there was for supposing that there would be any good result as regards money if letters of administration should be granted to the plaintiff, and if the claim in this action should be amended so that it should not only seek to recall previous letters of administration, but should also ask for a grant to Willis. Counsel for the plaintiff hardly suggested that there was any probability that if letters of administration were granted to the plaintiff he would thereby be able to obtain any money. It was indeed contended that there must be personal estate of the deceased outstanding, because, it was said, his estate appeared to have been £1,000,000, and that only something like £800,000 had been divided. But the supposition that the estate amounted to £1,000,000 was founded upon this circumstance alone, that in the books at Somerset House there were, in the margin of the accounts relating to this estate, the words, "July 6, 1798, upper value—bond." A gentleman made an affidavit that the meaning of those words "upper value" was that the estate was above £1,000,000 in value. The defendant probably thought that the then law was the same as the now existing law; but, as a matter of fact, the Act of Parliament which was in force in 1798 (37 Geo. 3, c. 90) took £10,000 as the maximum; and, in my opinion, all that was meant by that entry was that the value of the estate was over £10,000; and we know that it was of the value of about £700,000.

Then counsel for the plaintiff said that the plaintiff had been defeated by the Law of Property Amendment Act, 1860, in his previous proceedings, but that he now sought to set aside the letters of administration granted to Lord Beauchamp and Lady Andover, and the subsequent ones granted in 1817 to Lady Beauchamp, in order to get rid of the statute of 1860. But, in my opinion, the effect would not be to get rid of the statute. Section 13 protects the personal representatives in this way: [HIS LORDSHIP read the section, and continued:] It is very true that the letters of administration on which the title at present rests have only been granted within a short period; but, in substance, the plaintiff is seeking to recover from those who are the personal representatives of deceased administrators on the ground that he is a nearer relative than the persons to whom such deceased administrators have handed over this personal estate. In my opinion, having regard to that statute, even if the letters of administration were recalled, the action against the representatives of the deceased administrators would be hopeless, and, in my opinion, therefore, I cannot but look upon this action as one which is vexatious and unnecessary. It appears to be brought by Mr. Willis with the real object of obtaining a grant of administration. But there is no probability of any good result being obtained if he does succeed in this action, and obtains a grant of

letters of administration to himself. Therefore, if we allowed this action to go on it would be calling upon the defendants to contest the question of the plaintiff's relationship to the deceased after a great number of years have elapsed since that time—nearly ninety years—without the probability of any good result arising therefrom. On all these grounds, therefore, I am of opinion that the order made by the learned judge was right, and that this appeal must fail.

BOWEN, L.J.—I am of the same opinion. I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the courts, because it can really lead to no possible good. It does not fall within r. 4 of Ord. 25 as the lord justice has said; but the rules, as we have more than once pointed out, do not, and that particular rule does not deprive the court in any way of the inherent power which every court has to prevent the abuse of legal machinery, and, in my opinion, it clearly would be an abuse of legal machinery if, for no possible benefit, the defendants were to be dragged through a litigation which must be both very long and most expensive.

In the first place, I cannot understand, nor do I think we have had any satisfactory explanation offered to us, why these defendants are joined as defendants to the action. A grant of administration is a personal grant. On the death of the administrator there is no succession, and no authority derived from the original grant is transmitted to the personal representatives of the deceased administrator. It seems to me to follow from this, in the first place, that it is wholly unnecessary to apply to revoke any grant of letters of administration to a person who has since died, because the grant is already extinct with his death. Nor have we been able to discover for ourselves, or from those whom we have consulted, any precedent for a suit of the kind. It is not absolutely necessary, perhaps, to say that such a suit cannot be maintained; but it seems to me to be perfectly clear that, even in a suit to revoke the grant of letters of administration to a deceased person, to join the representatives of a deceased administrator is a misapprehension of the legal principle. I cannot see how they can have anything to do with such an action; and, in fact, I think they have been joined in this particular suit by some confusion of thought. It was probably felt that if the grant of letters of administration, which is sought in a collateral proceeding by the plaintiff, is obtained, the persons against whom he would ultimately desire to prosecute remedies for the purpose of recovering the personal estate which he supposed to be due to him would be the personal representatives of the deceased administrators. But, to my mind, it does not follow at all that because in the future proceedings (future proceedings which can only be prosecuted if the plaintiff succeeds on the present application) these defendants would be necessary parties, they are properly joined as parties to the present application. It seems to me that, upon that ground alone, the present action ought to be dismissed.

But if we proceed further, and consider what possible advantage can be obtained by the plaintiff, the answer seems to me to be, that he has not given us any materials for supposing that he can get a single farthing of benefit, or a single right declared which is of any value to him whatever, by the proceedings in this action. As regards all the acts done by the administrator bona fide, the grant, even if it were set aside, would be voidable only and not void, and the revocation of it would not displace all acts which had been done under the revoked letters; and, as regards the property outstanding, the ordinary Statute of Limitations would apply. It may be that the plaintiff would desire further to avail himself of any remedies open to him in respect of the alleged original breach of trust. But, without pronouncing absolutely that the statute of 1860 would apply to such a case, though I am rather inclined to think it would (I follow *COTTON, L.J.*, in that view without pronouncing upon it), it seems manifest to me that no case of any kind is made out by the affidavits which would justify us in supposing there is any property at all which could be recovered by the appellant, even if there were a grant of letters of administration

A to himself. Under those circumstances, I think this action ought to be stayed as frivolous and vexatious.

It is quite true that one ought not lightly to stay an action at its inception, or to pronounce to be frivolous and vexatious a proceeding the object of which is to ascertain and declare a right; but it is obviously and manifestly for the benefit of both parties that we should explain to the plaintiff at this early period—if it

B has to be explained to him at all—that he has really no right which he can prosecute with any success. If this litigation in which he is involving the defendants is pursued, it will be an extremely costly one; and I think we are bound in their interests at once to give judgment upon the point which has been submitted to us, and to say that they ought not to be worried or harassed by a litigation which can really come to nothing in the end.

C **FRY, L.J.**—I am of the same opinion. I think that this action ought to be stayed under the general jurisdiction of the court to prevent the prosecution of frivolous and vexatious actions, and I think it is hardly going too far to say that an action begun nearly ninety years after the death of the person to whose estate it relates is almost *prima facie* vexatious. I say that, because one knows the presumption which the law tends in favour of owners and possessors of property, and

D also the existence of statutes of limitations, one or other of which is almost always found to stand in the way of proceedings after such a lapse of time. I think, therefore, we have reasonably required the plaintiff to show what fruits he expects to reap from this suit.

He has suggested, in the first place, that there is outstanding property which he will be able to get in; but, after the lapse of time which has occurred since the

E death of the testator, that seems to me to be extremely improbable, and I think that it is based on a misunderstanding of the meaning of the words “upper value,” to which **COTTON, L.J.**, has referred. In the next place, the plaintiff suggests the probability of recovering property from the estate of the first Lord Beauchamp, or of Lady Andover, or of the Countess Beauchamp; but he has laid nothing whatever before us which can induce us to believe that there is a probability of

F any such recovery of property. No doubt suggestions of fraud have been thrown out, but they are entirely unsupported by any evidence to which we can attend. Therefore, the plaintiff is obviously unable to show us any probability of any beneficial result following to him from the prosecution of this suit.

But, in my opinion, this action is frivolous and vexatious on the pleadings themselves; and I say that, even assuming that the pleadings were to be amended by

G stating that this action is brought with the view to obtain letters of administration in another proceeding. I say so for this reason, that it appears to me the legal personal representatives of a deceased administrator have nothing whatever to do with defending the propriety of a grant of administration to him. They in no way claim under those letters of administration, and they have no burden whatever to defend or to discuss the propriety of them. I think, therefore, that the defendants are, so to speak, entire strangers to the question which the plaintiff proposes to put to them in this action. It so appears on the statement of claim, and I cannot help agreeing with what has been said by **BOWEN, L.J.**, that the real object of this action is not to discuss with the defendants the propriety or impropriety of the grant of the letters of administration to their predecessors, but to

H prejudice a claim which it is suggested the new administrator, when appointed, may have against the personal estates of those deceased administrators—a right in

I equity, or a cause of action, which is not stated in the present proceedings, and which, of course, therefore, the court below was not concerned with. I think, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *S. E. Lambert; Walfords.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

SMALLPAGE *v.* TONGE

[COURT OF APPEAL (Cotton and Lindley, L.JJ.), July 16, 17, 1886]

[Reported 17 Q.B.D. 644; 55 L.J.Q.B. 518; 55 L.T. 44;
34 W.R. 768; 2 T.L.R. 828]*Practice—Writ—Concurrent writ—Extension of time for issue—R.S.C., Ord. 6, r. 1, Ord. 64, r. 7.*

The power given by R.S.C., Ord. 64, r. 7, to enlarge the time appointed by the Rules of the Supreme Court applies to the time limited by Ord. 6, r. 1 for issuing concurrent writs, viz., twelve months from the issue of the original writ. The exercise of the power depends on the circumstances of each case.

Practice—Writ—Concurrent writ—Issue when only one dependant—Issue for service abroad—Original writ issued for service within jurisdiction.

A concurrent writ may be issued where there is only one defendant, and it may be issued for service out of the jurisdiction although the original writ was for service only within the jurisdiction.

Notes. Referred to: *Holman v. George Elliot & Co., Ltd.*, [1944] 1 All E.R. 639; *Battersby v. Anglo-American Oil Co., Ltd. and others*, [1944] 2 All E.R. 387.

As to concurrent writs see 30 HALSBURY'S LAWS (3rd Edn.) 302, para. 557; and for cases see DIGEST (Practice) 307. For R.S.C., Ord. 6, r. 1 and Ord. 64, r. 7 see THE ANNUAL PRACTICE.

Case referred to:

(1) *Doyle v. Kaufman* (1877), 3 Q.B.D. 340, C.A., Digest (Practice) 311, 361.

Also referred to in argument:

Cole v. Sherard (1855), 11 Exch. 482; 26 L.T.O.S. 139; 25 L.J.Ex. 59; 4 W.R. 126; 22 Digest (Repl.) 153, 1392.

Charrington v. Witherby, 23 Sol. Jo. 230.

Re Jones, Eyre v. Cox (1877), 46 L.J.Ch. 316; 25 W.R. 303; Digest (Practice) 311, 359.

Appeal from an order of the Divisional Court (WILLS and GRANTHAM, JJ.), refusing an ex parte application for leave to issue a concurrent writ of summons for service out of the jurisdiction.

On Mar. 18, 1881, the applicant, the plaintiff in an action, issued a writ against the defendant, who then resided in England, for service within the jurisdiction, claiming a sum for goods sold and delivered. The applicant could not effect service as he was unable to ascertain where the defendant was living and he renewed the writ within twelve months of issue and thereafter every six months in accordance with R.S.C., Ord. 8, r. 1, the last renewal being made on Mar. 5, 1886. In June, 1886, the applicant discovered that the defendant was living in France, and he then applied to a judge in chambers for leave to issue a concurrent writ out of the jurisdiction. The application was refused and on July 8, 1886, the applicant applied to the Divisional Court. The Divisional Court refused the application on the ground that Ord. 64, r. 7, did not empower the court to enlarge the time provided by Ord. 6, r. 1, for issuing a concurrent writ, viz., twelve months from the issue of the original writ, for to do so would affect the operation of the Statute of Limitations. The applicant appealed to the Court of Appeal.

Percy Gye for the applicant.

Cur. adv. vult.

July 17, 1886. **COTTON, L.J.**—This is an ex parte application on the part of the plaintiff for leave to issue a concurrent writ with the object of serving it out of the jurisdiction, the present action having been instituted before the

- A** Statute of Limitations was available as a defence, and, the plaintiff having kept the action alive from time to time by the renewal of the writ. The Queen's Bench Division declined to make the order, and from that refusal there is an appeal to us. As far as I understand the case, one of the principal reasons why the judges in the court below declined to make the order was, that they thought they ought not to, or could not, enlarge the time because the application was
- B** made under Ord. 6, r. 1, which provides that :

"The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word 'concurrent,' and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force."

C

A great deal more than twelve months has elapsed in this case since the original writ was issued, but, in my opinion, that lapse of time can well be cured under

D

Ord. 64, r. 7, which provides that

"A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time for doing any act or taking any proceeding."

E

Here the period of twelve months is, no doubt, fixed as the time within which a plaintiff wishing to have a concurrent writ must apply for it. But that is a limited time within which he is to do an act; and power is given to us, under the rule which I have just read, to enlarge the time. Therefore, in my opinion, that difficulty ought not to prevail. Of course we have to consider whether we ought to enlarge the time, and whether we ought, in the circumstances of the case, to make the order for the issue of a concurrent writ; because we are asked

F to order the issue of a concurrent writ to be served out of the jurisdiction, and there is but one defendant. These are the difficulties we have to consider.

With regard to there being only one defendant, although that struck us as a difficulty when we heard the case yesterday, yet, in my opinion, that does not in any way prevent the issuing of a concurrent writ. We ascertained, as far as we could, from one of the masters, what, irrespective of the rules, was the practice.

G

It appears that concurrent writs have been issued sometimes when there has been only a single defendant, and such a case seems to me within the principle which enables concurrent writs to be issued. The object of issuing concurrent writs, where there are several defendants, is to enable service to be effected upon them. If there was a single defendant, who was sometimes in England and sometimes abroad, it would be advisable to serve him at the place where, for the time being he might be. That being so, although there is only one defendant to this action; I think a concurrent writ may be issued.

H

There is another point which we have to consider. The original writ was issued for service within the jurisdiction—that is to say it was not a writ to be served out of the jurisdiction—and apparently the orders do not enable a writ, when it is once issued for service within the jurisdiction, to be served out of the jurisdiction; liberty must be obtained for service out of the jurisdiction before the writ can be issued. That really comes to this, that the different writs, one for service in the jurisdiction, and one for service out of the jurisdiction, are in different forms. There is no difficulty, as regards the mere issuing of a concurrent writ to be served out of the jurisdiction, from the fact that the original writ was one to be served only within the jurisdiction; because Ord. 11, r. 2, expressly provides for that.

I

Then we must look at the circumstances of the case to see whether we ought to enlarge the time, and now authorise this concurrent writ to be issued for

service out of the jurisdiction. It appears from the affidavits that at the time when the original writ was issued, the defendant was nowhere to be found, and it is apparent from the evidence that the defendant has left his residence near London for the purpose of evading the creditor who is now suing him in this action. He has gone abroad and left his house for the purpose of evading his creditors generally, and from the evidence it appears that efforts have been made to ascertain his place of residence from his brother, but that these efforts have been ineffectual. The plaintiff has now ascertained that the defendant is living in France, at the place stated.

It is very true that, if this writ is not issued for service out of the jurisdiction, the plaintiff will probably be unable to make this present action effectual against the defendant; and, if that occurred, a new writ would have to be issued for service out of the jurisdiction, unless any action so brought would be barred by the statute. In my opinion, the plaintiff's right of action has not gone, because it has been kept alive by the leave from time to time given to renew the writ, although the attempts to serve the defendant have so far been ineffectual. We are not asked to give leave to renew a lost cause of action, but to make the writ effectual and enable the plaintiff to serve the writ abroad, which will make the defendant come in and defend, or enable the plaintiff to proceed without the defendant taking any steps to defend the action. In my opinion, it will be right, under the circumstances of the case, to enlarge the time and allow this concurrent writ to be issued and to be served out of the jurisdiction.

I think I ought to mention *Doyle v. Kaufman* (1) a case in the Queen's Bench Division to which we were referred, and very fairly referred, because it was supposed it might be against the application. In that case an application to renew a writ was made where, by the default of the plaintiff, the writ had not been renewed, and the period of twelve months allowed by the rules had expired by the plaintiff's own negligence. But there the right of action was gone, and both the Queen's Bench Division and the Court of Appeal declined to order the renewal of the writ on the ground that the right of action had gone by the laches of the plaintiff, and that it would be wrong to give him an opportunity of reviving that which he had already lost. Here the right of action still continues, and we are only asked to make the action effectual by ordering service out of the jurisdiction.

LINDLEY, L.J.—I am of the same opinion. The point raised in this case is quite new. It is an important matter, but it has never arisen before that I know of. The action was commenced by a writ issued on Mar. 18, 1881. There was only one defendant, Mr. Tonge, and the writ was in the ordinary form, for service in England, there being nothing peculiar about it. That writ was not served, because the plaintiff, who had taken every pains to find Mr. Tonge, could not find him. The plaintiff has satisfied the judge in chambers, from time to time, of his inability to serve this writ on Mr. Tonge, and he has from time to time procured the renewal of the writ against him on the ordinary application. Therefore, the writ is still alive, old as it is, and if Mr. Tonge were in this country it could be now served upon him, and the action would be proceeded with in the ordinary course. But Mr. Tonge's whereabouts could not be discovered until quite lately, when the plaintiff obtained information that Mr. Tonge was in France, somewhere. The plaintiff has applied to the Divisional Court, and, by way of appeal, to us, for liberty to issue a concurrent writ for service upon Mr. Tonge abroad. We have not had the opportunity or advantage of having a note of the judgment of the Divisional Court; but, as I understand it, the Divisional Court refused this application on the ground of the length of time which had elapsed since the original writ was issued. They seem to have been of opinion that they could not enlarge the time for issuing a concurrent writ, the time limited by r. 1 of Ord. 6 being twelve months after the issue of the original writ. What was the precise view taken by the Divisional Court of

A their power to enlarge the time under Ord. 64, r. 7, I do not know. They seem to have thought it did not apply, and refused the application of the plaintiff; hence the appeal to us.

In the first place, we have to consider whether the enlarging power given by Ord. 64, r. 7, applies to the time limited by Ord. 6, r. 1, for the issuing of concurrent writs. I am unable to see what the difficulty is in extending the time mentioned in Ord. 6, r. 1. It seems to me that there is no more difficulty in exercising the power given by Ord. 64, r. 7, by extending the time specified in Ord. 6, r. 1, than there is in extending any other time limited by the rules. Of course, it must be a question in each case whether it is just and right that the time should be extended. If the court should be of opinion that it is just and right to extend the time for issuing a concurrent writ, it seems to me that Ord. 64, r. 7, gives ample power in that respect.

That difficulty having been got over, we have to consider other points. At first, it struck me as a novelty to issue a concurrent writ where there was only one defendant to the action. Concurrent writs are ordinarily issued where there are several defendants, and it is, therefore, extremely inconvenient to serve them all with the original writ. I was not aware, until today, that concurrent writs were ever issued where there was only one defendant; but on inquiry we learn, from a very experienced master, that concurrent writs have been issued, and are still issued, in cases where there is only one defendant, but he is a travelling defendant whom the plaintiff does not know where to find. Then the plaintiff issues an original and a concurrent writ, sends the original to one place where he thinks he can catch the defendant, and the concurrent writs to other places where he thinks he may be found, and hopes to serve him either with the original or with the concurrent writ.

Then it is a question whether the costs of the concurrent writs are to be allowed, or only the costs of one of them. Therefore, the difficulty of there being only one defendant to this action does not really exist, and there is no reason why concurrent writs should not be issued in such a case. That difficulty having been got rid of, there is no reason why concurrent writs should not be issued, with the leave of the court, against a defendant abroad, although the original writ was issued in the ordinary form for service within the jurisdiction. That difficulty is, I think, got over when one looks at the rules, and applies one's mind to their interpretation. Order 2, r. 4, is important. It says:

G "No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the court or a judge."

It follows from that that the original writ in this case, having been issued in the ordinary form, cannot now be served out of the jurisdiction, even with the leave of the court or a judge; but it does not follow that the concurrent writ cannot be so issued and served.

H It is obvious that the court, by ordering the issue and service of concurrent writs, is not contravening, but is practically complying with Ord. 2, r. 4. Then our attention was called to the language of Ord. 6, r. 2, which seems to contemplate a case where the original writ is issued against a person supposed to be in the jurisdiction, without leave in the ordinary way, and it being afterwards discovered that he is out of the jurisdiction. Looking narrowly at the language of r. 2, it seems to me that the case is provided for, and that there is nothing in the rule which prevents the court from authorising the issue, and service abroad, of concurrent writs, although the original writ was issued in the ordinary form for service in this country.

Having cleared away this difficulty, there remains only to be considered the question whether in this case it is just and right that the court should exercise its power and give this leave. It depends on the affidavits of course. We have looked at them, and we are satisfied that this is a case in which it will be right

and proper to grant the leave required. We are satisfied that the defendant has gone abroad in order to evade his creditors, and to evade this particular plaintiff, who has been fortunate enough to keep his writ alive. We are not giving the plaintiff leave now to revive a barred cause of action; we are merely removing from his way an impediment in the way of the service of his writ. This case is not like *Doyle v. Kaufman* (1) which was referred to by COTTON, L.J., in which the court was asked to allow the writ to be renewed after the Statute of Limitations was a bar. This writ has been renewed from time to time, and if the defendant came over here, the action could go on against him. It appears to us, having regard to the circumstances under which the defendant went abroad, obviously to evade his creditors, and having regard to the efforts which have been diligently made by the plaintiff to serve his debtor, and having regard to the fact that the plaintiff has kept his writ alive for the last five years, it will be expedient and just to authorise the issue of the concurrent writs.

COTTON, L.J.—Notwithstanding the period of twelve months has elapsed, we enlarge the time, and authorise the concurrent writ to be issued and served out of the jurisdiction at ———, naming the place, or elsewhere in France; and fourteen days after service will be allowed in which the defendant may enter an appearance.

Appeal allowed.

Solicitors: *G. S. & H. Brandon.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

REDFERN v. REDFERN

[COURT OF APPEAL (Lindley, Bowen and Fry, L.JJ.), November 19, December 3, 16, 1890]

[Reported [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 39 W.R. 212; 7 T.L.R. 157]

Divorce—Discovery—Purpose to establish adultery.

On a petition for divorce an order for discovery by means of interrogatories or by an affidavit of documents ought not to be made against the respondent where the sole object of discovery is to establish adultery against that party. The doctrine that no one is bound to incriminate himself applies to questions tending to establish adultery, which was an ecclesiastical offence.

Notes. Under R.S.C., Ord. 16 b, r. 9, an order for discovery can be made against an infant, and this rule renders obsolete the decision in *Mayor v. Collins* (1).

The Matrimonial Causes Rules, 1957, r. 82, provide that subject to the provisions of those Rules and of any enactment, the Rules of the Supreme Court shall apply, with the necessary modifications, to the practice and procedure in a matrimonial cause notwithstanding R.S.C., Ord. 68, which provides that the Rules of the Supreme Court shall not affect the procedure or practice in divorce or other matrimonial causes.

Rule 23 of the Matrimonial Causes Rules, 1957, expressly provides for discovery in a matrimonial cause.

As to evidence in a matrimonial cause see now the Matrimonial Causes Act, 1950, s. 32 (29 HALSBURY'S STATUTES (2nd Edn.) 417).

- A Explained: *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q.B. 124. Applied: *Cavendish v. Cavendish*, [1925] All E.R.Rep. 96. Distinguished: *Elliott v. Albert*, [1934] All E.R.Rep. 391. Explained and Distinguished: *Blunt v. Park Lane Hotel, Ltd. and Briscoe*, [1942] 2 All E.R. 187. Considered: *Tilley v. Tilley*, [1948] 2 All E.R. 1113; *Hulbert v. Hulbert*, [1957] 2 All E.R. 226. Referred to: *Curtis v. Mundy*, [1892] 2 Q.B. 178; *Evans and Blyth v. Evans*, [1904-7] All E.R.Rep. 110; *Hensley v. Hensley and Nevin* (1920), 122 L.T. 814; *Franklin v. Franklin and Minshall*, [1921] P. 407; *Triplex Safety Glass Co. v. Lancegaye Safety Glass* (1934), Ltd., [1939] 2 All E.R. 613; *Macintyre v. Macintyre and Moppett*, [1946] 1 All E.R. 121.

As to discovery in matrimonial causes, see 12 HALSBURY'S LAWS (3rd Edn.) 361. As to resisting discovery on the ground of crimination, and as to discovery against infants, see *ibid.*, 50, para. 72 and 15, para. 18. For cases see 18 DIGEST (Repl.) 16 and 27 DIGEST (Repl.) 266. For the Matrimonial Causes Rules, 1957, see THE ANNUAL PRACTICE, vol. 2.

Cases referred to:

- (1) *Mayor v. Collins* (1890), 24 Q.B.D. 361; 59 L.J.Q.B. 199; 62 L.T. 326; 38 W.R. 349; 6 T.L.R. 186, D.C.; 18 Digest (Repl.) 162, 1449.
- (2) *Harvey v. Lovekin* (1884), 10 P.D. 122; 54 L.J.P. 1; 33 W.R. 188; 1 T.L.R. 136, C.A.; 18 Digest (Repl.) 157, 1391.
- (3) *Euston v. Smith* (1884), 9 P.D. 57; 32 W.R. 596; 18 Digest (Repl.) 157, 1390.
- (4) *Winscom v. Winscom and Plowden* (1864), 3 Sw. & Tr. 380; 33 L.J.P.M. & A. 45; 10 L.T. 100; 10 Jur.N.S. 321; 12 W.R. 535; 164 E.R. 1922; 27 Digest (Repl.) 409, 3378.
- (5) *Pollard v. Pollard and Hemming* (1864), 3 Sw. & Tr. 613; 11 L.T. 749; 164 E.R. 1413; 18 Digest (Repl.) 16, 102.
- (6) *Mordaunt v. Moncreiffe* (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 23 W.R. 12; H.L.; 27 Digest (Repl.) 457, 3928.
- (7) *Finch v. Finch* (1752), 2 Ves. Sen. 491; 28 E.R. 315, L.C.; 18 Digest (Repl.) 158, 1401.
- (8) *Chetwynd v. Lindon* (1752), 2 Ves. Sen. 450; 28 E.R. 288, L.C.; 18 Digest (Repl.) 136, 1213.
- (9) *King v. King* (1850), 2 Rob. Eccl. 153; 7 Notes of Cases, 396; 14 Jur. 276; 18 Digest (Repl.) 224, 1915.
- (10) *Swift v. Swift* (1832), 4 Mag. Ecc. 139; 162 E.R. 1399; 18 Digest (Repl.) 225, 1924.
- (11) *Deane v. Deane* (1858), 1 Sw. & Tr. 90; 28 L.J.P. & M. 23; 31 L.T.O.S. 25; 22 J.P. 180; 4 Jur.N.S. 268; 164 E.R. 642; 27 Digest (Repl.) 516, 4599.
- (12) *Dunn v. Coates* (1738), 1 Atk. 288; West temp. Hard. 526; 26 E.R. 185, L.C.; 18 Digest (Repl.) 16, 99.

H Also referred to in argument:

Southwark and Vauxhall Water Co. v. Quick (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, 752.

Dyke v. Stephens (1885), 30 Ch.D. 189; 55 L.J.Ch. 41; 53 L.T. 561; 33 W.R. 932; 29 Sol. Jo. 682; 18 Digest (Repl.) 26, 186.

Hyde v. Hyde (1888), 13 P.D. 166; 57 L.J.P. 89; 59 L.T. 529; 36 W.R. 708; 4 T.L.R. 586, C.A.; 16 Digest (Repl.) 68, 661.

Hebblethwaite v. Hebblethwaite (1869), L.R. 2 P. & D. 29; 39 L.J.P. & M. 15; 21 L.T. 732; 27 Digest (Repl.) 519, 4617.

Anon. (1752), 2 Ves. Sen. 451.

Boxley v. Stubbington (1758), 2 Lee's Rep. 501.

Noverre v. Noverre (1846), 1 Rob. Eccl. 428; 4 Notes of Cases, 652; 10 Jur. 622; 163 E.R. 1090; 27 Digest (Repl.) 327, 2711.

Morgan v. Thorne (1841), 7 M. & W. 400; H. & W. 149; 10 L.J.Ex. 125; 5 Jur. 294; 28 Digest (Repl.) 483, 1.

Shaw v. Shaw (1862), 2 Sw. & Tr. 642; 31 L.J.P.M. & A. 95; 7 L.T. 254; 164 A
E.R. 1147; 27 Digest (Repl.) 531, 4763.

Fuller v. Ingram (1859), 28 L.J.Ch. 432; 32 L.T.O.S. 370; 5 Jur.N.S. 510; 7
W.R. 302; 18 Digest (Repl.) 16, 100.

Petition by a husband for divorce from his wife, an infant, on account of her adultery. The husband took out a summons asking that the wife might be ordered to make an affidavit of documents in her possession. The objection was taken that no such order could be made against her as she was an infant, and the registrar refused to make the order. **BUTT, J.**, holding that he was bound by *Mayor v. Collins* (1), affirmed the registrar's decision. The husband appealed.

Inderwick, Q.C., and *Searle* for the husband.

Finlay, Q.C., and *Rufus Isaacs* for the wife.

Cur. adv. vult.

Dec. 16, 1890. **LINDLEY, L.J.**, read the following judgment.—The question raised by this appeal is, whether an infant wife in a suit for dissolution of marriage on the ground of her adultery ought to be required to make an affidavit of documents. **BUTT, J.**, has decided that she ought not, and he so decided in supposed conformity with a decision of the Queen's Bench Division in *Mayor v. Collins* (1), which is to the effect that an infant is not bound to make such an affidavit in an action in the Queen's Bench Division. That case, however, turned upon the Rules of the Supreme Court—viz., Ord. 31, r. 12, and upon the practice of the Court of Chancery before, and of the Chancery Division of the High Court, since, 1875, when the Judicature Acts came into operation: see Supreme Court of Judicature Act, 1875, s. 25 (11); R.S.C., 1883, Ord. 1, r. 2; and Ord. 72, r. 2. But, by Ord. 68, r. 1 (d), the Rules of the Supreme Court do not apply to proceedings for divorce, or other matrimonial causes, except when expressly made applicable to such proceedings. There is no rule of the supreme court expressly relating to discovery in such proceedings; and the question raised by this appeal must be decided on grounds other than those on which **BUTT, J.**, decided it.

When we turn to the Matrimonial Causes Acts and the rules made under them, no express provision can be found relating directly to the subject in question. There is neither statutory enactment nor rule relating directly to discovery or affidavits of documents. The Matrimonial Causes Act, 1857, enacts (s. 22) that in all suits and proceedings, other than proceedings to dissolve any marriage, the court shall proceed on the principles and rules which prevailed in the ecclesiastical courts, but subject to the provisions of the Act, and to the rules and orders made under it; and, by s. 53, the court is directed to make such rules and orders concerning the practice and procedure under the Act as it may consider expedient, and to revoke or alter the same. Although no rules have been made relating to discovery or affidavits of documents, yet it is plain that the ecclesiastical courts had, and exercised, the power of compelling suitors in those courts to make discovery, and that this practice has been continued, and discovery, by interrogatories and by affidavit of documents, has been adopted in proceedings for dissolution of marriage which were beyond the power of the ecclesiastical courts.

It is obviously inexpedient to have two sets of rules applicable to discovery in the same court—viz., one set for those matrimonial causes over which the ecclesiastical courts had jurisdiction, and another for those matrimonial causes over which those courts had no jurisdiction; and it is desirable that the practice and procedure should, as far as possible, be the same in both classes of causes. This view has, I believe, been adopted by the successive judges of the Divorce Court, and a practice has been established, based partly on the old ecclesiastical practice and partly on the rules which prevailed at common law and in equity, and which now prevail in the other branches of the High Court. The power of the ecclesiastical courts to require discovery has been long established and recognised: see 3 **BURN'S ECCLESIASTICAL LAW**, 298, and *Harvey v. Lovekin* (2), and the

A cases there referred to. This power has, in fact, been constantly exercised by the Divorce Court in divorce cases: see *Euston v. Smith* (3), and *Harvey v. Lovekin* (2), in which latter case the practice in this respect was held by the Court of Appeal to be legal, although not founded on any express rule. The practice of requiring affidavits of documents in divorce proceedings seems to have been introduced, or at least settled, in 1864, in *Winscom v. Winscom and Plowden* (4) and *Pollard v. Pollard and Hemming* (5), and it has prevailed ever since; and, although not introduced or sanctioned by any express order or rule of the Divorce Court, the decision in *Harvey v. Lovekin* (2) is an authority for upholding the practice.

It was contended that a suit for divorce for adultery was a criminal proceeding, or, at all events, that adultery exposed the adulterer to punishment, or to some kind of penalty; i.e., penance or fine. It was, however, decided by the House of Lords, in *Mordaunt v. Moncreiffe* (6), that a suit for divorce for adultery was a purely civil, and in no sense a criminal, proceeding. The cases there cited show clearly that no indictment lies at common law for adultery: see 2 Salk. 552; neither is there any statute making it punishable. But adultery, like other forms of fornication and lewdness, exposes the guilty party to ecclesiastical censure and punishment (2 BURN'S ECCLESIASTICAL LAW, 403), and discovery may be resisted on this ground. It is true that ecclesiastical punishment for such offences is practically obsolete, but I cannot say that the jurisdiction of the courts in this respect has ceased. Indeed, the enactment to which I am about to refer is based on the theory that adultery is punishable, and that no person, therefore, is bound to answer any question tending to prove himself or herself guilty of it.

E The practice of requiring discovery in divorce cases is not opposed to the statute 32 & 33 Vict., c. 68, s. 3 [repealed], which relates to the examination of parties to divorce suits as witnesses; but that statute clearly recognises the doctrine that a person asked about his or her adultery is not bound to answer. By that statute parties to proceedings instituted in consequence of adultery are competent witnesses in such proceedings,

F "provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

G Discovery was enforced, both in the ecclesiastical courts and in the Court of Chancery, long before parties to suits in those courts were competent witnesses in such suits, and the statute in question does not, in truth, relate to discovery at all.

A very little reflection will show that, in suits for dissolution of marriage, discovery, whether by interrogatories or affidavit of documents, may be perfectly consistent with the provisions of that Act. In every such suit the marriage of the parties has to be proved; discovery addressed to that subject may be wanted, and, if wanted, is clearly permissible. Again, in a wife's suit for dissolution on the ground of adultery and cruelty or desertion, discovery as to these last matters is equally permissible. On the other hand, adultery being an ecclesiastical offence, and the recognition of this state of the law by the legislature being obvious from the prohibitory words in the statute, it would be wrong to compel discovery by means of interrogatories the object of which is to obtain answers tending to show that the person interrogated has been guilty of adultery. So with regard to an affidavit of documents, if there is reason to believe that a party has documents relating to matters in question in the cause, other than his or her adultery, it would be quite right to require an affidavit as to such documents; but, if there is reason to believe that the affidavit is required only for the purpose of discovering documents tending to prove adultery by the person required to make the affidavit, no order for such an affidavit ought to be made.

The objection, however, that a person's affidavit of documents, or answer to an interrogatory, may tend to criminate him, is an objection which, as a rule, ought to be raised to the production of a document, or to answering an interrogatory. Exposure to punishment, or to a penalty, does not, as a rule, afford a ground for refusing an order for discovery or for an affidavit of documents. But if discovery, or an affidavit of documents, is wanted solely for the purpose of proving adultery, no order for discovery or for an affidavit ought to be made. Such an order would be oppressive and unjust.

The next and last point for consideration, and the one mainly relied upon by the husband, is that an infant cannot be compelled to make any affidavit of documents or other discovery. It has certainly been the long-established rule in Chancery not to require an infant to make discovery, and the same rule was followed in the Queen's Bench Division in *Mayor v. Collins* (1). If this matter were open to discussion, I should think the Chancery rule too rigid. Be this as it may, I can find no trace of any such rule in the ecclesiastical courts, and the invariable practice in the Divorce Court has, I am informed, been inconsistent with any such rule. I see no reason why this practice should be declared wrong. The point, however, does not require decision in this case, and I say no more about it.

Having made the above observations, I ask myself what useful purpose can possibly be attained by compelling the wife in this suit to make an affidavit of documents? The only possible purpose must be to extract from her an admission that she has or had documents which tend to prove her own adultery. The pleadings allude to other matters, which are, however, wholly immaterial; but the sole question in the cause is, whether she has committed adultery or not. Guided by the principles explained above, I think she ought not to be required to make any affidavit of documents, not because she is an infant, for I should come to the same conclusion if she were adult. She cannot be compelled to produce the letters which the plaintiff desires to see; she cannot be asked any question tending to show that she has been guilty of adultery, and that being the case, to order her to make an affidavit of documents would, in my opinion, be wrong. The appeal, therefore, will be dismissed, with costs.

BOWEN, L.J., read the following judgment.—It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find that the doctrine that “no one is bound to criminate himself” should be applicable to it. Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions, which is now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognised as governing similar subject-matter by common law and equity alike: see *Finch v. Finch* (7), 2 Ves. Sen. at p. 493; *Chetwynd v. Lindon* (8). The ecclesiastical courts have dealt with the question in a like manner. In *King v. King* (9) DR. LUSHINGTON held (in a cause of divorce by reason of adultery) that a party in her personal answers to a libel was not bound to answer upon oath to articles, which, though not on the face of them criminatory, might by possibility furnish a link in the evidence against herself: see also *Swift v. Swift* (10).

Such was the law at the date of the passing of the Divorce Act, at which time, it must be remembered, the parties to a suit were incapable in the superior courts of giving evidence themselves on oath in their own case. The Evidence Act, 1851, which rendered parties to a suit or action competent and compellable to give evidence, provided by s. 4 [repealed] as follows:

- A "Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery."

And in s. 2 of the Evidence Amendment Act, 1853 [repealed] there was included a similar provision.

- B Such was the law at the time when the present Divorce Court was instituted, and it remains to be seen whether the legislature has anywhere justified a practice, hitherto unknown, of compelling a party to a divorce proceeding to make answer upon oath of any matter which might tend to prove him or her guilty of adultery. By s. 43 of the Matrimonial Causes Act, 1857 [repealed], the court was empowered to order the attendance of the petitioner, and to examine, or permit him or her to be examined or cross-examined, upon oath, on the hearing of any petition;
- C but the section provided that no petitioner should be bound to answer any question tending to show that he or she had been guilty of adultery; and, by s. 48, the rules of evidence observed in the superior courts of common law at Westminster were made applicable to, and were to be observed in, the trial of all questions of fact in the court: see *Deane v. Deane* (11). An important change in the law was no doubt effected by the Act 32 & 33 Vict., c. 68, being "an Act for the
- D further amendment of the law of evidence." Section 3 of this Act [repealed] enacts that

- E "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceedings: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

- F It seems to result from the history of the subject already set forth that no power existed down to the Matrimonial Causes Act, 1857, and that no power has since been given by the legislature, to compel a witness to make any answer on oath which would tend to show that he or she was guilty of adultery. On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery ought to be permitted, and, on similar grounds, the court cannot properly compel discovery on oath of documents which can only be material so far as they may
- G tend to establish that issue, although in ordinary cases such an objection would naturally be raised, not on the summons for discovery, but in the affidavit made in answer thereto. I do not doubt for a moment that the court has the power of allowing interrogatories and discovery both in ordinary cases, and even in divorce suits, upon issues which are not directed to the proof of adultery; subject always to the ordinary principles of the law of privilege, and to the same doctrine
- H (whenever applicable) that no one is bound to criminate himself.

- I In *Euston v. Smith* (3), which was a suit of nullity, SIR JAMES HANNEN stated that he found it to be in accordance with the practice in the Divorce Division to allow interrogatories, a view which was subsequently adopted in the Court of Appeal in *Harvey v. Lovekin* (2). The ecclesiastical court in like manner had, in former times and still has, the power of compelling the discovery of documents: see *Dunn v. Coates* (12). But it is contrary to the principles of law recognised alike in the common law courts, the Chancery Division, and the ecclesiastical courts that a wife or husband should be compelled to answer on oath as to matters tending to show adultery, whether in the shape of discovery of documents or of any other fact, and the legislation affecting the Divorce Court has done nothing to disturb, but much to recognise, this, to my mind, salutary principle.

It is true that the House of Lords in *Mordaunt v. Moncreiffe* (6), adopted the conclusion that a divorce suit is not a criminal or penal proceeding, but their judgment in no way conflicts with the view which I have above expressed. The

question as to the liability of infants to orders for discovery of documents in the Divorce Court does not, therefore, arise in the present case, which is to be decided on a still broader ground. Whether in matrimonial causes infants are compellable to make discovery, or to answer interrogatories, as to matters other than adultery, is a question I prefer myself to leave open till the point arises with reference to some specific issue, the character of which may possibly be material to the inquiry which will have then to be pursued. It is, perhaps, questionable whether infants have any special protection in the Divorce Court, but I express no final opinion on the subject.

If the opinion at which I have arrived as to the issue of adultery had been in conflict with the practice of the learned judges in the Divorce Court, I should feel much hesitation in disturbing what, upon that hypothesis, would have been the settled course of the court, but there seems no reason to think that interrogatories addressed solely to the issue of adultery have ever, otherwise than per incuriam, been allowed, or that, when the only issue was adultery, the practice of discovery of documents has been deliberately adopted by the judges of that court. So far as any laxity of practice may have crept in, it has, I think, been due to the fact that other issues, besides that of adultery, are often necessarily ventilated in a divorce suit. On the ground above mentioned I think the appeal should be dismissed with costs.

FRY, L.J.—I have had the benefit of reading the judgments delivered by my brethren, and I cannot usefully add anything to what they have said. I think no discovery ought to be required from litigants in a divorce suit for the purpose of proving adultery. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *J. B. Churchill; Eldred & Bignold.*

[*Reported by A. J. SPENCER, Esq., Barrister-at-Law.*]

THE MOORCOCK

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), February 25, 1889]

[Reported 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439;

5 T.L.R. 316; 6 Asp.M.L.C. 373]

Contract—Implied term—Term needed to give efficacy to transaction—Prevention of failure of consideration—Presumed intention of parties—Agreement by shipowners to discharge and load cargo at wharf—Damage through grounding of ship at ebb tide—Uneven bed of river—Implied warranty by wharfingers as to safety of river bed.

An implied warranty, as distinguished from an express contract or express warranty, is founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving such efficacy to the transaction as both parties must have intended it should have and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. The reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties, not to impose on

A one side all the perils of the transaction or to emancipate one side from all the burdens, but to make each party promise in law as much as it must have been in the contemplation of both parties that he should be responsible for.

By an agreement made in November, 1887, between shipowners and wharfingers it was arranged that the shipowners' vessel should proceed to a wharf in the River Thames belonging to the wharfingers for the purpose of discharging and loading cargo. It was known to both parties that on the tide ebbing a vessel at the wharf would be grounded. On December 4, 1887, while the shipowners' vessel was moored alongside the wharf, she took the ground, and, owing to inequalities in the river bed, sustained damage. The bed of the river where the vessel took ground was vested in the Thames Conservators and the wharfingers had no control over it, but it was within their power to ascertain its state. The wharfingers had taken no steps to ascertain the state of the river bed. In an action by the shipowners for damages for the damage to their vessel,

Held: both parties must have known, when entering into the agreement, that unless the ground was safe the ship would be placed in a position of danger when the tide ebbed and that all the consideration for the payment by the plaintiffs to the defendants for the use of the wharf might fail, and, therefore, a term was to be implied in the agreement that the defendants warranted that they had taken reasonable care to see that the berth was safe, and that, if it were not safe, they would warn the plaintiffs of that fact, and the plaintiffs were entitled to succeed.

Notes. Distinguished: *Tredegar Iron and Coal Co. v. Calliope, The Calliope*, [1891] A.C. 11. Considered: *Hamlyn & Co. v. J. C. Wood & Co.*, [1891-4] All E.R.Rep. 168; *Parker v. Plomesgate R.D.C.* (1903), 9 Com. Cas. 107; *Re Shell Transport and Trading Co. and Consolidated Petroleum Co.* (1904), 20 T.L.R. 517; *The Bearn*, [1904-7] All E.R.Rep. 315; *Devonald v. Rosser & Sons*, [1904-7] All E.R.Rep. 988; *Bede Steamship Co. v. River Wear Comrs.*, [1907] 1 K.B. 310; *Young v. Hoffman Manufacturing Co., Ltd.*, [1904-7] All E.R.Rep. 307; *City of Dublin Steam Packet Co. v. R.* (1908), 24 T.L.R. 798; *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309; *Re Anglo-Russian Merchant Traders, Ltd. and John Batt & Co. (London), Ltd.*, [1917] 2 K.B. 679; *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1917] 2 K.B. 1; *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18. Distinguished: *Scrutton v. A.-G. for Trinidad* (1920), 99 L.J.P.C. 30; *The Empress*, [1923] P. 96. Considered: *Cockburn v. Smith* (1923), 40 T.L.R. 113; *Kelantan Government v. Duff Development Co., Ltd.*, [1923] All E.R.Rep. 349; *Great Lakes Steamship Co. v. Maple Leaf Milling Co.* (1924), 41 T.L.R. 21; *The Grit*, [1924] P. 246; *Forbes, Abbott and Lennard v. Great Western Rail. Co.* (1927), 138 L.T. 286. Applied: *Silverman v. Imperial London Hotels, Ltd.*, [1927] All E.R.Rep. 712; *Walleris Rederij A./S. v. W. H. Muller & Co., Batavia*, [1927] All E.R.Rep. 369; *Great Western Rail. Co. v. James Durnford & Sons, Ltd.*, [1928] All E.R.Rep. 89; *Great Western Rail. Co. v. Monmouthshire County Council* (1929), 93 J.P. 142; *Campbell v. Hopkins & Sons (Clerkenwell), Ltd.* (1931), 49 R.P.C. 38; *Lamb & Sons v. Goring Brick Co.*, [1932] 1 K.B. 710; *Dorey (Onesimus) & Sons, Ltd. v. Headley's Wharf, Ltd. v. William Ashby, Ltd.*, [1939] 3 All E.R. 23; *Cawood Wharton & Co. v. Samuel Williams & Sons, Ltd., The Cawood III*, [1951] P. 270. Referred to: *Krell v. Henry*, [1900-3] All E.R.Rep. 20; *Nitrate Producers Steamship Co. v. George Wills & Co.* (1903), 19 T.L.R. 626; *Ogdens v. Nelson, Same v. Telford*, [1903] 2 K.B. 287; *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37; *Consolidated Goldfields of South Africa v. Spiegel* (1909), 100 L.T. 351; *E. Clemens Horst Co. v. Biddell Bros.*, [1911-13] All E.R.Rep. 93; *Easton v. Hitchcock*, [1912] 1 K.B. 535; *Lazarus v. Cairn Line of Steamships* (1912), 106 L.T. 378; *The Devonshire and St. Winifred*, [1913] P. 13; *Merryweather v. Pearson*, [1914] 3 K.B. 587; *Sharp v. Nosawa*, [1917] 2 K.B. 814; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918-19] All E.R.Rep. 151;

Kensington and Knightsbridge Electric Lighting Co. v. Nottinghill Electric Lighting Co. (1918), 87 L.J.K.B. 565; *Re Nott and Cardiff Corpn.*, [1918] 2 K.B. 146; *Turpin v. Victoria Palace*, [1918] 2 K.B. 539; *Liebig's Extract of Meat Co. v. Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381; *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1918-19] All E.R.Rep. 661; *Armour & Co., Ltd. v. Walford (London), Ltd.*, [1921] 3 K.B. 473; *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R. Rep. 1; *United States Shipping Board v. Durrell*, [1923] 2 K.B. 739; *British Petroleum Co. v. A.-G. for Ceylon*, [1926] A.C. 147; *Browning v. Crumlin Valley Collieries*, [1926] All E.R.Rep. 132; *United States Shipping Board v. Strick*, [1926] A.C. 545; *Marbé v. George Edwardes (Duly's Theatre), Ltd.* (1927), 43 T.L.R. 460; *Livock v. Pearson* (1928), 33 Com. Cas. 188; *Gaze v. Port Talbot Corpn.* (1929), 93 J.P. 89; *Bentall, Horsley and Baldry v. Vicary* (1930), 47 T.L.R. 99; *Rogerson v. Scottish Automobile and General Insurance Co.* (1930), 144 L.T. 460; *Miller v. Cannon Hill Estates, Ltd.*, [1931] All E.R.Rep. 93; *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *Foley v. Classique Coaches, Ltd.*, [1934] All E.R.Rep. 88; *George Trollope & Sons v. Martyn Bros.* (1934), 50 T.L.R. 544; *Doyle v. White City Stadium, Ltd. and British Boxing Board of Control* (1929), [1934] All E.R.Rep. 252; *Jensen Shipping Co. v. Anglo-Soviet Shipping Co.* (1935), 40 Com. Cas. 320; *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; *Broome v. Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1939] 3 All E.R. 978; *Adams v. Unicorn Cinemas, Ltd.*, [1939] 3 All E.R. 136; *Shirlaw v. Southern Foundries (1926), Ltd. and Federated Foundries, Ltd.*, [1939] 2 All E.R. 113; *Ward v. Barclay, Perkins & Co.*, [1939] 1 All E.R. 287; *Way and Waller, Ltd. v. Verrall*, [1939] 3 All E.R. 533; *Adams v. Adams*, [1941] 1 All E.R. 334; *Raymer & Co. v. Hambros Bank, Ltd.*, [1942] 2 All E.R. 694; *The Towerfield, Owners of the S.S. Towerfield v. Workington Harbour and Dock Board*, [1948] 2 All E.R. 736; *Sethia (1944), Ltd. v. Partabmull Rameshar*, [1950] 1 All E.R. 51; *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1950] 2 All E.R. 390; *London Graving Dock v. Horton*, [1951] 2 All E.R. 1; *Brewer v. Westminster Bank, Ltd.*, [1952] 2 All E.R. 650; *Jennings v. Tavener*, [1955] 2 All E.R. 769; *Lister v. Romford Ice and Cold Storage Co.*, [1957] 1 All E.R. 125; *The Ballyalton*, [1961] 1 All E.R. 459; *Re Automatic Telephone and Electric Co., Ltd.'s Application*, [1962] 2 All E.R. 207.

As to implied terms in contract, see 8 HALSBURY'S LAWS (3rd Edn.) 121 et seq.; and for cases see 12 DIGEST (Repl.) 681 et seq.

Cases referred to :

- (1) *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, 8665.
- (2) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 12 Digest (Repl.) 250, 1935.

Also referred to in argument :

- R. v. Williams* (1884), 9 App. Cas. 418; 53 L.J.P.C. 64; 51 L.T. 546, P.C.; 41 Digest 977, 8662.
- Heaven v. Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 41 Digest 982, 8700.
- White v. Phillips* (1863), 15 C.B.N.S. 245; 33 L.J.C.P. 33; 9 L.T. 388; 10 Jur.N.S. 425; 12 W.R. 85; 1 Mar.L.C. 394; 143 E.R. 778; 44 Digest 122, 983.
- Curling v. Wood* (1847), 16 M. & W. 628; 17 L.J.Ex. 301; 11 L.T. 159; 12 Jur. 1055; 153 E.R. 1341, Ex. Ch.; 44 Digest 103, 826.
- Winch v. Thames Conservators* (1874), L.R. 9 C.P. 378; 43 L.J.C.P. 167; 31 L.T. 128; 22 W.R. 879, Ex. Ch.; 44 Digest 110, 887.

- A *Indermauer v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 36 Digest (Repl.) 46, 246.

B **Appeal** by the defendants from a decision of BUTT, J., reported 13 P.D. 157, holding them liable for damage occasioned to the plaintiffs' vessel, the *Moorcock*, while moored at the defendants' jetty.

C The defendants were the proprietors of a wharf and jetty abutting on the Thames and known as St. Bride's Wharf. In November, 1887, it was agreed between the plaintiffs and the defendants that the *Moorcock* should be discharged and re-loaded at St. Bride's Wharf. Accordingly, on December 14, 1887, the *Moorcock* was moored alongside the wharf for the purpose of discharging her cargo, but, as the tide fell and she ceased to be waterborne, she took the ground and in consequence of inequalities in the bed of the river she sustained the damage complained of. It was known to both the plaintiffs and the defendants that on the tide ebbing the *Moorcock* would take the ground. The bed of the river at the place where the *Moorcock* took the ground was vested in the Thames Conservators, and the defendants had no control over it.

D BUTT, J., held that there was an implied undertaking on the part of the defendants that they had taken reasonable care to ascertain that the bed of the river was safe for the vessel and that they were liable for the damage to her. The defendants appealed.

Finlay, Q.C., and *Hollams* for the defendants.

E *Barnes, Q.C.*, and *Hurst* (with them *Robson*) for the plaintiffs.

LORD ESHER, M.R.—There can be no doubt that the two facts by themselves, of owning this jetty in the river and of there being an uneven bottom to the river in front of the jetty, impose no liability on the owners of the jetty with regard to the public in general. Of that there can be no doubt. The question is: What is the proper implication where the owners of the jetty are in the position in which these defendants are, and have made such a contract as has been made in this case? The question is, not what is their duty to the general public, but what is the implication from the contract into which they have entered with the plaintiffs, what is the contract which they have made with them?

G I cannot doubt that what the defendants did was to make an agreement with the plaintiffs to enable them to use their wharf by using the river which is adjacent to the front of the wharf. I agree with BUTT, J., that it is beyond doubt that the use of the defendants' premises by vessels such as the *Moorcock* cannot be had without mooring the vessel alongside the jetty, and without her taking the ground at the jetty. They do not charge directly for the use of their wharf, but they cannot charge anybody anything until the *Moorcock* is moored to their jetty. I say they cannot earn anything for the use of the wharf until that happens, for this reason: they allow a vessel to be moored alongside their jetty in order that it may be used for loading and unloading goods, and they get paid in that way for the use of their wharf. Therefore, they earn nothing without persuading a vessel to moor alongside the jetty. That is a necessary and immediate step to their earning profit by the use of the wharf. A vessel like the *Moorcock* cannot be moored to this wharf without being obliged to take the ground at low water on every tide. That is a necessary part of the transaction. Therefore, we have got this, that, in order that the defendants' wharf may be used so that they may earn profit, a vessel like the *Moorcock* must be moored to their wharf under such circumstances that she must take the ground at every tide. The defendants are always on the spot, and if anything happens in front of their wharf they know or have the means of finding out. They, in making such agreements as they made with the *Moorcock*, may be doing so with foreign vessels, or with British vessels coming from abroad or other parts of the United Kingdom. A ship's officers have

no reasonable means of discovering what the bottom of the river is until they are moored at the wharf and their ship has taken the ground. A

What, then, is the reasonable implication from such a contract for such a purpose among people of this class? In my opinion, honest business could not be carried on between people in the position of the plaintiffs and the defendants unless you imply that the defendants have undertaken some duty to the plaintiffs with regard to the bottom of the river at this place. If that is so, what is the least onerous duty one can imply? In this case we are not bound to say what is the whole of the duty. All we have to say is whether there is not at least the duty which the learned judge has held does lie on the defendants. That the defendants can find out the state of the bottom of the river close to the front of their wharf without the smallest difficulty is perfectly obvious to anybody who understands anything about rivers at all. For instance, they can sound the bottom with a pole, or ascertain its condition in a variety of other ways which are perfectly easy. It is the business of persons conversant with rivers, especially when they are on the spot at every tide, to find out the state of the bottom in some way or another. B C

Whether they can see the actual bottom of the river or not at low water is not, to my mind, the least material. Supposing at low water there were two feet of water always over the mud; it makes no difference that they cannot see the bottom. They can feel for the bottom by sounding, or in some similar way, and find out its condition with as much accuracy, nay, with a great deal more accuracy, than if they could see it with their own eyes. When it is so easy to do this, and when, in order to earn money, business requires a ship to be brought alongside their wharf, in my opinion honesty of business requires, and we are bound to imply it, that the defendants have undertaken to see that the bottom of the river is reasonably fit for the purpose, or that they ought, at all events, take reasonable care to find out whether the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, and then, if not, either procure it to be made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That, I think, is the least that can be implied as the defendants' duty, and that is what I understand the learned judge has implied. He then goes on to say that, as a matter of fact, they did not take such reasonable measures in this case. I myself have not the least doubt in making this implication as part of the contract. I, therefore, have no doubt that the defendants broke the contract, and they are, therefore, liable to the plaintiffs for the injury which the vessel sustained. D E F G

BOWEN, L.J.—The defendants in this case are the owners of a wharf and jetty attached in the river Thames, and the only use to which it is put is holding out to ships facilities for loading and unloading alongside of it. There is only one berth where the ships can lie, and that is close alongside the jetty. The question which arises in this case is whether, when a contract is made to let the use of this jetty to a ship which can only use it, as is known to both parties, by her taking the ground, there is any implied warranty on the part of the wharfingers, and if so what is the extent of that warranty. H

An implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in every instance founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. I believe that if one were to take all the instances, which are many, of implied warranties and covenants in law which occur in the earlier cases which deal with real property, passing through the instances which relate to the warranties of title and of quality, and the cases of executory contracts of sale and other classes of implied warranties like the I

- A implied authority of an agent to make contracts, it will be seen that in all these cases the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended it should have. If that is so, the reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to
- B give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from all the burdens, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for.

- What did each party in the present case know? because, if we are examining into
- C their presumed intention, we must examine into their minds as to what the transaction was. Both parties knew that the jetty was let for the purpose of profit, and knew that it could only be used by the ship taking the ground and lying on the ground. They must have known that it was by grounding that she would use the jetty. They must have known, both of them, that unless the ground was safe the ship would be simply buying an opportunity of danger and buying no convenience at all, and that all consideration would fail unless the ground was safe. In fact, the business of the jetty could not be carried on unless, I do not say the ground was safe, it was supposed to be safe. The master and crew of the ship could know nothing, whereas the defendants or their servants might, by exercising reasonable care, know everything. The defendants or their servants were on the spot at high and low tide, morning and evening. They must know
- E what had happened to the ships that had used the jetty before, and with the slightest trouble they could satisfy themselves in case of doubt whether the berth was or not safe. The ship's officers, on the other hand, had no means of verifying the state of the berth, because, for aught I know, it might be occupied by another ship at the time the *Moorcock* got there.

- The question is how much of the peril or the safety of this berth is it necessary
- F to assume in order to get the minimum of efficacy to the business consideration of the transaction which the ship consented to bear, and which the defendants took upon themselves. Supposing that the berth had been actually under the control of the defendants, they could, of course, have repaired it and made it fit for the purpose of loading and unloading. It seems to me that *Mersey Docks Trustees v. Gibbs* (1) shows that those who own a jetty, who take money for its
- G use, and who have under their control the locus in quo, are bound to take all reasonable care to prevent danger to those using the jetty, either to make the berth good or else not to invite ships to go to the jetty, i.e. either to make it safe or to advise ships not to go there. But there is a distinction between that case and the present. The berth here was not under the actual control of the defendants. The berth is in the bed of the river, and it may be said that those
- H owning the jetty have no duty cast upon them by statute or common law to repair the bed of the river, and that they have no power to interfere with it except with the licence of the conservators. It does make a difference where the entire control of the locus in quo, be it canal, or dock or river, is in the persons taking toll for the user, and, therefore, we must modify, to a certain extent, our view of the necessary implication which the law would make in the present case as
- I to the duties of the defendants. We must do so for the reason laid down by HOLT, C.J., in his famous judgment in *Coggs v. Bernard* (2) (2 *Ld. Raym.* at p. 918) where he says

“it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform.”

Applying that modification, which is a reasonable modification, to this case, it may well be said that the law will not imply that the defendants, who had not control of the place, ought to have taken reasonable care to make the berth good,

but it does not follow that they are relieved from all responsibility, a responsibility which depends not merely on the control of the place, which is one element as to which the law implies a duty, but on other circumstances. The defendants are on the spot. They must know the jetty cannot be safely used unless reasonable care is taken. No one can tell whether reasonable safety has been secured except themselves, and I think that, if they let out their jetty for use, they at all events imply that they have taken reasonable care to see that the berth, which is the essential part of the use of the jetty, is safe, and, if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so. Remember that this is a business transaction as to which the parties may at any moment make any bargain they please. We have to consider that. A

The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the covenant which the law ought to imply. So far as I am concerned, I do not wish it to be understood that I at all consider this is a case of a duty on the part of the defendants to see that the access to the jetty is kept clear. The difference between access to the jetty and the use of the jetty seems to me, as counsel for the defendants argued, only a question of degree, but when you are dealing with implications which the law prescribes, you cannot afford to neglect questions of degree, and it is just that difference of degree which brings one case on the line and prevents another from approaching it. I confess that on the broad view of this case I think that business could not be carried on unless there was an implication of the nature I have indicated, at all events, in a case where the jetty is to be used as it was in the present case. Therefore, although this case is a novel one, I do not feel any difficulty in drawing the inference that it comes within the line, and that the defendants are liable. B

FRY, L.J.—I have come to the same conclusion, and I shall add nothing except this. The facts that the conservators were under no obligation to remove the saddleback or shingle, or stone which did the damage, and that the defendants had the means of examining the bottom of the river and neglected to do so, are considerations which weigh much with me in coming to the conclusion that there was the implication which the learned judge has relied on. C

LORD ESHER, M.R.—We ought to have said that we do not think any of the cases cited are authorities binding on the present one. We have gone a step beyond any of them. D

Appeal dismissed. E

Solicitors: *Thomas Cooper & Co.; Hollams, Son & Coward.* F

[Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.] G

A

R. v. LONDON JUSTICES. Ex Parte FULHAM VESTRY

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Wills, J.), June 20, 23, 1890]

B

[Reported 25 Q.B.D. 357; 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 39 W.R. 11; 6 T.L.R. 389]

Highway—Justices—Complaint—Dismissal—Right of appeal by complainant—Person “aggrieved”—*Highway Act, 1835* (5 & 6 Will. 4, c. 50), s. 105.

C

By s. 105 of the Highway Act, 1835: “If any person shall think himself aggrieved . . . by any order, conviction, judgment, or determination made, or by any other matter or thing done, by any justice or other person in pursuance of this Act . . . such person may appeal to quarter sessions. . . .”

Held: this section gives a right of appeal only in the case of a conviction, not in that of an acquittal or dismissal of a complaint, and an unsuccessful complainant is not a person “aggrieved” within the meaning of the section.

D

Notes. Section 105 of the Highway Act, 1835, has not been repealed by the Highways Act, 1959, but s. 275 of the 1959 Act gives a corresponding right of appeal to persons aggrieved under that Act.

Applied: *R. v. Wright, Ex parte Bradford Corpn.* (1907), 72 J.P. 23. Considered: *R. v. London Sessions Appeal Committee, Ex parte Westminster City Council*, [1951] 1 All E.R. 1082; *R. v. Surrey Quarter Sessions Appeal Committee, Ex parte Lilley*, [1951] 2 All E.R. 659. Referred to: *Foss v. Best*, [1906] 2 K.B. 105; *R. v. Newport Salop Justices, Ex parte Wright*, [1929] 2 K.B. 416; *Benson v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 465; *R. v. London Keepers of the Peace and Justices*, [1945] K.B. 528.

E

As to appeals under the Highways Acts, see 19 HALSBURY'S LAWS (3rd Edn.) 308; and for cases see 26 DIGEST (Repl.) 529. As to appeals from magistrates' courts, see 25 HALSBURY'S LAWS (3rd Edn.) 290 et seq. For the Highway Act, 1835, see 11 HALSBURY'S STATUTES (2nd Edn.) 104, and for the Highways Act, 1959, see *ibid.*, vol. 39, p. 402.

F

Case referred to in argument:

Payne v. Uxbridge Division Justices (1881), 45 J.P. 327.

G

Rule Nisi for a mandamus to the justices of London to proceed to hear and determine an appeal by the vestry of Fulham, against the judgment or determination of a metropolitan police magistrate, upon the hearing of an information or complaint preferred by the vestry against one Lewis Cockerell, for unlawfully and wilfully obstructing the free passage of a certain highway, called Vereker Road.

H

The road in question was a road used by the vestry for the purpose of carting materials from one part of the parish to another for the repairing of the roads, and if it were closed additional expenses would be caused to the vestry by compelling them to go a longer distance by other roads. For that reason the vestry desired to uphold their right to use the road as a highway. Mr. Cockerell, as agent for the owners, put up a fence to obstruct the use of the road to prevent its becoming a highway, he denying that there had ever been any “dedication” of the road to the public. The vestry instituted proceedings against Mr. Cockerell, by a summons before a metropolitan police magistrate, under the Highway Act, 1835, s. 72, for unlawfully and wilfully obstructing the highway. The magistrate dismissed the complaint, not being satisfied with the evidence that the road was a highway. On the complainants appealing to the quarter sessions against this acquittal, the justices refused to hear the appeal on the ground that there was no appeal against an acquittal or the dismissal of a complaint. The complainants thereupon obtained the above rule for a mandamus directed to the justices of London, commanding them to proceed to hear and determine the appeal. The question, therefore, now was whether there is an appeal to the quarter sessions, under s. 105 of the

I

Highway Act, 1835, in a case where the complaint is dismissed, as well as in the case where a conviction follows. A

By s. 105 of the Highway Act, 1835 :

"If any person shall think himself aggrieved . . . by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of complaint shall arise." B

Candy, Q.C. (*Meates* with him), showed cause.

Lumley Smith, Q.C. (*Macaskie* with him), in support of the rule.

LORD COLERIDGE, C.J.—I am not aware of any case brought before us which distinctly decides the question we have now to determine. The section of the Act is s. 105 of the Highway Act, 1835, and I do not deny that there are expressions in it which, if the section stood alone, would be very fitly taken into account in support of the argument that there is an appeal against an acquittal. I cannot deny that there are such expressions. I agree that this is a "determination made," and I do not know that it is not "a thing done" by a justice in pursuance of the Act, and, therefore, so far as that is concerned, it might be said to come within the section. But I do not think that is the way of looking at a section of this sort. Generally the principle of law is that if a man is acquitted he is not to be a second time tried. That principle is admitted here, but it is said that this is not equivalent to trying a man a second time, but is an appeal. C

Another principle of law is that appeals are given by statute, and looked at broadly and looked at reasonably, this section does not give an appeal unless in case of conviction. The word "relief" in the section is an important word; the section says D

"for which no particular method of 'relief' hath been already appointed, such person may appeal to the justices, etc."

What is the fair meaning of that? Is a person who fails in getting a conviction a person "aggrieved"? Is he, in the ordinary use of the word, "aggrieved" because someone has been held not to have done something wrong? It appears to me that this section does not give an appeal unless in the case where something has been done against a person. I am of opinion that this rule must be discharged. E

WILLS, J.—I agree with all that has fallen from my Lord. I should like to add that I think that within the decision of the Court of Appeal, and within the principles laid down by the judges of that court, this is clearly a criminal matter. A fine is a punishment, and imprisonment may be substituted, and therefore it is a criminal matter. I should like to add also that this legislation took place in 1835, and analogous legislation to this has been found in very much earlier Acts of Parliament than this one, very many scores of years before 1835, and yet there is no instance to be found in the books in which an appeal has been successfully prosecuted on an acquittal. I have looked with some care into the books where any trace of a case of this kind would be likely to exist, and I have not found a trace of any such case. The appellant is always treated as person who has been convicted, or something analogous to that. I cannot find a trace of any case where there has been an appeal against an acquittal. Counsel in support of the rule also has not been able to find any such case. It seems to me that this absence of any such case for above one hundred years is almost conclusive on that point. F

Rule discharged.

Solicitors : *T. Blanco White; Lane, Monro & Soutter.*

[*Reported by W. ORR, Esq., Barrister-at-Law.*] G

A

JOHNSON v. WILD

[CHANCERY DIVISION (Chitty, J.), March 25, 1890]

[Reported 44 Ch.D. 146; 59 L.J.Ch. 322; 62 L.T. 537;
38 W.R. 500; 6 T.L.R. 259]

B

Equity—Contribution—Liability of underlessee—Assignment of part of land comprised in the lease—Sub-demise of remainder of land—Non-payment of rent by lessee—Payment of rent by assignee under threat of distress by landlord—Right of contribution as against underlessee of remainder of land.

C

In May, 1878, C. demised to M. a plot of land for 999 years. In April, 1879, M. assigned to A., the predecessor in title of the plaintiff, by way of mortgage, a portion of the land for the residue of the term subject to a proviso for redemption, and he covenanted to pay the entire yearly rent and indemnify A., his executors, administrators, and assigns, from all damage by reason of its non-payment. By an indenture of underlease, made in May, 1879, M. demised to W., the predecessor in title of the defendants, another portion of the land for the residue of the term save the last ten days, and covenanted to pay the entire rent and to keep W. indemnified against non-payment. M. being unable to pay the rent reserved by the lease, the landlord applied to the plaintiff, who was mortgagee in possession, for payment of the whole rent, which he paid under threat of distress. The plaintiff claimed contribution from the defendants, the underlessees, towards the payment of the rent.

D

E

Held: the defendants, as underlessees, were not liable to pay rent to the landlord, and, therefore, the plaintiff had no right of contribution as against them.

Notes. Referred to: *Whitham v. Bullock*, [1939] 2 All E.R. 310.

F

As to contribution, see 14 HALSBURY'S LAWS (3rd Edn.) 492, 493; and for cases see 26 DIGEST (Repl.) 256. As to liability of underlessee to landlord, see 23 HALSBURY'S LAWS (3rd Edn.) 478, 479; and for cases see 30 DIGEST (Repl.) 522.

Cases referred to in argument:

Layer v. Nelson (1687), 1 Vern. 456; 23 E.R. 582, L.C.; 26 Digest (Repl.) 134, 959.

G

Webber v. Smith (1689), 2 Vern. 103; 23 E.R. 676; 30 Digest (Repl.) 522, 1609.
Hunter v. Hunt (1845), 1 C.B. 300; 14 L.J.C.P. 113; 4 L.T.O.S. 374; 9 Jur. 375; 135 E.R. 555; 30 Digest (Repl.) 522, 1610.

Leigh v. Dickeson (1884), 15 Q.B.D. 60; 54 L.J.Q.B. 18; 52 L.T. 790; 33 W.R. 538, C.A.; 30 Digest (Repl.) 454, 954.

H

Special Case stated for the opinion of the court whether the defendants, the executors of an underlessee, should be liable to contribute to the rent paid in full by the plaintiff as assignee of part of the property comprised in the lease and against whom the landlord had threatened to distrain.

I

By an indenture of lease, dated May 27, 1878, M. A. H. Clarke demised to W. J. B. Minor a plot of land situated in Hyde, Cheshire, for a term of 999 years from Sept. 29, 1878, at a yearly rent of £11 7s. 8d. By an indenture of mortgage, dated April 8, 1879, W. J. B. Minor assigned part of the plot demised by the indenture of lease to R. S. Adams for the unexpired residue of the term of 999 years, subject to the payment of a yearly rent of £3 17s. 8d. as an apportioned part of the yearly rent of £11 7s. 8d., and subject to a proviso for redemption on payment of the sum of £500 and interest. W. J. B. Minor covenanted with R. S. Adams that he, his executors, administrators, and his assigns would duly pay the yearly rent of £11 7s. 8d., and he further covenanted to observe and perform the covenants contained in the lease dated May 27, 1878, and to indemnify R. S. Adams, his

executors, administrators, and his assigns against non-payment of the rent and non-observance of the covenants of the lease. The indenture of mortgage was prepared by the plaintiff, F. W. Johnson, as solicitor for R. S. Adams. By an indenture of underlease, dated May 21, 1879, W. J. B. Minor demised to Ann Whittaker a plot of land being another part of the plot demised by the lease of May 27, 1878, for the residue of the term of 999 years save the last ten days subject to the payment of a yearly rent of £6 6s. 6d., and W. J. B. Minor covenanted that he, his executors, administrators, and assigns would pay the yearly rent of £11 7s. 8d., and he further covenanted to indemnify Ann Whittaker, her heirs, executors, administrators, and assigns against non-payment of the rent and non-observance of the covenants of the lease. By an indenture dated Sept. 28, 1880, reciting the lease of May 27, 1878, and underlease of May 21, 1879, W. J. B. Minor sold the yearly rent of £6 6s. 6d. reserved in the underlease to Ann Whittaker for the sum of £118. By an indenture of further charge, dated Oct. 28, 1881, between W. J. B. Minor and R. S. Adams, W. J. B. Minor charged the premises and land comprised in the mortgage of April 8, 1879, with the sum of £50 and interest thereon. On Feb. 8, 1878, W. J. B. Minor filed a petition for the liquidation of his affairs, and on Feb. 17, 1882, R. S. Adams entered into possession of the mortgaged premises. The land and buildings in the possession of R. S. Adams being the only part of the property capable of being distrained on for the full annual rent, M. A. H. Clarke applied to R. S. Adams to pay the whole of the rent of £11 7s. 8d. and threatened to distrain in the event of non-payment. R. C. Adams paid £56 18s. 4d. being the whole of the rent from Mar. 25, 1882, to Mar. 25, 1887. R. S. Adams being dissatisfied with his security applied to the plaintiff to take over the same, which the plaintiff agreed to do, seeing that he had introduced the security and that he acted for R. C. Adams in the matter. Therefore, by an indenture, dated Aug. 2, 1887, and made between R. S. Adams of the one part and the plaintiff of the other part, after reciting that the total sum of £599 11s. 2d. then remained owing to R. S. Adams on the security of the indentures of mortgage and further charge, R. S. Adams assigned unto the plaintiff the sum of £599 11s. 2d. secured by the indentures of mortgage and further charge, and all interest thenceforth to become due thereon and the full benefit of all securities for the same; and by the same indenture R. S. Adams assigned unto the plaintiff the plot of land comprised in the indenture of mortgage, for the residue of the term of 999 years, subject to such right or equity of redemption as was then subsisting in the premises. Since the date of the transfer the plaintiff had been in possession of the mortgaged premises, and M. A. H. Clarke had applied to him to pay the whole of the chief rent of £11 7s. 8d., and had threatened to distrain in the event of non-payment, and the plaintiff had paid the rent half-yearly to M. A. H. Clarke, and the whole of such payments amounted to the sum of £28 9s. 2d., being the whole of the rent from Mar. 25, 1887, to Sept. 29, 1889. The plaintiff, as solicitor on behalf of R. S. Adams, applied to Ann Whittaker during her life, namely, on May 21, 1887, for contribution towards the rent so paid by R. S. Adams to M. A. H. Clarke, and since the transfer the plaintiff on his own behalf applied to Ann Whittaker for contribution towards the rent paid by him to M. A. H. Clarke, but Ann Whittaker through her solicitors denied her liability to contribute towards such rent. Ann Whittaker died on May 19, 1888, and Frederick Wild and Elkanah Woodhead were the trustees and executors of her will, and were in possession of the premises comprised in the underlease.

An action was brought by the plaintiff against F. Wild and E. Woodhead, and this Special Case was stated. The questions submitted for the opinion of the court were: (i) Whether the defendants, as trustees and executors of the will of Ann Whittaker, were liable to contribute any and what proportion of the rent reserved in the lease of May 27, 1878, in respect of the portion of the plot which was demised to Ann Whittaker by the underlease of May 21, 1879. (ii) Whether the defendants were liable, as such trustees and executors, to repay to the plaintiff

A any and what part of the sum of £28 9s. 2d. which had been paid by him for rent under the lease of May 27, 1878.

Levett (Romer, Q.C., with him) for the plaintiff.

Maclean, Q.C., and Swinfen Eady for the defendants.

CHITTY, J.—The plaintiff claims contribution from the defendants in respect of the payment that he, the plaintiff, has made for the rent under a lease for a term of 999 years granted in 1878. The plaintiff claims under the lessee. Adams took a mortgage from the lessee of part of the property, and Adams' security is framed in this way. He became the assign of part of the land comprised in the lease for the whole term granted by the lease; so that in law he was an assign of that part of the land demised; and consequently Adams remained liable to the landlord for the rent that was reserving upon the lease. Adams has assigned over, and the plaintiff stands in Adams' shoes as assignee. Adams for his protection took the covenant from his mortgagor for the payment of the entire rent of the lease, and also a covenant for indemnity. The defendants have a title to another part of the land comprised in the same lease, their title being derived out of the lessee's interest. The defendants, or rather their immediate predecessors, took an underlease, and that underlease was drawn in a different form. Instead of taking an assignment for the whole of the term granted by the original lease, in the part of the land with which the defendants' predecessor was dealing, she took an underlease, and so escaped all liability for payment of the original rent; and she also, by way of precaution, took from the original lessee a covenant to pay the rent, and to indemnify her against the rent.

E Minor, the lessee, has got into difficulties, and he is in that impecunious condition that he cannot pay the rent. I do not think it is material; but on the statements of this case it does not appear that he is discharged from payment of the rent. He remains liable, and he remains liable apparently on those covenants which I have mentioned, the covenant to pay the rent and the covenant to indemnify. But he cannot pay. In those circumstances the landlord has distrained for the rent, and finding he could obtain his distress best upon that part of the land which is in the plaintiff's holding, he has distrained, or threatened to distrain, which is the same thing, on the plaintiff. The plaintiff, in order to avoid the distress, has paid the entire rent reserved by the lease of 1878. That is the payment in respect of which he demands the contribution. He does not demand contribution from a person who is liable to a common demand, because the defendants are not liable for the rent; and the defendants are not only not liable for the rent, but nobody can sue the defendants in respect of this supposed liability unless it be the plaintiffs; whereas in a common demand for which two persons are liable, if one pays, then there is a right of contribution on the part of the one who makes the payment against the one who does not. But there is no authority for the proposition that has been now advanced. Co-sureties are liable to the principal demand, either in the whole or in part, and as between the co-sureties there is not only the common law right of contribution, but there is the equitable right of contribution.

I The most remarkable part of this case is, that this kind of question must, in fact, have arisen time after time during the centuries that this class of law has been known, a first demise, a sub-demise, and a sub-demise again to the second, third, fourth, fifth, or even tenth degree. If I were to assent to this proposition, I should have to pursue not the first, as it were, in the series of underlessees, but I should have to go down to the end of them. The position of the plaintiff is unquestionably unfortunate. He has in this case got a person who stands on the same level as he himself does in respect of the demand, that is to say, the rent; but unfortunately that person cannot pay. He would have a right of contribution, and something more, because he would have a right under the special covenants against Minor, and he need not as against him resort to any such device as this. But he has lost that, and he cannot get contribution from the defendants. I can

find no authority to justify the plaintiff's contention, and I think I should be A
 erring if I said that there was any principle which let in this demand. The result
 is, I think, that the plaintiff's case fails. I will answer the questions in the nega-
 tive. Then the action is dismissed with costs, including the costs of the Special
 Case.

Solicitors: *Robins, Billing & Co.*, for *Johnson & Johnsons*, Stockport; *A. J. Nash*,
 for *F. & T. Drinkwater*, Hyde. B

[Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.]

HUTH v. CLARKE

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Wills, J.), June 16, 1890] D

[Reported 25 Q.B.D. 391; 59 L.J.M.C. 120; 63 L.T. 348;
 55 J.P. 86; 38 W.R. 655; 6 T.L.R. 373]

*Local Authority—Powers—Delegation—Executive committee—Delegation of
 powers to sub-committees—Exercise of delegated powers by executive com-
 mittee.*

Under the Contagious Diseases (Animals) Act, 1878, West Sussex County E
 Council appointed an executive committee, which executive committee
 appointed local sub-committees and delegated to them certain powers vested
 in local authorities by the Contagious Diseases (Animals) Acts, 1878 to 1886,
 and Orders in Council made under those Acts. One of the powers so dele-
 gated was to make regulations in their districts under the Rabies Order, 1887.
 Subsequently, the local sub-committees, not having made any regulations under F
 the Rabies Order, 1887, and the delegation of power to do so not having been
 revoked by the executive committee, the executive committee themselves made
 and issued regulations with regard to dogs under the Order, to be in force
 throughout the whole of the administrative county of West Sussex. H. was
 convicted and fined for an offence contrary to such regulations. He appealed
 on the ground that the regulations, having been made by the executive com- G
 mittee in a matter which they had delegated to local sub-committees, were
 ultra vires and bad.

Held: by delegating their powers to local sub-committees the executive com-
 mittee had not deprived themselves of the right to exercise the powers delegated,
 and the regulations were good.

Notes. The Contagious Diseases (Animals) Acts, 1878 to 1886, have been re- H
 pealed. The present enactment relating to the control of animal diseases is the
 Diseases of Animals Act, 1950: see 30 HALSBURY'S STATUTES (2nd Edn.) 16.

Considered: *Dadds (Gordon) & Co. v. Morris*, [1945] 2 All E.R. 616; *Martin v.*
Brighton Corporation, [1951] 2 All E.R. 101. Referred to: *R. v. North Worcester-*
shire Assessment Committee, Ex parte Hadley, [1929] 2 K.B. 397; *Blackpool*
Corporation v. Locher, [1948] 1 All E.R. 85; *Lewisham B.C. v. Roberts*, [1949] I
 1 All E.R. 815.

As to committees and revocation of appointment of committees, see 24 HALS-
 BURY'S LAWS (3rd Edn.) 465-469; and for cases see 33 DIGEST (Repl.) 20.

Case Stated by the magistrates of the city of Chichester under the Summary
 Jurisdiction Act, 1879.

Under the Contagious Diseases (Animals) Act, 1878, Sched. 6 (5), the county
 council for the administrative county of West Sussex, on July 12, 1889, appointed

- A an executive committee. The executive committee, on Oct. 9, 1889, under Sched. 6 (6) of the same Act, appointed local sub-committees for each county petty sessional division (the areas of the city of Chichester and the borough of Arundel being for this purpose deemed to be included in the Chichester and Arundel county petty sessional divisions respectively), and delegated to them all the powers and duties vested in local authorities by ss. 6 to 33, both inclusive, of the Contagious Diseases (Animals) Act, 1878, ss. 1 to 8, both inclusive, of the Contagious Diseases (Animals) Act, 1886, and numerous Orders in Council made from time to time under the said Acts, including the Rabies Order of Jan. 31, 1887. The delegation was in the following terms :

- C "The sub-committees are hereby authorised, subject to any discretion of the executive committee, to execute the powers and duties which can be delegated to sub-committees of local authorities. . . ."

- D The local sub-committees thus appointed made no regulations under the Rabies Order, 1887, and at a meeting at the Council House, Chichester, on Mar. 21, 1890, the executive committee themselves made and issued certain regulations under the said Order, to be in force throughout the administrative county of West Sussex on and after Mar. 28, 1890. One of these regulations was to the effect that no dog should be at large within the district of a local sub-committee unless effectively muzzled or kept under proper control.

- E At Chichester Petty Sessions, on May 10, 1890, Richard Huth, the appellant, was charged by Richard Butler Clarke, the respondent, with having on May 8, 1890, unlawfully, in contravention of the above regulation, permitted a dog belonging to him, the said Richard Huth, to be at large at Westgate, in the parish of St. Bartholomew, in the said city, the same not being then and there effectively muzzled or kept under proper control. The facts charged were admitted, but it was contended on the part of the appellant that the regulations were not duly made, and were bad by reason that the executive committee had, by resolution on Oct. 9, 1889, which came into force on Oct. 14, 1889, and continued in force up to the date of the hearing, delegated their powers to the local sub-committee, and that until they revoked such delegation they were themselves denuded of the powers of making such regulations. The respondent admitted the resolution of the executive committee of Oct. 9, 1889, but contended that the regulations of Mar. 21, 1890, were good on the ground that any act or order of the executive committee as the governing body overrode any action of the local sub-committees, and that the latter could only make regulations under the Rabies Order, 1887, by incorporating therein certain orders which the administrative county council had passed. The magistrates being of opinion that the said regulations of Mar. 21, 1890, were good, convicted and fined the appellant 5s. and 11s. costs. The appellant appealed.

- G By the Contagious Diseases (Animals) Act, 1878, Sched. 6 :

- H "(5) A local authority may, if they think fit, appoint and designate one committee as their executive committee. (6) An executive committee shall have all the powers of the local authority except the power to make a rate, and may, if they think fit, appoint a sub-committee or sub-committees and delegate to them all or any of the powers of the executive committee with or without conditions or restrictions, and from time to time revoke or alter any such delegation. . . ."

- I *Arthur Gill* (with him *Horace Ivory*) for the appellant.
Francis C. Gore for the respondent.

LORD COLERIDGE, C.J.—I freely admit there is something in the point, and it is a reasonable one to argue. The county council has a right to appoint an executive committee, and the executive committee has a right to appoint a sub-committee, and to delegate so much of their powers as they think fit to the sub-committee, and they may from time to time revoke such delegation. The county executive committee have made a regulation in respect of dogs in regard to this

particular district where these magistrates have jurisdiction. The sub-committee has made no regulation, but it has, under the powers of the delegation which has been made to it, power to make a regulation. It has made none, however, and there is a regulation in the district in force where these magistrates act, made by the proper authority, and not contravened by any other regulation, made by any other authority, whether with or without power. It is suggested that, because there is another authority which might give trouble by making regulations inconsistent with this regulation made by the body giving them the power, therefore that body giving the power is unable to make the regulation. But that is a thing which I cannot see. Delegation does not imply denudation, and to my mind the very expression implies that the powers which are the subject of the delegation are always, or as a rule, subject to resumption. Unless controlled by statute, or by particular words, any body, which entrusts another with the exercise of a power belonging to itself, has from time to time the right to resume the power which it has delegated. I can understand the point having more difficulty if the delegated authority had made an order, and the delegating authority had made a rule varying it; but there is no conflict of regulations here. It seems to me that the executive committee are perfectly right, and the magistrates were perfectly right in holding that their regulations were good. This appeal must be dismissed.

WILLS, J.—I am of the same opinion. This question turns upon the meaning of the word “delegate.” It is a word which, it appears, has been in use in our legislative phraseology for at least thirty years. Therefore, I think it is clear that, if it was a word not easily understood, it would not have been used without some explanation of its meaning. But it does not seem to have been used in any peculiar or technical sense; therefore I suppose the world has got on very well by attributing to it its ordinary meaning. The word “delegation,” as generally used, in my opinion does not imply any parting with the power or authority which is the subject of the delegation, but merely implies that the person to whom the power is delegated has authority to do that which the person delegating may do himself. Perhaps the best interpretation may be afforded by the maxim, so well known, *delegatus non potest delegare*. It is very significant as to what that means in the book which is now before me, *BROOM’S LEGAL MAXIMS*. The place where that maxim is dealt with is under the head of the Law of Contracts, and, as far as my recollection serves me, it has never been said in the textbooks of legal writers that it means the parting with the right to do the thing delegated. In ordinary matters of contract there is no restricted meaning such as that. In the way in which that maxim is generally applied it really means very little more than the delegation of an authority to an agent. Therefore, it seems to me that the notion that the use of the word “delegate” implies that the executive committee has parted with its own authority is misconceived. Reference has been made to s. 201 of the Public Health Act, 1875; but the way in which that section is worded tells as much against as for the appellant’s argument. Here there is no such restriction of the words. In my opinion the decision of the magistrates was right.

Appeal dismissed.

Solicitors: *Michael Abrahams, Sons & Co.*; *H. Sowton*, for *Arnold, Cooper & Tompkins*, Chichester.

[*Reported by MERVYN LLOYD PEEL, ESQ., Barrister-at-Law.*]

Re HAYNES. KEMP v. HAYNES

[CHANCERY DIVISION (North, J.), December 14, 1887]

[Reported 37 Ch.D. 306; 57 L.J.Ch. 519; 58 L.T. 14;
36 W.R. 321; 4 T.L.R. 168]

Settled Land—Tenant for life—Forfeiture—Residence clause—Forfeiture incurred before exercise of statutory powers—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 51.

Under a settlement created by the will of the testator, who died on Feb. 16, 1887, his widow, as tenant for life, was entitled to an additional annuity of £200, subject to a defeasance clause as to residence, with a gift over on forfeiture. The widow did not observe the condition as to residence and did not apply for leave to sell the mansion-house, or exercise any of the powers under the Settled Land Act, 1882.

Held: s. 51 of the Settled Land Act, 1882, made a defeasance clause as to residence, or any other provision tending to defeat the powers given by the Act, void only so far as they tended to prevent the exercise of the statutory powers and not absolutely, and, as the widow had incurred the forfeiture before attempting to exercise any of her statutory powers, her interest was forfeited and the gift over took effect.

Notes. Section 51 of the Settled Land Act, 1882, has been repealed and is now replaced by s. 106 of the Settled Land Act, 1925: see 23 HALSBURY'S STATUTES (2nd Edn.) 226.

Not Followed: *Re Dalrymple, Bircham v. Springfield* (1901), 49 W.R. 627. Followed: *Re Trenchard, Trenchard v. Trenchard*, [1900-3] All E.R.Rep. 289.

As to events bringing a defeasance clause in a settlement as to residence into operation, see 34 HALSBURY'S LAWS (3rd Edn.) 503; and for cases see 40 DIGEST (Repl.) 812.

F Case referred to:

(1) *Re Paget's Settled Estates* (1885), 30 Ch.D. 161; 55 L.J.Ch. 42; 53 L.T. 90; 33 W.R. 898; 1 T.L.R. 567; 40 Digest (Repl.) 812, 2906.

Adjourned Summons in an administration action, taken out by the testator's widow as tenant for life under the settlement for a declaration whether she had forfeited the annuity of £200 and the right to reside in the house by non-residence in the house for more than three months.

By his will dated Feb. 1, 1887, Richard Haynes, the testator, after making certain specific gifts to his wife, and giving her an annuity of £500 during her life, proceeded:

"I also give, devise, and bequeath to her, in the event of there being any child of mine living at my decease, or born in due time afterwards, a further annuity of £200 until the death of my . . . wife, or until she marry again, or until the death of all my children under the age of twenty-one years, or until all my children who shall live to attain the age of twenty-one years shall have attained that age, or until she shall assign, charge, or incur the same, or until my . . . wife shall fail to comply with the directions hereinafter given in respect of her residence and conduct, in which, or any or either of which cases, the said annuity of £200 shall cease and determine."

The testator devised all his real estates to trustees for a term of one thousand years, with limitations over in strict settlement, and he declared the trusts of the term to be, as to his then present dwelling-house, with the gardens and appurtenances thereto belonging, and some adjoining cottages:

"That the trustees shall, in the event of there being any child of mine living at my death, or born in due time afterwards, permit my . . . wife to

occupy and enjoy the . . . dwelling-house, and to occupy or receive the rents and profits of the . . . cottages, until she shall marry again, or [until some one of the events should happen upon which the annuity of £200 was directed to determine], in which, or any or either of the said cases, this trust in her favour shall cease and determine."

And the testator declared the trusts of the term as to the rest of his freehold estates to be to raise the annuities given to his wife, and portions for his younger children. The will also contained the following provision as to residence :

"Provided always, and I direct, that my wife shall, during the continuance of her estate and interest of and in my . . . house and cottages at Downend, under the trust of the . . . term of one thousand years in that behalf declared, reside at my . . . house, and shall not absent herself therefrom for more than three calendar months in any one year, or for more than three calendar months continuously at any one time."

And after certain other directions, not material for the purposes of this report, the testator proceeded :

"And . . . in case my . . . wife shall disobey the above directions, or any of them, the estate and interest herein devised and bequeathed to or in trust for her, as well in the . . . house and cottages as in my furniture, chattels, and effects in and about the . . . dwelling-house, and in the . . . annuity of £200, shall forthwith cease and determine in the same manner as if she had died."

The testator died on Feb. 16, 1887, leaving him surviving his wife and one child only, an infant daughter, who took under the will, subject to the term of one thousand years, an estate for life for her separate use with remainder to her sons successively in tail male. The testator's will was proved on Mar. 30, 1887, and an action for the administration of his estate was commenced in accordance with the direction contained in his will. The testator's daughter was very delicate, and his widow, being advised that the child could not with safety reside at Downend, had deliberately resided away from that house for more than three months. This was a summons taken out in the action by the widow for a declaration whether she had forfeited the annuity of £200 and the right to reside in the house, and for directions as to the keeping up the testator's establishment at the said house and the maintenance of his daughter.

Higgins, Q.C., and *A. L. Ellis* for the widow.

Giffard, Q.C., and *Heath* for the trustees, were not called on to argue.

NORTH, J.—It is plain that, before the Settled Land Act, 1882, was passed, it was within the power of the testator to impose such conditions of residence as would preclude the donee from leaving the property, and it is admitted that the conditions in this will are apt conditions for that purpose. The object of the Act was to give an absolute power of sale to the tenant for life, and to secure that he should be able to exercise such power in spite of any device which the settlor, or the acute conveyancers by whom he might be advised, might insert in the settlement for the purpose of preventing its exercise. For this purpose the Act says that any provision which would have, or tend to have, this effect shall be void, and it is clear that, from the time when a sale or other disposition is made under the Act, any device to fetter its exercise in any way is void. That, I think, is all that *PEARSON, J.*, decided in *Re Paget's Settled Estates* (1). He says, after deciding that the applicant in that case was a person having the powers of a tenant for life (a point which in this case has not been disputed) (30 Ch.D. at p. 164) :

"Then arises the question what is the effect of that which has been called the 'residence clause,' and this depends upon s. 51 [Settled Land Act, 1882] which is expressed in the amplest and widest terms. It is impossible to say

- A** that this clause, which defeats the estate of the son in case he fails to comply with the condition as to residence, does not tend to induce him to abstain from exercising the power of sale which is conferred on him by the Act; the condition is therefore made void by s. 51, and if the son exercises the power of sale his interest in the proceeds of sale will by virtue of sub-s. (2) continue. I must make a declaration to this effect (following the words of s. 51), and I give
- B** leave to sell the mansion-house."

That is a decision that the power of sale could be exercised in the same way as if the residence clause were omitted. Here there has been no attempt to exercise the power of sale, nor any application to sell the mansion-house. I asked, in the course of the argument, in what way a direction to reside until sale, inserted in a settlement containing in express words all the powers given to the tenant for life by the Settled Land Act, 1882, would be inconsistent with those powers. That question was not answered. In this case the tenant for life has deliberately done that on which the estate is given over, unless s. 51 of the Act makes the provision in the will not only void so far as it interferes with the powers given by the Act, but void absolutely and for all purposes. I think that is not the meaning of the Act, and, therefore, as the condition has been broken, I must answer the question

D in the summons by declaring that the widow has forfeited the annuity of £200 and the interest given to her in the mansion-house. The rest of the summons, which asks for directions as to keeping up the mansion-house, and as to the maintenance of the infant, must be referred to chambers.

Order accordingly.

Solicitors: Rowcliffes, Rawle & Co.; Phelps, Sidgwick & Co.

- E** [Reported by J. R. BROOKE, Esq., Barrister-at-Law.]

F

COATSWORTH v. JOHNSON

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.J.J.), February 22, 1886]

G

[Reported 55 L.J.Q.B. 220; 54 L.T. 520; 2 T.L.R. 351]

Landlord and Tenant—Tenancy at will—Tenant in possession under agreement for lease not under seal—No payment of rent—Yearly tenancy on payment of rent.

H

Specific Performance—Agreement for lease—Plaintiff in occupation without payment of rent—Breach of covenant by plaintiff.

I

A tenant who has entered into possession under an agreement for a lease for twenty-one years, such agreement being void as a lease by not being under seal, is, until rent is paid, merely a tenant at will and the landlord may determine the tenancy by notice without assigning any reason for so doing and enter under a power of re-entry. But where any rent has been paid by the tenant the landlord is estopped from denying the existence of a tenancy from year to year upon such of the terms of the agreement as are applicable to such a tenancy. Specific performance of such an agreement for a lease will not be granted where the tenant has committed a breach of one of the covenants contained in the agreement which was signed by both parties, and the matter is not affected by s. 14 of the Conveyancing Act, 1881.

Notes. Section 3 of the Real Property Act, 1845, has been repealed and is now replaced by s. 52 (1) of the Law of Property Act, 1925; s. 14 of the Conveyancing

Act, 1881, has been repealed and is now replaced by s. 146 of the Law of Property Act, 1925: see 20 HALSBURY'S STATUTES (2nd Edn.) 549, 739.

Considered: *Swain v. Ayres* (1888), 21 Q.B.D. 289. Referred to: *Fajot v. Gaches* (No. 1) (1942), 86 Sol. Jo. 339.

As to limitations on the enforcement of agreements for leases, see 23 HALSBURY'S LAWS (3rd Edn.) 439; and for cases see 30 DIGEST (Repl.) 415 et seq. As to the effect of non-performance of conditions by the plaintiff when seeking a decree of specific performance, see 36 HALSBURY'S LAWS (3rd Edn.) 315; and for cases see 42 DIGEST 489 et seq.

Cases referred to in argument:

Braithwaite v. Hitchcock (1842), 10 M. & W. 494; 12 L.J.Ex. 38; 6 Jur. 976; 152 E.R. 565; 30 Digest (Repl.) 414, 569.

Walsh v. Lonsdale (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 30 Digest (Repl.) 416, 590.

Lord Bolton v. Tomlin (1836), 5 Ad. & El. 856; 2 Har. & W. 369; 1 Nev. & P.K.B. 247; 6 L.J.K.B. 45; 111 E.R. 1391; 31 Digest (Repl.) 46, 2049.

Hill v. Barclay (1811), 18 Ves. 56; 34 E.R. 238, L.C.; 30 Digest (Repl.) 428, 712.

Lewis v. Bond (1853), 18 Beav. 85; 52 E.R. 34; 30 Digest (Repl.) 512, 1524.

Gregory v. Wilson (1852), 9 Hare, 683; 22 L.J.Ch. 159; 19 L.T.O.S. 102; 16 Jur. 304; 68 E.R. 687; 30 Digest (Repl.) 428, 714.

Appeal by the plaintiff, as tenant in possession, in an action for trespass against the defendant landlord, from a decision of HUDDLESTON, B., on further consideration after trial by a special jury.

On Oct. 9, 1883, a written agreement, not under seal, was entered into between the plaintiff, John Coatsworth, a farmer, and the defendant, John Henry Johnson, a solicitor practising in London, whereby (among other things) the defendant agreed to let, and the plaintiff to take, a farm and messuage, called "Stocks Green Farm," for a term of twenty-one years from Oct. 11, 1883, subject to determination. It was thereby further agreed that the plaintiff should pay the amount of the valuation to the outgoing tenant, and that the defendant should grant, and the plaintiff accept, a lease of the farm for that term in a form already prepared, and a draft of which was then signed as approved by both parties.

The farm was situated in the parish of Hildenborough, in the county of Kent, and consisted of 130 acres, a portion of which was arable, and another portion, of about twelve acres, was planted with hops. On Nov. 23, 1883, by a further written agreement, not under seal, between the same parties, the plaintiff agreed that, on the defendant allowing him £350 for certain specified repairs and alterations, he would carry out such repairs and alterations and spend a sum of £400, and that the rent of the farm should be £200 per annum instead of £195 as in the draft lease. The rent was payable in half-yearly moieties of £100 on April 6 and Oct. 11 in each year. The draft lease contained a provision that if the rent should be unpaid for a space of twenty-one days after any of the days whereon the same ought to have been paid, the defendant or his representative might enter upon the messuage, land, and premises, and take possession thereof. The draft lease contained, among other covenants to be entered into by the plaintiff, the following: A covenant to maintain and keep the premises and all erections thereon in a good state of repair. A covenant to use and cultivate the farm and lands in a good and husbandlike manner, according to the most approved course of husbandry adopted in that part of the country. A covenant not to sell or dispose of or carry away, except as thereafter provided, any roots, hay, grass, straw, or fodder, which should at any time during the continuance of the term grow or be produced on the premises. A covenant to manure at least one-fourth of the arable land demised in every year of the term. The draft lease further contained a proviso enabling the defendant to re-enter if any of the covenants therein contained were not observed, performed, and kept by the plaintiff. On Oct. 11, 1883, the plaintiff

A entered into possession of the farm under the above agreement. No lease of the premises was ever executed, and the plaintiff never paid any rent.

In February, 1884, the defendant, finding that the plaintiff was selling all the hay and straw off the farm, brought an action against him in the Chancery Division to restrain him from removing such hay or straw under the covenants of the draft lease, and obtained an interim injunction against him; but ultimately the action
B was dismissed, with costs, by BACON, V.-C., on the ground that the hay and straw had not been grown on the premises during the tenancy. The defendant alleged that the plaintiff, from the time he entered into occupation, failed to observe or perform the terms of the agreements and the covenants of the intended lease, and, to repair, or keep in repair, the premises, or to expend in repairs, as provided by the agreement of Nov. 23, 1883, and that the plaintiff neglected and refused to
C cultivate the farm in a husbandlike manner, or to depasture the same, or to sow any crops or to trim or prune the hops. The defendant finding that, by reason of the plaintiff's default, irreparable injury was being done to the farm, determined the plaintiff's tenancy by a written notice, dated and served April 2, 1884, requiring the plaintiff forthwith to quit and deliver up possession. The plaintiff did not give up possession in accordance with such notice, and thereupon Charles Fitch Kemp,
D with the authority and under the directions of defendant, on April 11, 1884, using no more force than was necessary for the purpose, entered upon the farm and prevented the plaintiff's servants from coming upon or occupying the same.

In May, 1884, the plaintiff commenced this action against the defendant, alleging that he had suffered damage from trespass by the defendant in illegally breaking and entering the farm and messuage, and depasturing it with cattle, and taking
E and retaining possession of it. The defendant, in a counterclaim, alleged that, by the plaintiff's acts and defaults, the value of the farm was diminished; and that he (the defendant) had lost the benefit of the improvements which the plaintiff agreed to make, and had been, and would be, put to great expense in rendering the farm fit for cultivation and occupation, and had been prevented from letting
F the same. The defendant claimed £500 damages and £100 for the plaintiff's use and occupation of the farm from Oct. 11, 1883, till April 2, 1884. The action was tried in London, before HUDDLESTON, B., and a special jury. At the conclusion of the case, the judge summed up and asked the jury to decide whether the plaintiff had cultivated the farm according to the custom of the country. The jury gave their verdict that the plaintiff had not done so, and consequently had committed
G a breach of covenant. The other point to be decided was, whether such breach of covenant entitled the defendant to re-enter and take possession of the property. The judge then directed the jury to decide what damages they would award the plaintiff, supposing it should be found thereafter that the defendant was not entitled by law to re-enter and take possession as he did. The jury assessed the damages contingently at £500. On April 5, 1885, the action came on upon further
H consideration, when the questions of waiver and tenancy, as matters of law, were argued.

HUDDLESTON, B., held that as there was an agreement for a lease and occupation without payment of rent, the plaintiff was a tenant at will and that such tenancy having been determined on April 2, 1884, the defendant was entitled to enter, and judgment was given for the defendant. From this decision the plaintiff
I appealed.

Murphy, Q.C., and Edwyn Jones for the plaintiff.

Sir Richard Webster, Lockwood, Q.C., and R. S. Wright, for the defendant, were not called on to argue.

LORD ESHER, M.R.—In this case an action of trespass is brought by the plaintiff against the defendant, on the allegation that there has been a trespass on the plaintiff's property by the defendant. The facts proved are these: The plaintiff and the defendant entered into an agreement for a lease for twenty-one years, and

the plaintiff went into possession under that agreement. He has never paid any rent; but while he was in possession he did that which, if there had been a lease on the terms of the agreement, would have been a breach, and perhaps many breaches, of covenants in that lease as to the cultivation of the farm. Thereupon, that being so, and such breaches having been committed, the defendant gave notice to quit, not at any specific time, but treating the plaintiff as tenant at will. Having given him that notice, he sent people and took possession of several things on the farm, or took possession of it, which, unless he was justified, would have been a trespass. We have to consider what is the law to be applied to the case under these circumstances. The agreement for a lease could not be called a lease itself, because, by the Real Property Act, 1845, s. 3, that contract, not being under seal and purporting to grant a lease for twenty-one years, is void as a lease.

Then comes this question: Is there anything that has made a lease (not that lease for twenty-one years) between the plaintiff and the defendant? The plaintiff has gone into possession with the assent of the defendant under that agreement. The law seems to me to be perfectly well established with regard to their relation. Until the payment of rent, that tenancy is a tenancy at will only. If a rent, on the terms of its being part of an annual rent, had been paid, then the landlord would have been estopped, on the failure of the payment of that rent, from saying that there was not a tenancy from year to year. But it is a payment of rent, as part of the annual rent, which raises estoppel where there is an agreement for a lease. Where there has been rent paid, which is part of an annual payment of rent, then there is a tenancy from year to year upon such of the terms of the agreement (which is not a lease) as are applicable to a tenancy from year to year. The agreement as a lease is void, although the circumstances will then have raised a tenancy. But until there has been a payment of rent it is only a tenancy at will.

If there is a tenancy at will, how is the landlord to put an end to it? By giving notice to quit, and that is all. He has not to assign any reasons for giving that notice. Supposing there had been no breach of any covenant, he could have given that notice to quit so far as it is a tenancy at will. If it is a tenancy at will, the question of whether there is a breach of covenant or not is immaterial. But it is argued that it was not a tenancy at will, because, under the circumstances, the court of equity would have decreed specific performance of the lease; and it is said that now both sides of the court would consider that as done which the court of equity would have decreed to be done. That proposition is not to be denied.

That raises this question: Would the court of equity in this case have decreed specific performance? If it would, then that is to be considered as done, and then there is a lease. But if it would not, then, there being no lease at common law, it being in the position that the court of equity would not decree specific performance for a lease, then it is no lease at common law. But the proposition is this: It is admitted that, before the Conveyancing Act, 1881, if there had been a breach of the contract as to cultivation, the court of equity would not have decreed specific performance. But it is said that, although the tenant has declined or neglected to cultivate in the way mentioned in the agreement, nevertheless the court of equity would decree specific performance, because it is said that the Conveyancing Act, 1881, by s. 14, has altered the contract; and that now there is no breach of the contract to cultivate in a particular way, unless, besides the non-cultivation, there has been a demand by the landlord, or a notice by the landlord, not properly observed by the tenant. In other words, that s. 14 of the Conveyancing Act, 1881, has altered the contract, and that it is not confined merely to relief in the case of breach of the contract.

It is clear to my mind that s. 14 of the Conveyancing Act, 1881, has not altered the contract at all. It has merely dealt with relief, or non-relief, on the assumption that that particular stipulation of the contract has been broken. If the contract is not altered, then by the non-cultivation there is a breach of the contract. Would the court of equity then decree specific performance, there being in existence at the time this state of facts? The moment the plaintiff went into equity, and

- A** asked for specific performance, and it was proved that he himself was guilty of the breach of contract, which the defendant says he is by not cultivating, the court of equity would refuse to grant specific performance, and would leave the parties to their other rights. Then, if the court of equity would not grant specific performance, we are not to consider specific performance as granted. Then the case is at an end. It is a lease at will.
- B** If it is a lease at will, it does not come within s. 14 of the Conveyancing Act, 1881, at all. The landlord has a right to put an end to it by notice, without giving any cause. I am of opinion that this was a lease at will, and that therefore the notice of the landlord was perfectly correct, and that, after the notice, he had a right to enter. It follows from what I say that we have not to consider what would be the application of s. 14 of the Conveyancing Act, 1881, in such a case as
- C** this, if there had been a payment of rent, or anything of that kind. We are not called upon to consider whether an action of trespass could be maintained, and damages recovered for a trespass by a tenant, without the tenant bringing forward any grounds for relief to the court, or showing circumstances under which the breaches of covenant had been committed. We are not called upon to give any opinion about that. Nor are we called upon to give any opinion whether s. 14
- D** would have applied to an agreement for a lease, possession given under that agreement, and rent paid. All we say is that here this was—because specific performance would not have been granted—to be treated as a tenancy at will, which the landlord had a right to put an end to by the notice which he gave. I think, therefore, that the appeal must be dismissed, and be dismissed with costs upon the usual terms.

- E** **LINDLEY, L.J.**—I also think that, when the facts of this case are known, the decision of **HUDDLESTON, B.**, was correct. We are not dealing here with the case of a lease at all. This is the first thing which must be steadily borne in mind. The tenant here was in possession of an agreement for a lease. When it is said an agreement for a lease is, in equity, equivalent to a lease, that assumes that the
- F** court of equity will decree specific performance. Even on that assumption, it is not true to all intents and purposes. For example, notwithstanding the doctrine that what is agreed to be done is to be treated as done, it must be taken with a certain limitation. But the difficulty in the plaintiff's way is, that he had agreed, among other things, to farm this property in a particular way. He had made default, and it appears to me he would have asked in vain for specific performance
- G** of that agreement. He is not in a position to say, in equity or in law, that he has got a lease. Being in that position, he appears not to have brought himself within s. 14 of the Conveyancing Act, 1881, at all. Whether he could have applied for relief is another matter. He might possibly, if he had been thoughtful enough, before he committed the breaches of the covenant, have applied for specific performance. Then his position would have been totally different. But when once
- H** he has so misconducted himself as to disentitle himself to obtain a decree for specific performance, it seems to me that s. 14 is not to apply to the case.

- The point raised by counsel for the plaintiff strikes me as an exceedingly important one. That question was, whether a tenant under a lease, who is, therefore, within s. 14, can do what this tenant seeks to do; that is to say, not proceed under sub-s. (2), but without proceeding under that subsection, whether he can bring an
- I** action for damages? That, however, is a matter which does not arise. It is a question of some difficulty, and must be discussed when it does arise. Under these circumstances, I am of opinion that the view taken by **HUDDLESTON, B.**, of s. 14, is correct, and that it has no application at all to this case.

LOPES, L.J.—In this case the tenant, the plaintiff, who brings this action for trespass, is in possession of the land in question under an agreement for a lease. No rent has been paid, and that agreement contains a covenant to cultivate the land according to the approved course of husbandry—the usual covenant—and it

has been found by the jury that that covenant has been broken. But, as I have said, no rent has been paid. If rent had been paid the position of things would have been very different. Then the plaintiff would have been a tenant from year to year on the terms of that agreement, so far as those terms are not inconsistent with a yearly tenancy. But no rent having been paid, I am clearly of opinion that the plaintiff is a tenant at will only. A

But it is said in this case that he is more than a tenant at will, because the court of equity would have decreed specific performance of this agreement for a lease, and that he must be regarded as lessee for the term of years mentioned in that agreement on the ground that we must regard that as done which a court of equity would have done. No doubt that is perfectly correct. But then the point arises, would the court of equity have decreed specific performance under the particular circumstances of this case? The plaintiff, the tenant, when he went to the court of equity and asked for specific performance, would have had to admit that which has been proved here, namely, that he himself had failed to perform a material portion of the contract—in point of fact, that he had broken a portion of the agreement. I take it that, under those circumstances, it is perfectly clear that the court of equity would have refused specific performance. If that is so, he is only a tenant at will. The notice had been given; the tenancy was determined; and the landlord, the defendant, makes out the justification which he sets up in this action. B C D

It might have been that a very different and important question might have arisen under s. 14 of the Conveyancing Act, 1881. I do not think, however, that that arises under the circumstances of this case. It is not necessary for us to consider what the position of the tenant under the lease would have been, and I, therefore, do not give any opinion with regard to that section. E

Appeal dismissed.

Solicitors: *Lowless & Co.; James Y. Johnson.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

A

HOARE v. HOARE

[CHANCERY DIVISION (CHITTY, J.), October 29, November 1, 1886]

[Reported 56 L.T. 147]

B *Charity—Education—Relief of poverty—Religion—Private chapel—Almshouses for estate labourers—Education of estate children.*

Charity—Cy-près doctrine—General charitable intent—Trusts for benefit of a particular estate.

By an indenture a settlor granted to trustees a tithe rentcharge of £360 a year issuing out of certain lands in the parish of D. for the following trusts, namely, as to £80 upon trust for the payment of the salary of the priest in the private chapel built by the settlor, adjoining his mansion and dwelling-house, provided that such priest should not have any other ecclesiastical or pastoral duty except such as might appertain to the visitation of the tenants and labourers of the owners of the L. estates; as to the sum of £10 upon trust to apply the same for the purpose of lighting and cleaning the chapel; as to £100 upon trust for the teaching and maintenance of ten boys as choristers in the said chapel; as to £80 for the payment of the schoolmaster teaching and educating the poor boys at the schoolhouse then building and intended to be built on the L. estate; as to £30 for the payment of the schoolmistress teaching certain poor girls at the schoolhouse on the L. estate; as to £10 for the costs, charges, and expenses of keeping in order the schools and four almshouses for the poor labourers on the L. estates; and as to £80 for the support and maintenance of such poor labourers as should be dwelling in certain four almshouses on the L. estate. The trusts of this deed were not acted on during the lifetime of the settlor, except to a limited extent. The chapel on the L. estate was a private chapel and had never been consecrated, and no strangers were allowed into it except by special permission.

E **Held:** the settlor had not manifested purposes of general charity, since every one of the trusts was so closely and intimately connected with the L. estate that they could not be disassociated from it; accordingly, the trusts failed and the property could not be applied cy-près, but passed under the settlor's will.

Thompson v. Shakespear (1) (1860), 1 De G.F. & J. 399, applied.

G **Notes.** Considered: *Re Davis*, *Hannen v. Hillyer*, [1900–3] All E.R.Rep. 336. Referred to: *Re Leverhulme*, *Cooper v. Leverhulme*, [1943] 2 All E.R. 148; *Re Leverhulme*, *Cooper v. Leverhulme* (No. 2) (1943), 169 L.T. 294; *Gilmour v. Coats*, [1949] 1 All E.R. 848.

As to gifts for “private” charities, see 4 HALSBURY'S LAWS (3rd Edn.) 232 et seq.; as to ascertainment of the objects of the trust, see *ibid.* 275 et seq.; as to the cy-près doctrine, see *ibid.* 317 et seq.; and as to inquiries whether the specified objects are attainable, see *ibid.* 419. For cases see 8 DIGEST (Repl.) 358.

H Cases referred to:

(1) *Thomson v. Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.J.J.; 8 Digest (Repl.) 358, 364.

I (2) *A.-G. v. Stepney* (1804), 10 Ves. 22; 32 E.R. 751, L.C.; 8 Digest (Repl.) 326, 94.

(3) *A.-G. v. Whitchurch* (1796), 3 Ves. 141; 30 E.R. 937; 8 Digest (Repl.) 421, 1119.

Also referred to in argument:

Cocks v. Manners (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, 86.

Limbrej v. Gurr (1819), 6 Madd. 151; 56 E.R. 1049; 8 Digest (Repl.) 374, 627.

- Cherry v. Mott* (1836), 1 My. & Cr. 123; 5 L.J.Ch. 65; 40 E.R. 323; 8 Digest (Repl.) 431, 1221.
- Clark v. Taylor* (1853), 1 Drew. 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287; 1 W.R. 476; 61 E.R. 596; 8 Digest (Repl.) 419, 1104.
- Russel v. Kellett* (1855), 3 Sm. & G. 264; 26 L.T.O.S. 193; 20 J.P. 131; 2 Jur.N.S. 132; 65 E.R. 653; 8 Digest (Repl.) 444, 1336.
- Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, 924.
- Re Ovey, Broadbent v. Barrow* (1885), 29 Ch.D. 560; 54 L.J.Ch. 752; 52 L.T. 849; 33 W.R. 821; 1 T.L.R. 401; 8 Digest (Repl.) 420, 1107.
- Grievess v. Case* (1792), 4 Bro.C.C. 67; 2 Cox, Eq. Cas. 301; 1 Ves. 548; 29 E.R. 728, L.C.; 8 Digest (Repl.) 428, 1178.
- Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.
- Sinnett v. Hobert* (1872), 7 Ch. App. 232; 41 L.J.Ch. 388; 26 L.T. 7; 36 J.P. 516; 20 W.R. 270, L.C.; 8 Digest 422, 1131.
- Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C.; 8 Digest (Repl.) 439, 1299.
- Re White's Trusts* (1886), 33 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 34 W.R. 771; 2 T.L.R. 830; 8 Digest (Repl.) 447, 1399.
- A.-G. v. Bishop of Oxford* (1786), 1 Bro.C.C. 444, n; cited 4 Ves. 431; 28 E.R. 1231; 8 Digest (Repl.) 468, 1686.
- A.-G. v. Goulding* (1788), 2 Bro.C.C. 428; 29 E.R. 239; 8 Digest (Repl.) 421, 1118.
- Incorporated Society v. Price* (1844), 1 Jo. & Lat. 498; 8 Digest (Repl.) 453, *493.
- Carbery v. Cox* (1852), 3 I.Ch.R. 231; 4 Ir. Jur. 274; 8 Digest (Repl.) 333, *58.
- Re Templemoyle Agricultural School* (1869), I.R. 4 Eq. 295; 8 Digest (Repl.) 464, *533.
- Daly v. A.-G.* (1860), 11 I.Ch.R. 41; 8 Digest (Repl.) 410, *357.

Action by Peter Merriek Hoare, the plaintiff, for a declaration that the trusts of a deed of settlement made by his father, Peter Richard Hoare, were void, and that the property comprised therein passed under the will of the settlor.

By a deed, dated Mar. 28, 1867, which was enrolled in Chancery on April 6 following, Peter Richard Hoare granted to trustees a rectorial tithe rentcharge of £360 a year, issuing out of lands in Dawlish in Devonshire upon the following trusts: As to £80, upon trust to apply the same for the payment of the salary of the priest in holy orders for the time being officiating and performing the services of religious worship in the private chapel built by the settlor adjoining his mansion-house of Luscombe, with a proviso that such clergyman should be a Bachelor of Arts of Oxford or Cambridge, and admitted to holy orders in the Church as now established in England, and should not have any other ecclesiastical or pastoral duty except such as might appertain to the visitation of the tenants and labourers of the owners of Luscombe and of any adjoining estates held in conjunction therewith, or of the tenants and labourers on the estates of Stonelands, Radfords, and Shiverstone and Holcombe respectively, belonging to the settlor, or any of them, and that the nomination and appointment of such clergyman should belong to the owner for the time being of the mansion of Luscombe. As to the sum of £10, upon trust to apply the same for the expenses of lighting and cleaning and otherwise keeping and maintaining the chapel in proper order and condition for the conduct of religious worship therein. As to the sum of £100, upon trust to apply the same in the discretion of the trustees with the concurrence of the officiating clergyman for the teaching and maintenance of ten boys, to be nominated by the trustees, as choristers in the performance of religious worship in the chapel. As to £50, upon trust to apply the same for the payment of a schoolmaster, who was to be a member of the Church of England, to be nominated by the trustees,

A teaching and educating the poor boys at the schoolhouse then building or intended to be built by the settlor in a field called Headlands. As to £30, upon trust to apply the same for the salary of the schoolmistress, who was to be a member of the Church of England, to be nominated by the trustees, teaching and educating the poor girls at the schoolhouse built by the settlor in the Bere Field. As to £10, upon trust to apply the same for the expenses of keeping in proper repair, B order, and condition the schoolhouses for educating poor boys and girls and the four almshouses after mentioned. As to £80, upon trust to apply the same, in the discretion of the trustees, for the support and maintenance of such poor persons having been labourers on the Luscombe estate or on any of the adjoining estates held in conjunction therewith, or on the estates of Stonelands, Radfords, Shiverstone, and Holcombe respectively belonging to the testator, or the widows of such C labourers, to be nominated by the trustees, as should be dwelling as inmates in the four almshouses built by the settlor and situate in the field of Headlands. Provided always, that in case the total amount of the tithe rentcharge in any one year should, in consequence of any part thereof being paid or applied for the repairs of the chancel of the parish church, or in consequence of an increase in the yearly averages, should be less than £360, the sum of £80 appropriated for the D maintenance and support of the poor labourers should be limited so far as might be required and the number of them (if necessary) be reduced accordingly, but the several other sums appropriated for the several other purposes should be paid in full, and in case of an excess over and above the sum of £360 in any one year by the increase of the yearly averages the surplus should be appropriated, as to E one moiety, in augmentation of the salary of the clergyman officiating in the private chapel belonging to the mansion-house, and as to the remaining moiety for the maintenance and schooling of the choristers. Provided also, that in case, from any circumstances, any one or more of the objects or purposes for which any sum was thereinbefore directed to be applied should be in abeyance and incapable of being carried out or fulfilled, the sums of money appropriated to the purposes F which might for the time being fail, should be applied in aid and augmentation of any other of the objects and purposes thereinbefore mentioned, in such way and manner as the trustees or trustee for the time being should, in his discretion, consider best and most advisable.

The settlor died in May, 1877, having by will dated in 1872 devised the residue of his real estate to trustees during the life of his son, the plaintiff Peter Merrick G Hoare, upon certain trusts, and after his death to the use of the sons of Peter Merrick Hoare in tail. Peter Merrick Hoare was one of the trustees named in the deed, but he never accepted or acted in the trusts thereof. The indenture of Mar. 28, 1867, was not acted on during the life of the settlor, who received the rentcharge and applied it as he thought fit. With the exception of a sum of £16 applied in the repair of the organ in the chapel, no part of the tithe rentcharge had H been applied on the trusts of the indenture of Mar. 28, 1867, but the amount received had been invested and accumulated by the trustees. The chapel was a private chapel adjoining or forming part of the mansion-house of Luscombe. It was not consecrated, and had never been open to the public, but was intended solely for the use of the resident in the mansion-house, the members of his family, and the tenants and labourers on the estate; no strangers were allowed, unless with I a special permission.

The present action was brought by the settlor's son, P. M. Hoare, for a declaration that the trusts of the indenture of Mar. 28, 1867, were void, and that the property comprised therein passed under the will of the settlor. The plaintiff contended that no valid charitable trust was declared with respect to either the almshouses or the inmates thereof, or the school, or the scholars taught thereat, and that none of the trusts declared by the deed were valid charitable trusts, and that if any were valid there was no general charitable intention in the deed, and the trusts were only for particular private purposes which had failed, and could

not be administered *cy-près*, and the whole of the income of the rectorial tithe should be applied in accordance with the residuary clause in the will.

Macnaghten, Q.C., and *Phillpotts* for the plaintiff.

Romer, Q.C., and *Morshead* for the tenant in tail.

Ingle Joyce for the Crown.

Almaric Rumsey, Cecil Russell and *Spence* for other parties.

CHITTY, J.—It is plain that in the existing circumstances the trusts cannot be executed *modo et forma* as they are shown upon the face of the deed, and the real question is whether upon the face of the deed the settlor has manifested the purposes as purposes of general charity. It is said for the plaintiff that all has been done to show a purpose connected with the particular land, and that the land has not been devoted to charitable purposes, and in the existing circumstances the court may take it now as certain that the land never will be devoted to charitable purposes. I think, as a matter of fact, that the land never will be devoted to charitable purposes, but it is not a case in which there ought to be any inquiry as to whether the land could be given or not.

Unquestionably, it is a matter of considerable nicety to determine, when there are particular trusts to be found on the face of an instrument such as the present deed, whether the court can or cannot extract from the terms in which the settlor has expressed himself a general charitable purpose. Is charity the main object, or is it simply a case in which the purposes show a particular object of a subordinate character connected with the main object? **LORD ELDON**, in *A.-G. v. Stepney* (2), said (10 Ves. at p. 28):

“The next consideration is whether, upon the whole taken together, this charity, of whatever nature, is so engrafted into and connected with and placed upon an establishment in real property that the charity cannot subsist as the real estate is so given.”

And the proposition was stated in somewhat similar terms, but in my opinion in as plain and direct a way as it can be, by **KNIGHT BRUCE, L.J.**, in the well-known case of *Thomson v. Shakespear* (1). He says (1 De G.F. & J. at p. 408):

“Then the question would arise or might arise, whether the case nevertheless falls within those cases where a gift for a charitable or public purpose will be supported by the court (to use our own technical language) *cy-près* where the particular mode to which the testator has pointed cannot be used, cannot be adopted, cannot be applied. There are cases of that description, of which the case of *A.-G. v. Stepney* (2) is a striking instance—a case I have no doubt rightly decided, and therefore, perhaps, if the object of a museum could be dissociated from Shakespeare’s house, it might be possible to support the gift. But I am of opinion that this case falls rather within the principles of *A.-G. v. Hitchchurch* (3) and other cases of that description, where a particular place is of the essence of the establishment, and where you cannot impute to the giver an intention independent of place. That is my opinion upon the testator’s will, and under the impossibility which, as I think, exists of imputing to him any intention independent of place, you find that the place which he has selected is one not devoted to charity, not devoted to any particular purpose, and the appropriation of which to any such object as he has pointed out cannot be secured.”

So far as the places mentioned in the deed of trust are concerned, on the facts, I hold that the observations which were applied to the Shakespeare house by **KNIGHT BRUCE, L.J.**, do apply to the case before me. Is there then here to be found any intention on the part of the testator of a charitable nature independent of the place? I proceed then to examine the deed. The deed was duly enrolled. The subject-matter of the deed of grant is a tithe rentcharge of £360, and that is divided into several portions. The first portion is the sum of £80, which is given upon trust as a stipend, to put it shortly, for a priest in holy orders officiating

A in the performance and performing the services of religious worship in a private chapel built by the settlor adjoining the mansion and dwelling-house of Luscombe; and then the deed contains a provision as to the qualification of the priest so to be appointed, and says that the priest

B "shall not have any other ecclesiastical or pastoral duty except such as may appertain to the visitation of the tenants and labourers of the owners of Luscombe."

I will not deal with this case separately in the first instance, because the chapel is here described as a private chapel. It has never been consecrated, and it never has been and never will be, in my opinion, dedicated by proper conveyance to the purposes of a charity. It is a room really in or adjoining the family mansion, which is so fitted up as that it can be properly used as a chapel for performing Divine service; but no person has a right to go there, no member of the public has a right to go there, not even the tenants of the estate have a right to go there, nor the agricultural labourers; it is simply a private chapel in a gentleman's house. I can find in that no charitable object. It appears to me, shortly stated, to be no more than a salary to be given to a private chaplain of any gentleman of position in this country.

D The argument which was founded upon the qualification which I have read with reference to the pastoral duty is one that appears to me to carry the case no further, because there is no condition imposed upon the officiating clergyman that he shall visit the tenants or labourers of the owners of the estates which are here mentioned. The clause is only introduced by way of negating his holding, as I understand it, any other employment of an ecclesiastical or pastoral nature, except this particular one, and allows him, if he should think fit, no doubt, to visit the tenants and labourers of the estate in question without any breach of his duty as an officiating private clergyman to the owner of the estates. I think, therefore, in that there is nothing of a public nature, and it was essentially intended there should not be a public purpose found in the instrument with regard to it. The result is, that I think this is neither more nor less than a stipend to be paid in perpetuity to a private chaplain of a private gentleman.

F The next point may be passed over rapidly: £10 is given simply for the purposes of lighting, cleaning, and repairing; that falls necessarily within what I have said.

G The next sum is £100 a year, which is to be applied for the teaching and maintenance of ten boys as choristers in the performance of the religious worship in the said chapel. It appears to me that there the main purpose, and I think I am right in saying the sole purpose, is for the teaching and maintenance of the choristers in that particular chapel. I think there again I cannot gather from that any general intention of a public character. Taking these three subject-matters which I have already mentioned, and putting them together, they really come to this—a trust for the benefit of the private owners of the estate, who are to have a chapel for the use of the owner of the estate and such persons as he may think fit to admit there, and for the proper performance of the service of a choral nature in the private room.

H The next sum which is specifically mentioned is £50 further part of the trust; that is for payment of the salary to the schoolmaster

I "for teaching and educating the poor boys at the schoolhouse now built or intended to be built by the settlor, and situate in the field or close of land called Headlands."

No such house has been devoted to charity. Whether the settlor did or did not intend to devote some such house as this permanently to charitable objects I cannot say. I can only say he has not done so; and there again I think that his object was to benefit particularly the estate of which he was then the owner, and there is no general purpose of education which could be found sufficient to make it come within a public charity. There is no general scheme for educating poor boys

to make it come within a public charity. Closely and intimately connected with that is the schoolhouse built, or intended to be built, on the field or close which is on the estate, and I think that, in this case, was the principal part of the trust.

Then, without going through all the other clauses upon which similar observations may be made, I will mention the £80 a year, which is given

“for the support and maintenance of such poor persons having been labourers on the Luscombe estate”

as may be found there—not generally for the poor of the district, as was argued for the Attorney-General, but it was

“for the support and maintenance of such persons having been labourers on the Luscombe estate as shall be dwelling as inmates in the four almshouses built by the settlor, and situate in the field called Headlands,”

and so forth. It appears to me that is an endowment of the fund intended to be for the benefit of those who should inhabit the almshouses; and the almshouses again never having been dedicated to charity properly, I hold the almshouses here were the main and principal part of the trust, and that the £80 was a mere subsidiary endowment.

There follow afterwards clauses, one of which is to the effect that, if there should be a deficiency, the deficiency is in substance to be borne by the poor labourers; and then there comes a clause at the end to the effect

“that in case from any circumstances any one or more of the objects or purposes for which any sum is hereinbefore directed to be applied shall be in abeyance and incapable of being carried out or fulfilled, the sums of money appropriated to the purposes which may for the time being fail shall be applied in aid and in augmentation of any other of the objects or purposes hereinbefore mentioned in such way and manner as the trustees or trustee for the time being of these presents shall, in their or his discretion, consider best and most advisable.”

The effect of that clause, I think, has been correctly stated by counsel for the Attorney-General, and it is this, that if the court should find any one of these purposes to be a good charitable purpose, then the result would be that the whole ought to be supported, because there would be sufficient on the face of the deed itself to show the intention on the part of the settlor that if the purposes as defined could not be exactly carried out with regard to all the objects—that is, that if some should be in abeyance and not carried out or fulfilled—then the fund might, in the discretion of the trustees, be devoted to any one of the other objects.

I have gone through the deed sufficiently to show my opinion that every one of these trusts is so closely and intimately connected with the estate itself that it would be wrong in me to attempt to dissociate them, and I think the principle which is to be found in the judgment of KNIGHT BRUCE, L.J., in *Thomson v. Shakespear* (3) does apply, and that the trust consequently fails.

Then counsel for the Crown argued that, the settlor himself having to a certain extent during a period of some ten years or so after the date of the deed executed the trust—that is to say, appointed a chaplain and allowed him to officiate—he says that is a case in which the charitable purposes found to be specific have failed in the result, and having failed by reason of subsequent events, the court ought to direct a scheme and apply the doctrine of *cy-près*. But I think what was stated in reply is correct, that the court must form its opinion of the nature of these trusts at the time when the deed was executed, and the case is just the same as if the settlor had come to the court the next day and asked to have a charity established. If he had done that, he would have been asked to devote the land which he has mentioned in the deed to charitable purposes, and judging from what he would have said in answer to such a question as that by what he himself has done, I take it he would have said: “No, I will do nothing of the kind.”

- A It would be, therefore, absurd for him to come and ask to have the charity established. But suppose the trustees of the deed had come. I think they would have been in exactly the same position as if they had come the next day, and I see no difference in point of time between their coming the next day after the deed was executed, or the day before the testator's death, which was the supposition put by counsel for the Crown or someone interested in the estate, or coming now
- B something like nine years after the death of the settlor, and asking for the opinion of the court on the matter. At whatever time the application is made, I think the same answer would be given. But I think, on the face of this deed, the purposes are so intimately connected with the land, and there being no charitable trusts to be declared as to the land, and in fact there being an improbability now of any such trust ever being declared, or the land being devoted to charity, the court
- C must, at whatever time the application was made, come to the same conclusion and hold the trusts to be invalid.

There will be a declaration that all the trusts of the deed have failed, and that the rentcharge passed under the devise of the residue in the will, and that the accumulations are to be paid to the trustees of the will. The costs of all parties to be paid out of the accumulations.

- D Solicitors: *Yarde & Loader*, for *Tozer & Whidborne*, *Dawlish*; *Tylee*, *Wickham*, *Moberley & Tylee*; *Hare & Co.*; *Simpson*, *Hammond*, *Richards & Simpson*.

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

E

ELWES v. BRIGG GAS CO.

- F [CHANCERY DIVISION (Chitty, J.), June 23, July 6, 1886]

[Reported 33 Ch.D. 562; 55 L.J.Ch. 734; 55 L.T. 831;
35 W.R. 192; 2 T.L.R. 782]

Landlord and Tenant—Ownership of objects in land demised—Chattel—Mineral—Part of soil—Prehistoric boat found by lessee under lessor's land.

- G In land demised by the plaintiff to the defendant company there was found an ancient boat of rude construction, stated to be two thousand years old, which, having been abandoned or left derelict by its original owners on the bank of a river, became, by the operation of natural causes, buried in the earth, and so remained for many centuries until discovered and excavated by the company. When discovered the boat was lying embedded in the clay at a depth from the surface of four feet at one end and six feet at the other. It
- H was about forty-five feet in length, hollowed out of a single oak tree; the wood had not become petrified or fossilised, but retained the properties of wood. The lease to the company contained a reservation of mines and minerals, and they were authorised, under the inspection of the plaintiff's surveyor and accordingly to plans previously approved, to erect a gasholder and other buildings on the land. It was in the course of excavating for the foundations of the
- I works that the boat was found.

Held: the plaintiff was in lawful possession of everything which lay beneath the surface of the land down to the centre of the earth, and, therefore, had possession of, and property in, the boat whether it was considered as a mineral, or as part of the soil, or as retaining the character of a chattel.

Notes. Considered: *Corpn. of London v. Appleyard*, [1963] 2 All E.R. 834. Distinguished: *Hannah v. Peel*, [1945] 2 All E.R. 288. Referred to: *South Staffordshire Waterworks Co. v. Sharman*, [1895-9] All E.R.Rep. 259; *Hibbert v. McKiernan*, [1948] 1 All E.R. 860.

As to possession of chattel, see 29 HALSBURY'S LAWS (3rd Edn.) 363 et seq.; A and for cases see 37 DIGEST 155 et seq.

Cases referred to:

- (1) *Hext v. Gill* (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957, L.J.J.; 33 Digest (Repl.) 728, 44.
- (2) *Climie v. Wood* (1868), L.R. 2 Exch. 257; 37 L.J.Ex. 158; 18 L.T. 609; 32 J.P. 712; affirmed (1869), L.R. 4 Exch. 328, Ex. Ch.; 38 L.J.Ex. 223; 20 L.T. 1012, Ex. Ch.; 31 Digest (Repl.) 200, 3314. B
- (3) *R. v. Rowe* (1859), Bell, C.C. 93; 28 L.J.M.C. 128; 32 L.T.O.S. 339; 28 J.P. 117; 5 Jur.N.S. 274; 7 W.R. 236; 8 Cox, C.C. 139, C.C.R.; 15 Digest (Repl.) 1086, 10,751.
- (4) *Blades v. Higgs* (1865), 11 H.L.Cas. 621; 20 C.B.N.S. 214; 6 New Rep. 274; 34 L.J.C.P. 286; 12 L.T. 615; 29 J.P. 390; 11 Jur.N.S. 701; 13 W.R. 927; 11 E.R. 1474, H.L.; 43 Digest 500, 396. C

Also referred to:

- Ivy v. Herlakenden* (1589), 4 Co. Rep. 62a; 76 E.R. 1025; 31 Digest (Repl.) 216, 3489.
- Spark v. Spicer* (1698), 1 Ld.Raym. 738.
- Merry v. Green* (1841), 7 M. & W. 623; 10 L.J.M.C. 154; 151 E.R. 916; 15 Digest (Repl.) 1048, 10,323.
- Bridges v. Hawkesworth* (1851), 21 L.J.Q.B. 75; 18 L.T.O.S. 154; 15 Jur. 1079; 3 Digest (Repl.) 68, 85.
- Tucker v. Linger* (1882), 21 Ch.D. 18; 51 L.J.Ch. 713; 46 L.T. 894; 30 W.R. 578, C.A.; on appeal (1883), 8 App. Cas. 508; 52 L.J.Ch. 941; 49 L.T. 373; 48 J.P. 4; 32 W.R. 40, H.L.; 33 Digest (Repl.) 730, 77. E
- A.-G. v. Tomline* (1880), 15 Ch.D. 150; 43 L.T. 486, C.A.; 33 Digest (Repl.) 738, 160.
- Channon v. Patch* (1826), 5 B. & C. 897; 8 Dow. & Ry.K.B. 651; 4 L.J.O.S.K.B. 316; 108 E.R. 333; 2 Digest (Repl.) 100, 666.
- A.-G. for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294; 48 L.J.P.C. 36; 40 L.T. 764, P.C.; 33 Digest (Repl.) 729, 56. F

Action brought for the purpose of deciding the right of property in a certain prehistoric boat or ship found below the surface of land demised by the plaintiff to the defendant company.

By a lease, dated Dec. 7, 1885, the plaintiff, Elwes, lord of the manor of Brigg, and tenant for life in possession of the Elwes family estates, in exercise of a power limited to him by a settlement of April 5, 1856, appointed and demised to the defendant company, the Brigg Gas Co., a piece of land in Brigg, forming part of the Elwes estates, for a term of ninety-nine years, at a yearly rent of £4 11s. 4d., reserving to the plaintiff and his assigns, and to the person or persons for the time being entitled under the said settlement to the Elwes estates, in remainder or reversion expectant on his death, H

"all mines and minerals, and all watercourses which now are, or during the term hereby granted shall be, upon or under the said piece of land and premises, with liberty to enter thereon respectively from time to time for the purpose of opening, cleansing, and repairing such watercourses."

The lease contained a covenant by the defendant company to erect a boundary I wall, and that the gasholders, gas tanks, erections, sheds, and buildings of every description which might be erected and set up on the demised premises should be made under the inspection and to the satisfaction of the plaintiff's surveyor or agent for the time being, and according to plans and specifications to be previously approved in writing by him; and that they would erect and set up every such gasholder, etc., with the best bricks, timber, and other materials as should from time to time be approved, and sanctioned by such surveyor or agent. The plaintiff thereby covenanted with the defendant company, their successors and assigns,

- A that on their paying the yearly rent thereby reserved, and observing and performing the covenants by them therein contained, they should hold and enjoy the premises and all buildings to be erected thereon during the term of ninety-nine years without any interruption by the plaintiff, or any person or persons claiming under him or under the settlement, with a proviso that at the expiration or sooner determination of the term thereby granted, the defendant company or their assigns might take
- B down and remove all trade fixtures, implements, and things in or about the demised premises, but not the boundary wall, erections, sheds, and buildings, all of which would form the property of the plaintiff, with an option to the plaintiff to take the trade fixtures at a valuation.

In April, 1886, the defendant company, while making excavations for the purpose of building a gasholder on the piece of land demised, discovered embedded

C in the clay, some feet below the surface, and within a few yards of the river Ancholme, an ancient prehistoric ship or boat, about forty-five feet long, and apparently hollowed out of a large oak tree. On May 1, the plaintiff served a notice on the defendant company claiming the boat, but the defendant company refused to comply, asserting that the boat belonged to them. The plaintiff then commenced this action for the delivery up of the boat.

- D *Romer, Q.C., and S. Dickinson* for the plaintiff.
Macnaghten, Q.C. (Nalder with him) for the defendant company.

CHITTY, J.—The facts are not in dispute. The boat is very ancient. The parties to the action concur in the statement, more or less conjectural, that it is some 2,000 years old, and that having been abandoned or left derelict by its

E original owners on what is now the bank of the river Ancholme, it became, by the operation of natural causes, such as by sinking in the ooze and the deposit of alluvial soil, buried in the earth; and so it remained for many centuries until it was recently discovered and excavated by the defendant company. When discovered it was lying embedded in the clay at a depth from the surface of four feet at one end and six feet at the other; and now that it is brought to the surface

F it appears to be a boat of rude construction forty-five feet in length hollowed out of a single oak tree. The wood has not become petrified or fossilised, but retains the properties of wood.

A discussion took place at the Bar whether the boat, just previously to its discovery, ought in point of law to be considered as a mineral, or as part of the soil in which it was embedded, or as still retaining the character of a chattel. It was one or other of these three things. In my opinion, for the reasons subsequently to be given, it is not necessary to decide which it was.

G

In support of the contention that it was a mineral, reference was made to *Hext v. Gill* (1), and to the statement in the judgment of MELLISH, L.J. (with which JAMES, L.J., concurred), that the term “minerals” includes every substance which can be got from underneath the earth for the purpose of profit. The terms of

H this definition are wide enough to include the boat, but I am not aware that the term “minerals” has ever been held to include anything except that which is part of the natural soil. Unquestionably coal is deemed in law a part of the natural soil without regard to what geologists may show to have been its origin. In law the natural processes by which the trees of a forest have become coal are not investigated, the result only is considered. But the boat has not become petrified

I or fossilised; it always has been distinguishable from the natural soil itself. If, therefore, I were required to decide the question I should hold that it is not a mineral.

In support of the contention that it ought to be deemed in law as part of the soil in which it was embedded, reference was made to the principle embodied in the maxim, *quicquid plantatur*, or, as it is sometimes stated: see BROOM'S LEGAL MAXIMS (6th Edn.), p. 376 n., and the judgment in *Climie v. Wood* (2), *fixatur solo, solo cedit*. This principle is an absolute rule of law not depending on intention; for instance, if a man digs in the land of another and permanently fixes in the

soil stones or bricks or the like as the foundation of a house, the stones or bricks become the property of the owner of the soil, whatever may have been the intention of the person who so placed them there, and even against his declared intention that they should remain his property. Nor does it appear to me to be material that the things should have been placed there by the hand of man; it would seem to be sufficient if they have become permanently fixed in the soil by the operation of natural causes. A

In support of the contention that the boat always remained a chattel, it was or may be urged that, though embedded in the soil, it always was distinguishable from the soil itself, and preserved its original character of a chattel, which it certainly now is. Not long ago there was discovered in the course of making excavations in Hampshire a jar containing Roman coins, not gold or silver coins, and therefore not falling within the Royal prerogative of treasure trove; apparently the coins formed the small change of the treasure of a Roman legion. Could it be said that the jar or the coins were part of the soil within the principle referred to? Similarly a short time ago there was found beneath the soil (I believe in Devonshire), a Roman lamp of ingenious construction made of lead and in an excellent state of preservation. A similar question may be asked of the lamp. But, as I have said, it is not necessary to decide these or the like interesting questions in the present case. B C D

The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. The principle of the decision of the court in *R. v. Rowe* (3) appears to me to apply. There the question was whether the property in some iron lying at the bottom of a canal was well laid in the indictment in the canal company. The water had been taken out for the purpose of cleaning the canal, and the prisoner was indicted for stealing the iron which had been dropped into the canal by the owner. The court held that the canal company had a sufficient property in and possession of the iron to support the indictment. If the fact of the iron having been left on the surface of the ground covered by water was sufficient to give in law possession of the chattel to the person in possession of the land, it appears to follow *à fortiori* that the facts of this case justify me in holding that the plaintiff was in possession of the boat. The boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil and waste of the inheritance: *Blades v. Higgs* (4), and HOLME'S THE COMMON LAW, title "Possession," p. 223. E F G H

The plaintiff then being in the possession of the chattel it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff then had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference in these circumstances that the plaintiff was not aware of the existence of the boat. I

The defendant company's claim must then rest on the lease and what has been done or what has occurred since it was granted, including the finding of the boat. The boat did not pass to them by the mere demise, a lease being only a contract for the possession and profits of the land: *Bac. Abr. tit. "Leases and Terms for*

- A Years," vol. 4, p. 632. By the lease the defendant company covenants to build a wall round the demised property, but they do not covenant to construct a gasholder. The construction of such a work is, however, contemplated by the lease. The covenant by the company in regard to the gasholder is ungrammatically expressed, but the substance of it is clear. It is a covenant to the effect that any gasholder which they may construct shall be in accordance with plans previously approved of on behalf of the plaintiff. Plans were accordingly submitted and approved. These plans involved the excavation of the ground where the boat lay embedded, and to a depth below the bottom of the boat. The defendant company discovered the boat in making these excavations pursuant to the plans. The lease did not give any licence to make the excavations, but the approval of the plans was equivalent in law to a licence to make the excavations. The plans,
- C however, were silent as to what was to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the plaintiff the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly be deemed to have contemplated would be found in making the excavations, but beyond this point it ought not to be carried. The existence of the boat was unknown, and its discovery was not contemplated. In my opinion, then, the licence
- E to remove and dispose extended to the clay and ordinary soil likely to be found in pursuing the licence to excavate, but it did not extend to what was unknown and not contemplated, and therefore did not comprise the boat.

- If the boat ought to be considered as a mineral (which I think it was not), then it fell within the express exception of minerals contained in the lease; against this express exception no implication ought to be raised. If, however, the boat
- F ought to be considered as part of the soil by reason of its having become permanently affixed to it, or, if it ought to be considered as a chattel, it would be unreasonable to infer that it was intended to be included. Further, if it ought to be regarded as a chattel, the defendant company did not acquire any property in the chattel by the mere finding, as against the plaintiff, who, upon the grounds already stated, was the owner of the chattel. For these reasons I hold that the
- G plaintiff is entitled to the boat.

Solicitors: *Tamplin, Tayler & Joseph; Collyer-Bristow, Withers, Russell & Hill for Freer, Hett & Hett, Brigg.*

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

HARRIS v. BRISCO

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), May 17, 18, 21, June 11, 1886]

[Reported 17 Q.B.D. 504; 55 L.J.Q.B. 423; 55 L.T. 14;
51 J.P. 37; 34 W.R. 729; 22 T.L.R. 709]

Maintenance of Action—Defence—Charitable motive—Absence of reasonable cause of action—Neglect by maintainer to inquire.

To a claim in respect of the maintenance of an action the facts that the suit maintained was that of a poor person and that the maintenance was effected purely for motives of charity constitute a good defence, and it matters not that the poor person had no reasonable ground of action and that the maintainer acted without making proper inquiry as to the nature of the suit.

Notes. Considered: *Neville v. London "Express" Newspaper, Ltd.*, [1918-19] All E.R.Rep. 61. Referred to: *Bloxham v. Medical Defence Union* (1894), 10 T.L.R. 307; *Alabaster v. Harness*, [1894] 2 Q.B. 897; *Scott v. N.S.P.C.C. and Parr* (1909), 25 T.L.R. 789.

As to maintenance of action, see 1 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 1 DIGEST (Repl.) 99 et seq.

Cases referred to:

(1) *Wallis v. Duke of Portland* (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E.R. 508; 1 Digest (Repl.) 84, 629.

(2) *Pechell v. Watson* (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 1 Digest (Repl.) 85, 640.

(3) *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, 618.

(4) *Rothwell v. Pewer* (1431), Y.B. 9 Hen. 6, p. 64, pl. 713; 1 Digest (Repl.) 80, 607.

(5) *Pomeroy v. Abbot of Buckfast* (1443), Y.B. 22 Hen. 6, 5, pl. 7; (1442), Y.B. 21 Hen. 6, p. 15, pl. 30; 1 Digest (Repl.) 80, 608.

Also referred to in argument:

Master v. Miller (1791), 4 Term Rep. 320; 100 E.R. 1042; affirmed, 5 Term Rep. 367; 1 Digest (Repl.) 73, 550.

Findon v. Parker (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 7 Jur. 903; 152 E.R. 976; 1 Digest (Repl.) 81, 610.

Appeal by the defendant from a decision of WILLS, J., sitting without a jury at Reading Assizes, in an action to recover damages for maintenance.

Jelf, Q.C., and *Ruegg* for the defendant.

Underhill, Q.C., and *H. Nash* for the plaintiff.

Cur. adv. vult.

June 11, 1886. **FRY, L.J.**, read the following judgment of the court.—This is an appeal from a decision of WILLS, J., by which the plaintiff recovered from the defendant Brisco a sum of £118 0s. 4d. and costs. The action was one for maintenance, and the short facts are these. One William Nailer and his brother Charles Nailer were owners in fee in equal moieties of a small farm. This had been mortgaged for £1,000. Charles Nailer sold to the plaintiff Harris his equity of redemption in his moiety for £25. William Nailer obtained advances from Harris. Harris took an assignment of the mortgage for £1,000, and subsequently purchased from William Nailer his equity of redemption in his moiety for £40. Harris allowed William Nailer for a time to occupy the farm, and then turned him out. Nailer considered himself aggrieved, and brought an action in the Chancery Division against Harris for the redemption of the farm. In this action

A Nailer was aided and abetted by Brisco. Harris set up the assignment of the equity of redemption, and thereupon Nailer by amendment denied that he had executed any conveyance of his equity of redemption, and alleged that, if he had executed any such conveyance, his execution was procured by fraud. The action was tried before KAY, J., when the plaintiff Nailer entirely failed, and his action was dismissed with costs to be paid by Nailer. Harris's costs were taxed at the sum of £113 Os. 4d., which sum Nailer, being a pauper, has never paid. Harris has brought the present action to recover this sum of £113 Os. 4d., together with £5 for personal costs from Brisco, as having maintained Nailer in his redemption action. WILLS, J., has held that the plaintiff has proved his case, and from his judgment the defendant Brisco has appealed.

On this appeal many points have been urged. The defendant's counsel have in the first place contended that no such action will lie. On principle this contention appears untenable, for maintenance is an unlawful act, and when an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to such person a remedy by action against the wrongdoer. But it is hardly necessary to resort to principle, for the point is well covered by authority. The law writers of the age of Elizabeth refer to the action in question as a well-known one. THELOALL in his DIGEST DES BRIEFES (liv. 2, c. 12, fol. 59), states a case in which three plaintiffs may be joined in a brief in maintenance, and RASTELL in his ENTREES, under the head "Maintenance," gives a form of a count in such an action. LORD COKE (INSTITUTES, part 2, c. 25, p. 208), is equally clear: "An action of maintenance did lie at the common law," he says in commenting on the Statute of Westminster the First, which on this point was declaratory of the common law. COMYN'S DIGEST (Maintenance, c. 1) is to the like effect. LES TERMES DE LA LEY, p. 422, Edn. of 1708, after defining maintenance, adds,

"the party grieved shall have against him [that is the wrongdoer] a writ called a writ of maintenance."

LORD LOUGHBOROUGH, in 1797, in *Wallis v. Duke of Portland* (1) (3 Ves. at p. 502), in like manner declared that such an action would lie at common law. In *Pechell v. Watson* (2), the Court of Exchequer seem to have entertained no doubt as to the existence of such an action, and lastly in *Bradlaugh v. Newdegate* (3), LORD COLERIDGE, C.J., upheld the action. In the face of this long chain of authorities the defendant's argument on this point is utterly untenable. In the next place the defendant alleges that he aided and maintained Nailer out of charity, and that charity is an answer to an action of maintenance.

The facts of this case, as found by WILLS, J., appear to us to be, shortly, that the defendant Brisco aided Nailer out of charity, and because he believed him to be oppressed by Harris, but that in fact Nailer was not oppressed by Harris, and had no cause of action against him, and that Brisco took no reasonable pains to make inquiries into the real facts of the case, or to ascertain those facts. It was alleged that if he had acted as a reasonable man he would never have aided Nailer in an action, and that he had thereby put Harris not only to the anxiety and trouble of being defendant in the action, but to the loss of his costs from the poverty of Nailer. WILLS, J., has held as a matter of law that the mere desire to benefit Nailer is not a defence to this action

I "unless the defendant had some kind of reasonable ground for his belief that he was furthering the cause of justice and supporting the oppressed against the oppressor."

To the view taken by WILLS, J., of the facts we entirely assent, but upon these facts two questions of law arise, which have been argued before us, viz., First, is charity a defence to an action for maintenance? Second, is thoughtless and inconsiderate kindness towards a particular person charity within the meaning of the defence, if such defence there be?

The doctrine that charity is an excuse for maintenance seems first to find expression in our law in *Rothewell v. Pewer* (4), in the course of which MARTIN, J., of the Common Pleas, said : A

"I can give gold or silver to a man that is poor to maintain his plea if he himself cannot through his poverty : this is not maintenance against the law ;" and in *Pomeroy v. Abbot of Buckfast* (5) PASTON, a judge of the Common Pleas, B said :

"Suppose that I of my charity give a sum of money to a poor man who has a suit, in order to aid him in the suit, it is no maintenance : no more is it in the case at the Bar."

Again, in 22 Hen. 6, p. 35, Prisot, Serjeant, who appears to have been counsel in the case, observed : C

"That in writ of maintenance it is a good plea that he who is supposed to have been maintained is a poor man, and had no means to defend himself in the suit which the plaintiff had against him, and that the said now defendant of his alms gave him 20s., which is the same maintenance alleged."

These authorities found, as might be expected, their place in the Abridgments of BROOKE and ROLLE (BROOKE ABR. Maintenance, 14; ROLLE ABR. Maintenance, Q. 1). The result of them appears in HAWKINS' PLEAS OF THE CROWN (8th Edn.), D vol. 1, p. 460, in the statement

"it seems to be agreed that anyone may lawfully give money to a poor man to enable him to carry on his suit,"

and in BLACKSTONE'S COMMENTARIES, vol. IV, p. 184, in the words, E

"A man may, however, maintain the suit of his near kinsman, tenant, and poor neighbour, out of charity and compassion with impunity."

Similar statements are to be found in VINER'S and BACON'S ABRIDGMENTS (VINER ABR. Maintenance, Q. 1; BACON ABR. Maintenance, B. 4). It is no doubt remarkable that no case can be found in our law in which the defence of charity has been raised to a proceeding for maintenance. But the proposition that charity is a good defence was asserted by the judges as well known and understood law more than four hundred years ago, when the law of maintenance was more familiar than it is now, and it has been adopted and accepted by the compilers of the digests to which we are accustomed to look for guidance, and upon this proposition no judge, counsel, or writer has, so far as we can learn, thrown any G doubt. We hold that the proposition is part of the law of England.

But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by WILLS, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor as well as of the supposed victim, and shall act only after due inquiry and upon H reasonable and probable cause. If we were making new law, and not declaring old law, it would in our opinion be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI? A view which even now is present to the minds only of a select few, and does not I commend itself to a large proportion of the kind-hearted and charitable among mankind? To say that charity is not charity unless it be discreet, appears to us without foundation in law. Of this limitation on the word charity no trace can be found in any of the authorities which have been cited, and, furthermore, in the other exceptions to the law of maintenance, such as those arising from the relations between lord and tenant, master and servant, neighbour and neighbour, there appears, so far as we can learn, to be no case or dictum in the books in which the duty of making inquiry, or of acting on reasonable and probable

A grounds has been recognised as a limitation on the right of giving assistance. For these reasons, but not without regret, we differ from WILLS, J., and think that his decision must be reversed and the action dismissed with costs here and below.

Appeal allowed.

Solicitors: *R. A. Biale; R. T. Webster.*

B [Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

C

TURQUAND AND ANOTHER v. BOARD OF TRADE

[HOUSE OF LORDS (The Earl of Selborne, L.C., Lord Blackburn, Lord Watson, Lord FitzGerald, Lord Halsbury and Lord Ashbourne), May 27, 28, 1886]

D [Reported 11 App. Cas. 286; 55 L.J.Q.B. 417; 55 L.T. 30; 2 T.L.R. 680]

Bankruptcy—Official receiver—Powers—Sale of bankrupt's property—Sale before appointment of creditors' trustee—Property not of perishable nature.

E The official receiver, while acting as trustee in a bankruptcy, in the interval after the adjudication and before the appointment of a creditor's trustee, has power to sell any part of the bankrupt's property, even though it be not of a perishable nature.

Notes. Sections 54, 56, 68 and 70 of the Bankruptcy Act, 1883, have been repealed and replaced by ss. 53, 55, 72 and 74 of the Bankruptcy Act, 1914.

F Considered: *Re Cohen*, [1904-7] All E.R.Rep. 421. Referred to: *Re Wells and Croft, Ex parte Official Receiver* (1895), 72 L.T. 359.

As to powers of official receiver as trustee of bankrupt's property, see 2 HALSBURY'S LAWS (3rd Edn.) 367 et seq.; and for cases see 4 DIGEST (Repl.) 218 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

G **Appeal** from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.), reported 15 Q.B.D. 196, reversing a decision of CAVE, J., reported 14 Q.B.D. 407.

H On Mar. 6, 1884, a petition in bankruptcy was presented against the firm of Parker and Parker by one of the creditors of the firm, and on Mar. 10 a receiving order was made. On Mar. 20 they were adjudicated bankrupt, and on April 18 a trustee was appointed, and on May 6 a committee of inspection. The official receiver, under the impression that he had power to make the sale, between the date of the adjudication, Mar. 20, and the appointment of trustee on April 18, proceeded to sell certain property forming part of the separate estates of the two debtors. The proceeds of these two sales amounted to something between £5,000 and £6,000 and the costs and expenses, as alleged by the Board of Trade, in connection with those sales, including the commission retainable by the official receiver on behalf of the Board of Trade, came to something over £800, and of that £800, £330 represented a commission or fee or percentage of 6 per cent. on the proceeds of the sale, and that the Board of Trade retained, and asserted their right to retain.

I After the appointment of the committee of inspection, the trustee, at the instance of the committee of inspection, applied to the Board of Trade to refund the money which had been so retained out of the proceeds of the sale. The Board of Trade declined to refund it, and thereupon the trustee applied to the learned judge sitting in bankruptcy to make an order for that purpose on the ground that, having regard

to s. 70 of the Bankruptcy Act, 1883, the official receiver, while acting as trustee, and while being a trustee within the terms of the provisions of the Act, had not power to sell any portion of the bankrupt's estate. CAVE, J., decided that as far as regarded the costs and expenses of the sale—it not being suggested that the property had realised less than was the fair and proper price for it—inasmuch as the bankrupt's estate would have the benefit of the sale, the bankrupt's estate should bear those costs; but the £330, being the 6 per cent. on the amount of the sale that was retained in the nature of the fee, should be refunded inasmuch as there was no profit or benefit derived by the bankrupt's estate. The Board of Trade appealed from the order so far as it disallowed the £330 commission, and the Court of Appeal reversed CAVE, J.'s, decision upon the point.

Charles, Q.C., and Linklater for the appellants.

The Attorney-General (Sir Charles Russell, Q.C.), the Solicitor-General (Sir Horace Davey, Q.C.), and Muir Mackenzie for the respondents.

THE EARL OF SELBORNE.—The argument in support of the appeal has been very clearly put before your Lordships, but I believe that none of you wish to hear the argument on the other side. I might almost content myself with saying that I agree with the decision of the Court of Appeal. I will, however, with respect to the argument, endeavour very briefly to put the way in which it strikes me.

It is admitted on all hands that ss. 54 and 56 and one of the subsections of s. 68 of the Act, if they stood alone, would place the official receiver, after adjudication, in the position of trustee in bankruptcy for the general purposes of those provisions in the Act which relate to the trustee in bankruptcy, subject of course to any special enactments (if any can be found) bearing upon the duties of the official receiver while he is trustee. That being admitted, and the express terms of s. 68 throwing upon the appellants the burden of pointing out something in the Act which is repugnant to the exercise by the official receiver, when trustee, of the power of sale given by s. 56, nothing is offered for that purpose except some vague suggestions as to a scheme of the Act which is supposed to be at variance with a sale by anyone not selected by the creditors, and s. 70, which is supposed to be a provision overriding those to which I have referred, and limiting the powers of the official receiver when trustee.

As to the scheme of the Act, I confess that I always listen to an argument founded on a general scheme or general intention with caution. I will not say that such arguments as to deeds or Acts of Parliament are never well founded. There can be no doubt that if in the preamble or in the other part of the Act some purpose or intention is expressed, that should be borne in mind in construing everything which is ambiguous or open to more constructions than one; nor do I say that such a view of the purpose and intention of an Act of Parliament may not sometimes properly be collected otherwise than from the declared policy expressed in the preamble. But we are not to treat everything as the policy, or the intention, or the scheme of the Act, which anyone may surmise to be so. If that is to govern us it should be clearly shown that it is so. To me it seems at least as reasonable to say that the scheme and the general intention of the Act is to provide for a trustee, for a series of persons filling the office of trustee, in all events and at all times, from the date of the adjudication, as to say that there is any particular scheme or intention more especially applicable to one kind of trustee than to another.

The one scheme is consistent. The trustee is to be invested with certain powers deemed necessary or convenient for the administration of the estate, and may be appointed in various ways, and from time to time. The creditors may, simultaneously with the adjudication, appoint a trustee of their own selection. If they do not, then until they do so or decline to do so within the time allowed them for that purpose the official receiver is to be the trustee de facto, and the estate is to vest in him, and he is to be trustee for the purposes of the Act. A certain time is allowed to the creditors to choose a trustee for themselves. If they do, when that

- A choice is complete, it supersedes the earlier official appointment, and the vesting in him follows. If they do not, then after the time allowed them the Board of Trade does, and then the trustee appointed by the Board of Trade is trustee, and if there is a vacancy from time to time, and no one is appointed to fill the vacancy, either by the creditors or by the Board of Trade, the official receiver comes in again. It is at least an equally consistent view of the general intention of the
- B Act that there should be one office *ejusdem generis* all through, filled from time to time in different ways, to provide for the different cases which may arise. But that being, as it appears to me, a consistent intention which I should gather from the provisions of the Act, and the three sections to which I have referred, as to the official receiver when trustee being in accordance with it. It is, however, possible that there may be something in the Act which draws the distinction suggested by the appellants, and limits the powers of the official receiver, when trustee, in a manner not applicable to a trustee selected by the creditors.

- It is admitted really that unless such a limitation or restriction can be made out from s. 70 there is no such thing in the Act; because the earlier sections referred to appear to me to have no bearing at all upon the matter. But s. 70, in those passages which were supposed by CAVE, J., to limit the powers of the official receiver as trustee, appears to me, with very great submission to that learned judge, to have no bearing upon, and no relation to, the powers or the action of the official receiver when he is trustee, and in that character. Those passages deal entirely with certain powers which he is to have as official receiver; and those powers are the powers of what is there called "interim receiver" (which I take to mean receiver until the appointment of a trustee by the creditors or by the Board of Trade) and of "manager." Those powers during a certain part of the period over which the provision extends, will be the only powers which the official receiver will have, because he does not become trustee at all until adjudication. Therefore the clause is perfectly officious, even if that were the only period during which there was a distinction between the powers of "manager" or "receiver" and the powers of "trustee." Before he had the powers of trustee he would have no other powers
- F than those of receiver and manager; but, even after he is trustee, no one has any doubt, and it has not been disputed at your Lordships' Bar, that a receiver or manager, such as the Chancery Division of the High Court of Justice appoints, as between party and party in ordinary causes, has powers exactly coincident with, and neither greater nor less than those of trustee.

- It is perfectly consistent that after he has become trustee, and down to the time at which there is another trustee appointed, he should have those powers which specially belong to the office of receiver and manager, as well as those powers which belong to the office of trustee. Section 70 merely says that, so far as he is acting in the character of receiver or manager, he shall do certain things, and it leaves it to the rest of the Act to tell him what he may do in the character of trustee, with which that section does not deal. I say it does not deal with that
- H character, not forgetting that in that section is contained a provision that among other things, when there is a vacancy in the office of trustee, he is to fill that vacancy. For the duties and the powers belonging to the office of trustee it was not necessary for that section to provide, because that had been done elsewhere, and not being necessary, it is not done there. But what is done is to say what are to be the powers of the official receiver, first, as such, and then, secondly, as
- I receiver and as manager with which characters that section says he shall be vested. It appears to me that the express provisions and the natural effect of the earlier clauses, are perfectly consistent with s. 70 which deals with another matter altogether. I, therefore, agree with the decision now under appeal, and move your Lordships that it be affirmed with costs.

LORD BLACKBURN.—I am of the same opinion. I scarcely think that it is necessary that I should add anything to what has been said already, but I will say a word or two out of respect to CAVE, J. I think CAVE, J., rightly enough thought

that the official receiver, as official receiver and in that capacity, as separate from trustee, had not the power to sell this property, and I think that he rightly enough thought that the sections which define the powers of the official receiver show that he had not power as such to do it; but CAVE, J., seems to me to have assumed that where the receiver was also trustee, the effect of the sections defining the powers and duties of the official receiver, as such, showed that he was to have no more. I cannot think that at all. It seems to me quite a possible thing that where there is an official receiver who also happens to be appointed trustee, the powers may be cumulative, he may still continue to have his powers as official receiver whatever they are, and also exercise at the same time any of the powers of trustee that are not inconsistent with them.

Upon that the argument has been to say that it cannot be that that was intended, for, if the official receiver, during the interval after the adjudication and before the appointment, is trustee, with the powers which a trustee would have (subject, of course, to the control of the court), during that time of selling the property, which is what has been done in this case, it would be contrary to the spirit of the Act, which, it seems to be argued, is to take away all power and control from the officials and give it to the creditors. There is nothing, however, in the Act that I can see that says that. In construing this Act, of course, like every other Act, we must take the whole of the Act together, and as this is a very long Act it requires, in order that we may be certain that we omit nothing, that we should look carefully at it altogether, and consider all the clauses. That has been carefully done in the Court of Appeal, and the result is to bring about a very clear opinion, in my mind at least, that, whilst the official receiver is trustee after adjudication, he may exercise the powers of a trustee, one of which would be to sell, subject, of course, to anybody interfering who had the right to interfere, or getting the court to interfere to prevent his doing so; but still having a power to sell, and, consequently, that this power was exercised within the jurisdiction of the official receiver as trustee at that time. The possibility, of course, of that power, like every other power, being abused, exists. It seems to be an admitted fact that in this case it was not abused, but such a power may be abused, and the control which would be exercised by the court to prevent it, if it seemed likely to be abused, or to punish it if it were abused, one need not inquire into. That there is such a control and such a power seems to be pretty clear.

I am, therefore, entirely of opinion that the proposed order that the appeal be dismissed, and that the order appealed against be affirmed, is the right order to make.

LORD WATSON.—I am also of opinion, after hearing the very able argument that has been addressed to us in this case, that the Court of Appeal rightly construed the statute, and that their order ought to be affirmed.

LORD FITZGERALD.—I, too, concur in thinking with the noble and learned Earl that the construction put upon the sections of the Act of Parliament which relate to the question now before us, was the correct interpretation of that statute, and I will also add that the conclusion arrived at is the wisest in the interest of the creditors. It is true, as it has been observed, that this authority given to a public officer may be the subject of abuse, but I think that is amply provided for in a preventive manner by s. 90; and there is also authority given to the Board of Trade to punish a trustee for any official misconduct.

LORD HALSBURY.—I am of the same opinion. It appears to me that the policy of the Act was that there should be some person who, immediately after adjudication, should have complete dominion over what would then be the creditors' estate, in trust for them. I think it would be very disastrous to the interests of creditors if there was no person who could have complete dominion over the creditors' estate. I think that ss. 54 and 56 of the Act give that dominion, and that no other section of the Act of Parliament qualifies or cuts down the plain,

A simple and ordinary meaning of the language of those sections. I therefore am of opinion that the order proposed by the noble and learned Earl is the order which your Lordships should make.

LORD ASHBOURNE.—I concur. I think it is plain that the power of sale which is questioned in this appeal does exist. I think that ss. 54, 56, and 68 are clear, and that there is nothing in any part of the Act to qualify their interpretation.

Appeal dismissed.

Solicitors: *Linklater & Co.*; Solicitor, *Board of Trade.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

D KEWNEY v. ATTRILL

[CHANCERY DIVISION (Kay, J.), December 21, 1886]

[Reported 34 Ch.D. 345; 56 L.J.Ch. 448; 55 L.T. 805;
35 W.R. 191]

E *Partnership—Dissolution—Receiver—Judgment creditor—Leave to issue execution on assets in hands of receiver.*

An order having been made in a Chancery action for the dissolution of a partnership and a receiver having been appointed, creditors who had obtained judgment in the Queen's Bench Division for the amount of a debt and costs took out a summons in chambers for leave to issue execution against the assets of the firm in the hands of the receiver. This application was refused and on a motion to discharge the order refusing the application the court refused to decide that the creditors would be entitled to any preferential payments in the administration of the partnership assets, but gave them a charge for their judgment debt, with 4 per cent. interest and costs, and costs of the motion, on all the moneys then in the hands of the receiver or to come into his hands, they undertaking to deal with it according to the order of the court, the intention of the court being to preserve to the creditors such legal rights as they would have had in case the sheriff had seized under an execution and sold on that day.

Notes. Considered: *Ridd v. Thorne*, [1902] 2 Ch. 344. Referred to: *Brand v. Sandground* (1901), 85 L.T. 517; *Newport v. Pougher*, [1937] 1 All E.R. 276.

H As to rights of judgment creditors when a receiver has been appointed by the court, see 32 HALSBURY'S LAWS (3rd Edn.) 422, 423; and for cases see 36 DIGEST (Repl.) 596 et seq.

Motion by judgment creditors asking for the discharge of an order previously made in chambers refusing an application to issue execution against the assets of a dissolved partnership in the hands of a receiver.

I In 1882 Kewney and Attrill entered into partnership, and in March, 1886, Kewney commenced an action in the Chancery Division of the High Court for dissolution of the partnership. In April, 1886, judgment by consent was given for the dissolution, the usual accounts and inquiries ordered, and a receiver appointed of the assets, property and effects belonging to the partnership. On Oct. 19, 1886, David Hyam & Co. commenced an action in the Queen's Bench Division of the High Court claiming £48 13s. 8d. due upon a bill of exchange drawn by them and accepted by Kewney and Attrill. On Nov. 27, 1886, they recovered judgment for that sum. On Dec. 7, 1886, David Hyam & Co. applied by summons for leave to

issue execution against the partnership assets in the hands of the receiver. This application was refused. A

David Hyam & Co. now moved that the order refusing the application of Dec. 7, 1886, might be discharged, and that an order might be made giving them leave to issue execution against the partnership assets in the hands of the receiver, upon the judgment recovered by them in the Queen's Bench Division, together with the costs of the application of Dec. 7, 1886, and the present application, or that the receiver should pay to them out of the partnership assets in his hands the amount of the said judgment, debt, and costs, with the costs of the present application, such several costs to be assessed in chambers. B

D. L. Alexander for the motion.

A. Whitaker for the partners. C

KAY, J.—I do not intend to decide that the applicants will be entitled to any preferential payment in the administration of the partnership assets, but I will give them a charge for their judgment debt with 4 per cent. interest and costs, and costs of this application, on all the moneys now in the hands of the receiver, or to come to his hands, they undertaking to deal with it according to the order of the court, the court intending to preserve to the applicants such legal rights as they would have in case the sheriff had seized under an execution and sold on this day. D

Solicitors: *Spyer & Son; William Easton* for *Edwin Vine*, Exmouth.

[*Reported by F. E. ADY, ESQ., Barrister-at-Law.*] E

WENNHAKE v. MORGAN AND ANOTHER F

[QUEEN'S BENCH DIVISION (Huddleston, B., and Manisty, J.), February 7, 1888]

[Reported 20 Q.B.D. 635; 57 L.J.Q.B. 241; 59 L.T. 28;
52 J.P. 470; 36 W.R. 697; 4 T.L.R. 295]

Libel—Publication—Publication by husband to wife.
Document—Defacement—Damages. G

The plaintiff entered the domestic service of the defendant and his wife, but the place did not suit him and he gave notice to leave. After he had given notice he went out to visit his wife, and on his return he found the door locked and was forced to stay out all night. The next morning the defendant dismissed him, and a written testimonial given to the plaintiff by a previous employer was returned to him by the defendant's wife, endorsed by the defendant to the effect that the plaintiff had been dismissed for staying out all night and "leaving the house open." In an action brought by the plaintiff against the defendant and his wife for damages for a libel in the endorsement of the testimonial and for malicious defacement of the testimonial, H

Held: (i) husband and wife were one in law, and, therefore, the handing of the testimonial by the defendant to his wife did not amount to a publication to her of the libel; (ii) the property in the testimonial and the question of damages for its defacement was one for the jury, and substantial damages could be given in respect of that matter. I

Notes. Referred to: *Gottliffe v. Edelston*, [1930] 2 K.B. 378.

As to publication of a libel, see 24 HALSBURY'S LAWS (3rd Edn.) 33 et seq.; and for cases see 32 DIGEST 76 et seq.

A Cases referred to :

(1) *Lefroy v. Cridland* (1854), 24 L.T.O.S. 60.(2) *R. v. Lord Mayor of London* (1886), 16 Q.B.D. 772; 55 L.J.M.C. 118; 54 L.T. 761; 50 J.P. 614; 34 W.R. 544; 2 T.L.R. 482; 16 Cox, C.C. 81, D.C.; 32 Digest 11, 29.(3) *Phillips v. Barnett* (1876), 1 Q.B.D. 436; 45 L.J.Q.B. 277; 34 L.T. 177; 40 J.P. 564; 24 W.R. 345; 27 Digest (Repl.) 261, 2110.(4) *Trumbull v. Gibbons*, 3 City Hall Recorder 97.

Also referred to in argument :

Wenman v. Ash (1853), 13 C.B. 836; 1 C.L.R. 592; 22 L.J.C.P. 190; 17 Jur. 579; 1 W.R. 452; 138 E.R. 1432; 32 Digest 78, 1086.(C) *Toogood v. Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.*Taylor v. Hawkins* (1851), 16 Q.B. 308; 20 L.J.Q.B. 313; 16 L.T.O.S. 409; 15 Jur. 746; 117 E.R. 897; 32 Digest 160, 1931.**Motion** on behalf of the plaintiff for a new trial on the ground of misdirection in an action for libel, tried before **MATHEW, J.**, and a jury.

D The action was brought by the plaintiff, who was a servant, against the defendants, Mr. Morgan and his wife, for a libel in an endorsement upon a written character given to the plaintiff by a former employer, and also for defacing the document. In October, 1886, the plaintiff entered the service of the defendant and his wife, and he then gave them a written character from his previous employer. The place did not suit him, and he gave notice to leave. He then went out to visit his wife, and when he returned, at about twelve o'clock midnight, he found the doors locked, so that he was shut out for the night. On returning to his employment next morning the defendant dismissed him, and on his asking for his written character, the document was handed to him by Mrs. Morgan, endorsed by the defendant with these words :

F "This man has lived with us five weeks, and we dismiss him for staying out all night, and leaving the house open."

The plaintiff brought the present action against the defendant and his wife, claiming damages for libel and also for defacing the document. At the trial before **MATHEW, J.**, the plaintiff was called and denied that he had left the house open, and said that when he returned at night the door was locked. It was urged before the learned judge that there was a sufficient publication of the libel by the husband to the wife, but the learned judge ruled that, as the document was only handed back to the plaintiff himself, there was no publication, and that there could not be any publication by husband to wife, or wife to husband. He also ruled, as to the second ground of action, that the plaintiff could only recover nominal damages for the defacement, and, accordingly, he directed a verdict for the plaintiff for a sum of 1s. The plaintiff applied for a new trial on the grounds : (i) that the learned judge was wrong in law in ruling that there was no evidence of publication of the alleged libel by either of the defendants, and in excluding evidence of such publication; (ii) that he was wrong in law in ruling that the measure of damages for the defacement of the written character was nominal damages only, and in excluding evidence to increase the damages.

I B. Hopkins for the plaintiff.

R. V. Williams for the defendants.

HUDDLESTON, B., stated the facts and continued : Two questions arise in the case, namely, first whether there was a publication of the libel, and, secondly, whether the learned judge was right in withdrawing from the jury the question of damage, and holding that the plaintiff was entitled to nominal damages only.

As to the first question, this is, so far as it appears, the first time it has been alleged that a delivery of a libel to the wife of the person charged with libel, is a

publication of the libel. No reported case has been cited to us, but a note of a case in the Common Pleas in the time of JERVIS, C.J., *Lefroy v. Cridland* (1), has been mentioned, in which it was held that the delivery of a libel to the wife of the defendant is not a publication. The ground of the decision there was probably that husband and wife are in law one person. A

In *R. v. Lord Mayor of London* (2) it was held, that a wife could not before, and cannot since, the Married Women's Property Acts, take criminal proceedings against her husband for a defamatory libel, on the ground that a husband and wife are one person. So in *Phillips v. Barnet* (3), it was held that a wife cannot sue her husband after divorce for an assault committed during coverture, and upon the same ground that husband and wife are one person. [But see now the Law Reform (Husband and Wife) Act, 1962: 42 HALSBURY'S STATUTES (2nd Edn.) 333.] In ODGERS ON LIBEL AND SLANDER (2nd Edn.), p. 153, an American case is referred to: *Trumbull v. Gibbons* (4), and TOWNSEND ON SLANDER AND LIBEL refers to the case (3rd Edn.), p. 146, n., in the following terms: B C

"Gibbons wrote defamatory matter of Trumbull and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained and five copies he sent to his wife in New Jersey, endorsing four of them with the names of certain persons acquaintances of the wife, but without any instructions to the wife as to how she should dispose of the copies so sent to her. The wife delivered two of the copies in New Jersey to the persons whose names were endorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel it was contended for defendant (i) that there was no publication by defendant; (ii) or no publication within the State. The second point was overruled, and as to the first it was held that the delivery of the manuscript to be printed was a publication; although a delivery to a wife in confidence would not be a publication, yet, in the case before the court, the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant." D E

We hold, therefore, that according to the well-recognised principle, husband and wife are one person, and consequently that the uttering of a libel by a husband to a wife is not a publication of the libel, and as to that part of the case the decision of the learned judge was right. F

With regard to the second point, there is far more doubt as to whether the learned judge was right in withdrawing the case from the jury, and deciding that the plaintiff was entitled to recover nominal damages only. For the defence it was alleged that the document was not the property of the plaintiff, and also that the endorsement upon it was not made maliciously, but bona fide. The learned judge thought the document, handed over to the defendant, remained the property of the plaintiff. We cannot now say whether the learned judge was right or wrong upon that point, and as to that it was urged that it would be a question for the jury to say whether the document was handed to the defendant with a view of passing the property in it to the defendant. G H

There is a great distinction between the case of a letter written by a previous employer to the master in answer to an inquiry as to the character of the servant, which, no doubt, would be the property of the master to whom it was written, and the present case of a general testimonial as to character intended probably to be used on future occasions. It might have been a question for the jury whether, under the circumstances of the case, the handing over of the document was intended to be as a deposit only, or whether it was with the intention of passing the property in it to the master. If the jury found that the handing over was as a deposit only, then the illustration as to handing over a diploma on seeking a situation would apply. The learned judge decided that point in favour of the plaintiff, but he also took upon himself to decide as to the amount of damages. We are of opinion that that was a matter entirely for the jury. The learned judge I

A thought that the measure of damages was the expense the plaintiff would have to incur in getting a new character. But we cannot say that the expense would have been only one shilling. It might cause much expense in finding where the lady who gave the character was, as it was admitted she was abroad. Besides, if the jury had thought that the endorsement was malicious they might have given substantial damages. We think that the verdict must be entered for the defendants on the claim for libel, on the ground that there was no publication, and that there must be a new trial on the other issues in the case.

MANISTY, J.—I am of the same opinion. The case, although it may seem a small one in magnitude, involves a very important principle. As to the first point, namely, the question of the publication, the principle that has for a very long time been acted on is still in existence, that, so far as this question is concerned, husband and wife are one person in law. The authorities in support of this view are collected in MONTAGUE LUSH ON HUSBAND AND WIFE (1st Edn.) at p. 3. It is enough to say that that is the law. But what is the foundation of it? It is, in fact, a question of public policy, or, in other words, a question of social policy. No doubt this principle has been modified by judge-made law. Public opinion has altered very much in the view taken of these matters, and, as an instance of such change of view, we may mention deeds of separation between husband and wife. But what is there to show any change either of judicial opinion or of public policy with regard to the question of communications made between husband and wife which have hitherto been held sacred? It is said that in some cases it might be proper to render actionable a slander communicated by a husband to his wife; but to lay down this principle might lead to results disastrous to our social life, and I should not be any party to extending the law in such a direction. I may say that there is no ground at all for this action, so far as the female defendant is concerned, as all that she did was to hand the alleged libel to the plaintiff. As regards the female defendant, therefore, judgment ought to have been entered for her.

Then as to the question of defacement of the document. The learned judge thought there was no evidence of damage; but, if that were so, there would be no cause of action. The plaintiff's allegation was, that the defendants maliciously defaced the document. We have, then, to consider, whether the endorsement was written maliciously or bona fide on the document, and whether the document was the property of the plaintiff. The learned judge held that the document was the property of the plaintiff, and he also must have held that the endorsement was malicious, otherwise he could not have given the plaintiff any damages at all. Whether the document was the property of the plaintiff was, it seems to me, a question for the jury. It might be that the testimonial was handed to the defendant under such circumstances as would pass the property in it to him; or it might be that it was only deposited with him. That is a question of fact, and not of law, and was for the jury.

The next point is a more serious one. The learned judge held that there was no evidence of damage, but the question of damage was one for the jury. It seems to me that the learned judge, in holding that there was no evidence of damage, and giving a verdict on this part of the case for nominal damages, was wrong; and, therefore that, as to the second question, the case must go down for a new trial, but, as to the first question, the verdict and judgment for the defendants ought to stand.

Order accordingly.

Solicitors: C. A. Swaine; F. Romer.

[Reported by H. LEIGH, Esq., Barrister-at-Law.]

TURNER v. THOMPSON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), December 6, 1887, January 24, 1888]

[Reported 13 P.D. 37; 58 L.T. 387; 52 J.P. 151; 36 W.R. 702;
4 T.L.R. 243]

Conflict of Laws—Marriage—Divorce decree by foreign court—Foreign domicile acquired by petitioning party—Petition for nullity decree in England—Jurisdiction to grant decree.

In 1872 the petitioner, then a domiciled Englishwoman, went through a ceremony of marriage with an American citizen. She subsequently went with him to America and lived with him there until 1879, acquiring a domicile in the United States. She then instituted proceedings against him in the Supreme Court of Columbia and obtained a decree dissolving the marriage on the ground of the husband's impotence. This decree took the form of a decree of divorce. The petitioner returned to England and presented a petition for a declaration of nullity. On the question of the jurisdiction of the English court to entertain the suit,

Held: the petitioner having abandoned her English domicile and having acquired the domicile of her husband, the American court had jurisdiction in the matter, and, therefore, the English court would recognise the decree of divorce granted by it, and had no jurisdiction to grant a decree of nullity as no marriage was in existence.

Notes. Applied: *Salvesen (or Von Lorange) v. Austrian Property Administrator*, [1927] All E.R.Rep. 78. Referred to: *Mitford v. Mitford and Von Kuhlman*, [1923] All E.R.Rep. 214; *Inverclyde v. Inverclyde*, [1931] P. 29; *Adams v. Adams*, [1941] 1 All E.R. 334; *De Reneville v. De Reneville*, [1948] P. 100.

As to recognition of foreign decrees, see 7 HALSBURY'S LAWS (3rd Edn.) 112 et seq; and for cases see 11 DIGEST (Repl.) 481 et seq.

Cases referred to:

- (1) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, 1065.
- (2) *Harvey v. Farnie* (1880), 6 P.D. 35; 50 L.J.P. 17; 43 L.T. 737; 29 W.R. 409, C.A.; affirmed (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, 1084.
- (3) *Niboyet v. Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, 1021.

Also referred to in argument:

Sottomayor v. De Barros (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; 11 Digest (Repl.) 460, 945.

Sottomayor v. De Barros (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917; 11 Digest (Repl.) 461, 946.

Crawford v. Crawford and Dille (1886), 11 P.D. 150; 55 L.T. 305; 34 W.R. 677; 2 T.L.R. 768, C.A.; 27 Digest (Repl.) 465, 4009.

Ingham (falsely called Sachs) v. Sachs (1886), 56 L.T. 920; 11 Digest (Repl.) 483, 1093.

A. v. B. (1868), L.R. 1 P. & D. 559; 17 W.R. 14; sub nom. *P. v. S.*, 37 L.J.P. & M. 80; sub nom. — v. —, 19 L.T. 22; sub nom. *Anon.*, 32 J.P. 743; 27 Digest (Repl.) 270, 2166.

Petition for nullity of marriage.

This case was first heard before BUTT, J., on Aug. 12, 1887, and on that occasion the learned judge raised the question as to the jurisdiction of the court, but declined, on the invitation of counsel for the petitioner, either to decide that he had not jurisdiction, and to dismiss the petition on that ground, or, on the other hand,

A to determine to exercise jurisdiction and hear the case. Counsel for the petitioner, having called attention to *Simonin v. Mallac* (1), BUTT, J., directed that notice should be given to the Queen's Proctor. This was accordingly done, and the case now came on before SIR JAMES HANNEN, P.

The Attorney-General (Sir Richard Webster, Q.C.) (C. A. Middleton with him) for the Queen's Proctor.

B *Bargrave Deane* for the petitioner.

Cur. adv. vult.

Jan. 24, 1888. SIR JAMES HANNEN, P., read the following judgment.—The petitioner, Georgiana Turner, was a British subject, domiciled in England, and on Nov. 7, 1872, she, in England, married Charles Peter Thompson, the respondent, who is a citizen of the United States, and domiciled there. He was in the United States Marine Service, and was from time to time engaged professionally, away from his wife; but they appear to have cohabited together at various places in the United States and elsewhere, and in 1879 she instituted proceedings in the United States for a decree dissolving the marriage on the ground of the husband's impotence. The form of decree in the United States is that the marriage is dissolved, and not declared null and void as in this country. The marriage was accordingly dissolved, and the lady has now returned to England, and instituted proceedings here for the purpose of having her marriage declared null, and, the case coming on before my brother BUTT, he raised the question whether or not there was anything upon which this court could proceed—whether or not this court had jurisdiction—because, of course, if the marriage was absolutely dissolved by the decree of the United States tribunal, then there exists between the parties no marriage upon which this court can be called upon to pronounce any opinion. BUTT, J., directed that the question should be argued by the Queen's Proctor.

I am of opinion that this court has not jurisdiction, in the sense which I have already mentioned; that is, that the marriage was duly and absolutely dissolved by the decree in the United States court, and, therefore, there is no marriage existing between these parties to be dissolved or declared null by this court. The marriage, though it took place in England, must now, according to the decision in *Harvey v. Farnie* (2), be taken to be prima facie an American marriage, because the husband was domiciled in the United States, and prima facie the courts of his place of domicile would have jurisdiction in the matter. If the parties had remained in England, then, in some circumstances, *Niboyet v. Niboyet* (3) would be an authority to the effect, that the courts of this country would have had jurisdiction. But, as a matter of fact, these parties, after the solemnisation of the marriage, went to the United States, and there took up their permanent abode, and I am of opinion that the wife did completely acquire a domicile in the United States. It is alleged on her behalf that that is not so, on the ground that, as she was originally a British subject, and as, by the law of England, the form in which the matter in dispute between her husband and herself would be adjudicated upon here is, that the marriage would be declared null and void from the beginning, she never lost her English domicile. The fallacy which underlies that argument appears to be this: a woman when she marries a man, not only by construction of law, but absolutely, does acquire the domicile of the husband, and, if she goes and lives with him in that country, there is then no pretence for saying that she did not take up that domicile of her husband. She intended to take up that domicile, and to make that place her permanent abode. It is to be remembered, that the marriage, by the law of England, is not absolutely void; it is only voidable at the instance of the injured party. If she had thought it to her interests, she might have enjoyed all the advantages of a wife, save that of marital intercourse; and it was not until 1879—the marriage having taken place in 1872—that she commenced proceedings for getting that marriage set aside. I am of opinion that, at the time of the institution of that suit, which is the turning point in the proceedings, her

domicil was, in fact and in law, in the United States, and, therefore, the courts of the United States had jurisdiction in the matter. Upon this ground I think this suit ought to be dismissed. A

Petition dismissed.

Solicitors: *S. H. Turner; Queen's Proctor.*

[Reported by H. DURLEY GLAZEBROOK, ESQ., Barrister-at-Law.] B

MELLIS v. SHIRLEY LOCAL BOARD C

[COURT OF APPEAL (Lord Esher, M.R., Cotton and Bowen, L.JJ.), November 20, December 18, 1885]

[Reported 16 Q.B.D. 446; 55 L.J.Q.B. 143; 53 L.T. 810;
50 J.P. 214; 34 W.R. 187; 2 T.L.R. 360] D

Local Authority—Contract—Contract with third party—Validity—Officer of authority interested in contract and liable to penalty—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 193.

Section 193 of the Public Health Act, 1875, provided that officers or servants employed under the Act by a local authority "shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act." For a breach of this provision the officer or servant concerned was rendered incapable of holding any office or employment under the Act, and was liable to forfeit the sum of £50. E

Held: any contract made on behalf of a local authority by an officer or servant who acted in breach of s. 193 of the Act was void. F

Notes. Section 193 of the Public Health Act, 1875, has been repealed and a similar provision is now contained in s. 123 of the Local Government Act, 1933 (14 HALSBURY'S STATUTES (2nd Edn.) 419).

Considered: *Anderson v. Daniel* (1924), 130 L.T. 418. Referred to: *Whiteley v. Barley* (1887), 20 Q.B.D. 196. G

As to officers of local authorities in general, see 24 HALSBURY'S LAWS (3rd Edn.) 471 et seq.; and for cases see 33 DIGEST (Repl.) 15 et seq.

Cases referred to:

- (1) *Cope v. Rowlands* (1836), 2 M. & W. 149; 2 Gale, 231; 6 L.J.Ex. 63; 150 E.R. 707; 12 Digest (Repl.) 305, 2345.
- (2) *Smith v. Mawhood* (1845), 14 M. & W. 452; 15 L.J.Ex. 149; 153 E.R. 552; 12 Digest (Repl.) 305, 2346.
- (3) *Law v. Hodson* (1809), 11 East, 300; 2 Camp. 147; 103 E.R. 1019; 12 Digest (Repl.) 305, 2340.
- (4) *Taylor v. Crowland Gas & Coke Co.* (1854), 10 Exch. 293; 23 L.J.Ex. 254; 23 L.T.O.S. 194; 18 Jur. 913; 2 W.R. 563; 2 C.L.R. 1247; 156 E.R. 455; 12 Digest (Repl.) 306, 2347. H

Also referred to in argument:

- Foster v. Oxford, etc., Rail. Co.* (1853), 13 C.B. 200; 22 L.J.C.P. 99; 20 L.T.O.S. 224; 17 Jur. 167; 1 W.R. 151; 138 E.R. 1174; 10 Digest (Repl.) 1239, 8724.
- Barton v. Piggott* (1874), L.R. 10 Q.B. 86; 44 L.J.M.C. 5; 31 L.T. 404; 39 J.P. 454; 23 W.R. 233; 12 Digest (Repl.) 304, 2338.
- Todd v. Robinson* (1884), 14 Q.B.D. 739; 54 L.J.Q.B. 47; 52 L.T. 120; 49 J.P. 278; 1 T.L.R. 44, C.A.; 33 Digest (Repl.) 17, 68. I

A *Burgess v. Clark* (1884), 14 Q.B.D. 735; 49 J.P. 388; 33 W.R. 269; 1 T.L.R. 4, C.A.; 33 Digest (Repl.) 17, 67.

Appeal by the defendants from an order of CAVE, J., in an action brought by the plaintiffs to recover money for work done under a contract purported to have been made between the plaintiffs and the defendants.

B The plaintiffs, Mellish and Prin, carried on business in partnership as civil engineers. The defendants were a local authority within the meaning of the Public Health Act, 1875. The plaintiff, Pim, was appointed surveyor to the defendants, and was paid by salary and while the plaintiff, Pim, held this appointment a contract was entered into between the plaintiffs and the defendants, whereby the plaintiffs undertook to execute certain drainage and sewage works for the defendants. At the trial before CAVE, J., without a jury, it was objected that the plaintiffs were not entitled to recover, on the ground that the contract was invalid, because it was contrary to the provisions of, first, s. 174, and secondly, s. 193, of the Public Health Act, 1875. CAVE, J., overruled both objections, and gave judgment for the plaintiffs. The defendants appealed.

By the Public Health Act, 1875, s. 193 :

D "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of £50, which may be recovered by any person, with full costs of suit, by action of debt."

E *Charles, Q.C.*, and *Bankes (Crump, Q.C.*, with them) for the defendants.
F. Meadows White, Q.C., and *Muir Mackenzie* for the plaintiffs.

Cur. adv. vult.

F Dec. 18, 1885. **LORD ESHER, M.R.**—This is an appeal by the defendants from the judgment of CAVE, J., in favour of the plaintiffs. It was contended on behalf of the defendants that the plaintiffs were not entitled to recover, on the ground that the contract under which they claimed did not comply with the provisions of s. 174 of the Public Health Act, 1875 [repealed]; and a further objection was taken, which was that the contract could not be sued upon because it was void by s. 193 of the same statute.

G I have carefully considered the case, and I regret to say that I feel obliged to come to the conclusion that the contract is void by s. 193, on the ground that one of the plaintiffs who was interested in the contract was a servant of the board. It was contended on behalf of the plaintiffs that, although what has been done is prohibited by s. 193, nevertheless the consequences of disobedience to the provisions of the section are enacted, which are not that the contract shall be void, but that the officer or servant interested in it shall be liable to a penalty. It is true that s. 193 does not in terms provide that the contract shall be void; but, on looking at the cases, I am of opinion that they establish this rule, that, although there may be no express words in a statute making a particular contract void, yet where a penalty is imposed on persons entering into such a contract, it is necessary to consider the whole scope of the Act in order to decide as to its effect. The context and the subject-matter dealt with must be considered in order to ascertain the object of the particular provision in question. The contracts to which this section applies may be very large, and where a servant of the local board is interested in any large contract, if the only consequences were the loss of his office and the pecuniary penalty, which is limited to £50, such consequences would be quite inadequate to prevent the mischief at which the enactment is aimed. Considering the subject-matter dealt with, it is obvious that the intention of the

legislature was that such contracts should not be entered into. The first words of the section are prohibitory, and the subsequent imposition of a penalty does not detract from their effect. A

I come to this conclusion with regret in the present case, because the defendants have accepted the contract; but I am clear that it is a void contract, and, therefore, one on which the plaintiffs are not entitled to recover. This view renders it unnecessary to decide the question which has been raised as to the effect of s. 174. B
For the reasons I have given I am of opinion that the judgment ought to be reversed.

COTTON, L.J.—I am also of opinion that s. 193 of the statute is fatal to the plaintiffs' claim.

The rule applicable to such cases was laid down by **PARKE, B.**, in delivering the judgment of the Court of Exchequer in *Cope v. Rowlands* (1), in the following terms (2 M. & W. at p. 157): C

"It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." D

In *Smith v. Mawhood* (2), **ALDERSON, B.**, said (14 M. & W. at p. 464):

"The question is, does the legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it." E

These authorities show that, where a penalty is imposed, the question to be considered is whether the statute was intended to prohibit the contract.

In the present case, looking at the first part of the section, which contains words of express prohibition, I have come to the conclusion that the Act prohibits the contract. In my opinion the section was intended to prevent officers or servants of a local board from entering into contracts from which they themselves would derive profit, but which otherwise they would advise against in the interest of the board. That, I think, is the obvious intention. Although there may be hardship in particular cases, the conclusion at which I have arrived is, that although a penalty is imposed, that is not all which is intended to be the result of a breach of the provisions of the section, for the first words expressly prohibit such contracts. F
If an officer or servant of the board were to acquire an interest in a contract already entered into, I do not think that would necessarily avoid the contract. I agree with the Master of the Rolls that it is unnecessary to give any opinion as to the effect of s. 174 [repealed]. G

BOWEN, L.J.—I am of the same opinion, and I have no doubt about the question. H

It is an established rule that no action can be successfully brought on an agreement which is prohibited either by the common law or by statute. This is clearly established by the decisions in *Law v. Hodson* (3) and *Taylor v. Crowland Gas & Coke Co.* (4). In the present case we have to consider whether the contract is prohibited by the common law or by statute, and whether the action is brought to enforce it. The contract is not prohibited by the common law, so the question is, whether it is prohibited by s. 193 of the Public Health Act, 1875 [repealed]. I
We must consider whether on its true construction the Act of Parliament prohibits the contract, for, if it does, the rule applies that a man cannot recover on an agreement which is based on the breach on his part of the provisions of a statute. Some other cases which have been referred to are not in point. I am of opinion that the language of s. 193 [repealed] contains a plain prohibition, and that the further fact that a penalty is imposed does not make this the less plain. What

A would happen if an officer became interested in a contract after it had been made is a different question. In that case I think the language of the section would not apply so as to make the contract void. Here, however, there are express words of prohibition showing a clear intention that such contracts should not be entered into. As to the point raised on s. 174 [repealed], I agree that we need not discuss it.

B

Appeal allowed.

Solicitors: *Keen, Rogers & Co.*; *Speechly, Mumford & Landon* for *Lampert & Trimmell*, Southampton.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

C

D

EDMONDS v. BLAINA FURNACES CO.

BEESLEY v. BLAINA FURNACES CO.

[CHANCERY DIVISION (Chitty, J.), June 15, 1887]

E

[Reported 36 Ch.D. 215; 56 L.J.Ch. 815; 57 L.T. 139;
35 W.R. 798]

Bill of Sale—Debenture—"Debenture" within *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 Vict., c. 43), s. 17.

F

There is no precise legal definition of the term "debenture" as used in s. 17 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882, and whether an instrument is a debenture or not has to be decided by looking at the substance of the instrument itself. The fact that an instrument is or is not called a debenture by the company is immaterial. Further, there is nothing in the section which requires that more than one instrument must be issued, and, therefore, a debenture may validly consist of one instrument only.

G

A memorandum of agreement made between a company and persons referred to in the agreement as "lenders" was almost verbatim in the same form as debentures previously issued by the company except that it was provided that debentures which had been previously issued should be brought into the security.

H

Held: the memorandum of agreement was a debenture within the meaning of the section.

Per CHITTY, J.: The term itself imports a debt—an acknowledgment of a debt; and... I find that generally, if not always, the instrument imports an obligation or covenant to pay.

I

Notes. Considered: *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch.D. 281. Approved: *Re Standard Manufacturing Co.*, [1891-4] All E.R.Rep. 242. Considered: *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212. Applied: *Lemon v. Austin Friars Investment Trust, Ltd.*, [1925] All E.R.Rep. 255. Referred to: *Levy v. Abercorris Slate and Slab Co.*, ante p. 509; *Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187.

As to debentures in general, see 6 HALSBURY'S LAWS (3rd Edn.) 466 et seq.; and for cases see 10 DIGEST (Repl.) 763 et seq. For the *Bills of Sale Act* (1878) *Amendment Act*, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 574.

Case referred to :

- (1) *British India Steam Navigation Co. v. I.R.Comrs.* (1881), 7 Q.B.D. 165; 50 L.J.Q.B. 517; 44 L.T. 378; 29 W.R. 610, D.C.; 6 Digest (Repl.) 467, 3272.

Also referred to in argument :

Ross v. Army and Navy Hotel Co. (1886), 34 Ch.D. 43; 55 L.T. 472; 35 W.R. 40; 2 T.L.R. 907, C.A.; 10 Digest (Repl.) 785, 5106.

Re Colonial Trusts Corp., Ex parte Bradshaw (1879), 15 Ch.D. 465; 10 Digest (Repl.) 766, 4983.

Re Florence Land and Public Works Co., Ex parte Moore (1878), 10 Ch.D. 530; 48 L.J.Ch. 137; 39 L.T. 589; 27 W.R. 236, C.A.; 10 Digest (Repl.) 770, 5010.

Brocklehurst v. Railway Printing and Publishing Co., [1884] W.N. 70; 28 Sol. Jo. 358; Bitt. Rep. in Ch. 117; 7 Digest (Repl.) 32, 166.

Gardner v. London, Chatham and Dover Rail. Co. (No. 1), Drawbridge v. Same, Gardner v. Same (No. 2), Imperial Mercantile Credit Association v. Same (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.J.J.; 10 Digest (Repl.) 1273, 8993.

Further Consideration of two actions which had been consolidated.

The only question which had to be determined on further consideration, and which had been reserved by the chief clerk's certificate, was, whether a memorandum of agreement was or was not a debenture, and as such within s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882, which provides that

"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

The agreement in question was to the following effect :

"Memorandum of agreement made this 26th day of July, 1883, between the Blaina Furnaces Co., Ltd., hereinafter called the company, of the one part, and the several persons mentioned in the schedule hereto, hereinafter called the lenders, of the other part.

By a memorandum of agreement dated the 9th July instant, and made between the company of the first part, Edward Gotto and Frederick Beesley of the second part, and certain debenture-holders of the company of the third part, the said debenture-holders authorised the company to mortgage or pledge as collateral security for the repayment of any loan or loans made to the company amounting in all to the sum of £6,000, and the interest thereon not exceeding 15 per cent. per annum, all or any of the debentures of the company belonging to the said debenture-holders which they had at the respective times of their signing the now reciting agreement lodged with the company for the purposes of the said agreement, and the said debenture-holders nominated Edward Gotto and Frederick Beesley, and each of them separately, their attorneys to execute assignments of the said debentures for the purpose of carrying such mortgage or pledge into effect.

The company has procured the lenders to make to the company loans of the amounts set against their respective names in the schedule upon condition of having the same secured in manner hereinafter expressed, and the lenders have accordingly, at or before the time of executing these presents, lent the said sums to the company. Now these presents witness :

Art. 1. In consideration of the said loans, the company hereby covenants with each of the lenders that it will on April 30, 1884, or such earlier day as payment shall be demanded as provided in article 2, pay to each of them the sum so advanced by him with interest thereon at the rate of 15 per cent. per annum from this day until repayment. If any payments of less than the whole of the said loans and interest shall be made, they shall be made to all the

A lenders rateably, as in proportion to the amounts owing to them respectively, and if any payments are made in other proportions, the lenders agree with each other to contribute such payments so as to make them rateable in manner aforesaid.

B 2. The demand for payment referred to in article 1, must be in writing, and signed by the majority of 60 per cent. in amount of the lenders not less than two in number, and left at the registered office of the company for the time being.

C 3. As securities for the payment of the said principal moneys and interest to the lenders, the company hereby charges therewith all its undertaking, property, estate, and effects of every kind, but subject to prior charges, and with liberty to the company to sell or pledge in the ordinary course of business, until default shall be made in payment of the principal and interest secured by these presents, any iron or other things manufactured by it.

4. As further security for the payment of the said principal moneys and interest, the company, in exercise of the authority given to it by the hereinbefore recited agreement, hereby mortgages and pledges all the debentures deposited by the said debenture-holders as aforesaid.

D 5. The lenders, notwithstanding the loans to them shall not be payable, shall be entitled to receive, by the agency of the trustee hereinafter mentioned, all principal money and interest payable upon the said debentures of the company, and apply the same rateably in or towards discharge of the principal moneys and interest secured by these presents.

E 6. If default shall be made in the payment of the principal and interest hereby secured as and when they shall become payable, the lenders shall be entitled, by the agency of the trustee hereinafter mentioned, to sell all or any of the said debentures so mortgaged and pledged, which sale shall be made by public auction or private contract, together or in parcels, at such times, for such price, and generally upon such terms and conditions as their said trustees shall think fit, and to assign or transfer to the purchaser or purchasers buying the same the debentures so sold, freed and discharged from all equity of redemption therein, and out of the proceeds to repay all expenses of sale, and the principal moneys and interest due on the security of these presents.

F Provided always, that no such sale shall be made without three calendar months' notice in writing, given by the said trustee to the company and the said debenture-holders.

G 7. The company hereby authorises and directs the said Edward Gotto and Frederick Beesley, and each of them separately, as the attorney of the said debenture-holders, to execute an assignment of the said debentures to George Menzies Clements, of 17, Gresham House, Old Broad Street, in the city of London, as trustee for the purpose of carrying the said mortgage or pledge into full effect, which assignment shall contain a power of sale and other powers in accordance with these presents.

H All parties to these presents will do all such things as shall be necessary or reasonably expedient for the purpose of giving full effect to the provisions of these presents."

Then followed the schedule with the names of the lenders.

I *Ingle Joyce*, and *R. T. Parker* for the plaintiffs in the first action, took no part in the argument.

Romer, Q.C., and *C. Ashworth James* for the plaintiff in the second action.

Vernon R. Smith for the company.

CHITTY, J.—The instrument in question is avoided by the Bills of Sale Act (1878) Amendment Act, 1882, unless it is within the exception of s. 17. A point suggested during the argument, turning on s. 4 of the Bills of Sale Act, 1878, was very properly abandoned at the Bar, after an observation or two from me to the

effect that the words excluding certain instruments in s. 4 did not relate to the property of an incorporated or joint-stock company, but to shares or interests, capital, or property of any such company; that is to say, to shares or interests of members of the company. A

The language of s. 17 of the Act of 1882 is as follows :

"Nothing in this Act shall apply to any debenture issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, or goods or effects of such company." B

With respect to the point on s. 17 of the Act of 1882, I have to say that, so far as I am aware, the term "debenture" has never received any precise legal definition. It is comparatively speaking a new term. I do not mean a new term in the English language, because there is a passage in SWIFT which has been mentioned to me where the term "debenture" is used. But although the term debenture is not a term with any legal definition, yet it is a term which has been used by lawyers frequently with reference to instruments under Acts of Parliament, although such instruments, when you turn to the Acts of Parliament themselves, are not so described. The "debentures" of a railway company are frequently spoken of, but the Companies Clauses Act, 1845, speaks of "bonds and mortgages" and not debentures. In the same way the instruments of a company incorporated under the Companies Act, 1862, of which a register must be kept, are commonly called debentures, but the term in the Act is "mortgages" and "charges." It is an expression used frequently in the law courts, both by counsel and judges, and it is a very convenient term, but it has no legal definition. That is the opinion of GROVE, J., and LINDLEY, L.J., as expressed in *British India Steam Navigation Co. v. I.R.Comrs.* (1). The term itself imports a debt—an acknowledgment of a debt; and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. So that there are debentures which are secured and debentures which are not secured. This distinction is shown on the face of s. 17, which speaks of a "debenture" issued by an incorporated company, and secured upon its capital stock and chattels. C D E F

Ought I to put any narrow restricted interpretation upon the term "debenture" in this section? I see no reason why I should. I see one reason, though it may not cover all the ground, why I should not, and it is this: the two great classes of existing companies, viz., those established by the Act of Parliament incorporating the Companies Clauses Act, 1845, and those incorporated under the Companies Act, 1862, are bound by statutory provisions to keep a register of their debentures, using that term in the sense already explained. The legislature, finding these existing provisions for registration, may have considered that it was not necessary to require the registration under the Bills of Sale Act (1878) Amendment Act, 1882, of the secured debentures of an incorporated company. The legislature may have acted on this ground, or may have taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by that Act. In determining what is or is not a debenture within the section, I am not bound to hold that an instrument is a debenture because it is called a debenture by a company issuing it, nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion I can whether the instrument does or does not fall within the exemption of the section. G H I

The argument of junior counsel for the plaintiff in the second action with regard to the document in question suggested an excellent test. If you strike out from it those parts which relate to bringing into the security the debentures which had been previously issued, the document is almost verbatim in the same form as the

- A debentures which had been previously issued, and which unquestionably ought to be considered as within the meaning of the section. The document does this: it contains a recital to show that the company procured certain debenture-holders to assist the company in getting this loan. The first article witnesses that in consideration of the loan the company covenant with each of the lenders that it will pay upon a particular day the sums advanced, with interest, and if any payments
- B less than the whole of the loan shall be made they shall be made to all the lenders rateably. Then, after some other clauses of the kind usually found in instruments which would at once be admitted to be debentures, there comes a charge in this form: [HIS LORDSHIP here read cl. 3 of the witnessing part, and continued:] Without reading the rest of the instrument the effect is exactly as has been stated: it is an acknowledgment of a debt the company is to pay to each of the lenders
- C separately. It gives a security to them and to all the lenders *pari passu* upon not any particular part of the property of the company, but all its undertaking, property, estate, and effects of every kind, subject to prior charges. Then there is a schedule in which the names of the lenders are set forth. It appears to me that the instrument is within the exemption of s. 17, and not the less so because some of the previous debenture-holders have thrown their debentures into the security.
- D I have seen debentures of various kinds and classes, and it is a mistake to say that to be debentures the instruments must be issued and numbered *seriatim*. I have even seen a single debenture issued to one man. There is nothing in the section requiring that more than one instrument should be issued. In this case the security is given to each one, so that each shares *pari passu* with the other. No doubt, as a rule, the instruments called debentures are issued so that each person
- E gets his own document, and can deal with it separately. He has greater facility of dealing with it in the market than is afforded by this instrument; but it would be unreasonable to hold that, because the obligation to pay and the security in favour of several persons is contained in one single document, therefore the instrument is not within the protection of the section; there would not be any principle in doing that. I do not see why a single debenture should not be given to half a
- F dozen persons and still be a good debenture within the Act. In my opinion, therefore, this is a valid instrument, and the plaintiffs are entitled to claim the pig iron as comprised in their security.

One word upon the only case which it is necessary for me to mention, *British India Steam Navigation Co. v. I.R. Comrs.* (1). The question there was one of interpretation of the Stamp Act, 1870, and it was necessary to find out whether

G the instrument then before the court was a promissory note or debenture. In the schedule to the Act there were various definitions used, which made it necessary to examine carefully that Act of Parliament. The decision that the instrument there was a debenture has little or no bearing upon the case before me, because the question there was between the company itself and the Commissioners of Inland Revenue, and the company, as LINDLEY, L.J., particularly pointed out during his

H judgment, were getting an advantage from issuing a document which they themselves called a debenture, and it certainly was a debenture within the terms of some portion of the Act of Parliament, although it might have been a promissory note within some other parts. But the company called it a debenture, and they got commercial advantage by so calling it. They meant it to operate as a debenture, and they did not mean it to be a promissory note, and if, contrary to the

I intention of the company, the court had held it to be a promissory note within the provisions of the Stamp Act, the instrument would have been void unless properly stamped before issue. I think that case has little or no bearing on the present. I determine this case upon the true nature of the instrument before me.

Solicitors: *Clements; C. A. Clulow.*

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

MINET v. JOHNSON

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Bowen, L.JJ.), July 10, 1890]

[Reported 63 L.T. 507; 6 T.L.R. 417]

Judgment—Setting aside—Judgment by default for possession of land—Ejection of occupier—Occupier not party to proceedings—R.S.C., Ord. 12, r. 25.

The plaintiff served a writ upon J. claiming possession of a house, and judgment was signed in default of appearance. The sheriff, in pursuance of a writ of possession, ejected H., who was in possession of the house, and delivered up possession to the plaintiff. H. had no knowledge of the action, and did not claim to hold through J. H. applied for an order that the writ and all subsequent proceedings in the action be set aside for irregularity, and that the plaintiff restore possession of the house to him. The judge in chambers ordered that the judgment and subsequent proceedings be set aside, the plaintiff to go out of any possession obtained by reason of, or under, the judgment, the order to take effect only if the applicant within twelve days should elect to be added as a defendant; the applicant to be at liberty so to appear upon filing an affidavit that, at the time of the issue of the writ, he was in possession by himself or his tenant; costs of the application to be costs in the action if the applicant should elect to appear and defend, otherwise plaintiff's costs to be paid by the applicant; the order to be without prejudice to any right the plaintiff might thereafter have to sign judgment against J. upon a proper affidavit.

Held: R.S.C., Ord. 12, r. 25, applied and the order made by the judge in chambers was the proper order in the circumstances.

Notes. Section 168 of the Common Law Procedure Act, 1852, was repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3 and Schedule.

As to setting aside judgments in default, see 22 HALSBURY'S LAWS (3rd Edn.) 788 et seq.; and for cases see DIGEST (Practice) 391 et seq.

Cases referred to in argument:

Anlaby v. Praetorius (1888), 20 Q.B.D. 764; 57 L.J.Q.B. 287; 58 L.T. 671; 36 W.R. 487; 4 T.L.R. 439, C.A.; Digest (Practice) 972, 5065.

Smith v. Sydney (1870), L.R. 5 Q.B. 203; 39 L.J.Q.B. 144; 22 L.T. 16; 18 W.R. 628; 21 Digest (Repl.) 546, 437.

Gledhill v. Hunter (1880), 14 Ch.D. 492; 49 L.J.Ch. 333; 42 L.T. 392; 28 W.R. 530; 38 Digest (Repl.) 916, 1065.

Lyn v. Morris (1887), 19 Q.B.D. 139; 56 L.J.Q.B. 378; 56 L.T. 915; D.C.; 7 Digest (Repl.) 70, 396.

Appeal from an order of the Divisional Court of the Queen's Bench Division (CAVE and A. L. SMITH, JJ.), affirming an order made by VAUGHAN WILLIAMS, J., in chambers on a summons by one Hartley who asked that a writ of summons, judgment, and writ of possession, and all other proceedings to recover possession of 14, Harold Street, Camberwell, be set aside on the grounds of irregularity in that the said writ of summons was not directed to the persons in possession of the property sought to be recovered, that the affidavit of service filed by the plaintiff in order to sign judgment in default of appearance did not allege that the writ of summons had been served on the persons in possession, or that the defendant was in possession thereof, and that the plaintiff should restore to the applicant the possession thereof.

By R.S.C., Ord. 12, r. 25:

"Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the court or a judge appear and defend, on filing an

- A** affidavit showing that he is in possession of the land either by himself or by his tenant."

Frank Gover for the applicant.

Pollard for the plaintiff.

- LORD ESHER, M.R.**—In this case the plaintiff bona fide and without any abuse of the process of the court brought an action against Johnson to recover possession of certain premises. There is nothing to show but that he had a bona fide belief that the defendant Johnson was the person in possession. The writ was served on Johnson only, and he allowed judgment to go by default, which was an admission that, as between himself and the plaintiff, he was in possession and the plaintiff was entitled to turn him out. Then, in pursuance of a writ of possession the sheriff turns out of possession the persons on the premises and delivers possession to the plaintiff. If Hartley were a tenant of Johnson's of course he must go out; therefore, to support his complaint now he must say that he had some independent right of his own. What then is his remedy? There has been a miscarriage of justice, and Hartley has a right to be heard, and he must be let in to assert his case.

- D** If he had taken his point before judgment had been signed, he would have been treated as though he were a defendant in the action; if he has done so after judgment has gone by default, without his knowing anything of the former proceedings, he must then also be allowed to defend. But the judgment must not be set aside as between the plaintiff and Johnson; it can only be set aside so far as it concerns him. That is what has been ordered here, but it is said that that is not enough. It is said that the proceedings were irregular because the writ ought to have been served on everyone actually in possession. Under the Common Law Procedure Act, 1852, that was once the rule in actions of ejectment, but new rules have been made for the procedure in such actions, and they must now be followed.

- E** There is no question here of natural justice. The only person to be served with the writ of summons is the defendant who is named in it, and no doubt in ordinary cases that would be the person in possession. In case of mistake a procedure has been provided by Ord. 12, rr. 25 and 27, by which a person in possession not named as a defendant on the writ can come in and defend. If the judgment was set aside simply, Johnson would be able to come in and defend if he liked. Therefore the judgment must be set aside, and also the writ of possession, only so far as it affects Hartley. **VAUGHAN WILLIAMS, J.**, has imposed no terms on Hartley; his order merely says in effect that Hartley must come in in the same way as if he had come in before judgment had been signed. The order is right, and this appeal must be dismissed.

- LINDLEY, L.J.**—I think the order of **VAUGHAN WILLIAMS, J.**, was right. The action was brought against Johnson to recover possession of some land. It so happens that Hartley was in possession, but was not named as a defendant on the writ. On principle a person in actual possession ought to be made a defendant; but where this has not been done Ord. 12, r. 25, seems to me to point out what is the proper course of procedure. The moment the person in possession has done as he is there directed he is treated as a defendant in the action. On reading the order made by **VAUGHAN WILLIAMS, J.**, I cannot see that any injustice has been done.

- I** **BOWEN, L.J.**—I am of the same opinion. The mistake at the root of this application is, that the applicant has been deprived of some right. **VAUGHAN WILLIAMS, J.**, has let in the applicant as a defendant in the action, and set aside so much of the judgment as affected him. The procedure which existed under the Common Law Procedure Act, 1852, s. 168 [repealed], has been dropped under the new system, and though there might have been opportunities for obscurity by dropping that section, nothing is clearer than the present rules. It is objected that Ord. 12, r. 25, cannot apply here because Hartley is not in possession; but this view is at once displaced by considering that he could not do better than he is

entitled to do under the order. We must take a wider view of the meaning of the rule, and allow a person in possession to come in and defend even after execution. Under Ord. 13, r. 8, the judgment in this action was that the person whose title is asserted on the writ should recover possession of the land, and that judgment, together with the writ of possession, ought to be displaced as regards a person in possession who has had no notice of the action. That has been done by the order of VAUGHAN WILLIAMS, J. There is only one other possible objection. The order is merely that the plaintiff is to go out of possession, not that he is to put the applicant in, and there is a possibility of the plaintiff so acting that a stranger might take possession before the applicant was able to do so. But counsel for the plaintiff says that his client will tell Hartley when he intends to go out of possession, so that Hartley may be ready to come in immediately after. No terms are imposed by this order on Hartley, and he has all that he is entitled to claim.

Appeal dismissed.

Solicitors: *Gover & Sons; Dawes & Sons.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

EAST AND WEST INDIA DOCK CO. v. KIRK AND RANDALL

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord FitzGerald and Lord Macnaghten), May 3, 5, 6, 10, June 13, 14, 16, 17, 23, July 29, August 1, 2, 5, 9, 1887]

[Reported 12 App. Cas. 738; 57 L.J.Q.B. 295; 58 L.T. 158;
3 T.L.R. 821]

Arbitration—Submission—Revocation—Jurisdiction of court—Lack of jurisdiction of arbitrator—Reasonable grounds for thinking arbitrator going wrong on law.

The court has jurisdiction to give leave to revoke a submission to arbitration, not only on a question of the jurisdiction of the arbitrator, but also if there is reasonable ground for thinking that he is going wrong in point of law.

Notes. Section 5 of the Common Law Procedure Act, 1854, has been repealed.

Explained and Distinguished: *James v. James* (1889), 22 Q.B.D. 669. Considered: *Den of Airlie Steamship Co. v. Mitsui and British Oil and Cake Mills* (1912), 17 Com. Cas. 116.

As to revocation or termination of the agreement to refer, see 2 HALSBURY'S LAWS (3rd Edn.) 15 et seq.; and for cases see 2 DIGEST (Repl.) 506 et seq.

Cases referred to in argument:

Thorn v. London Corpn. (1876), 1 App. Cas. 120; 45 L.J.Q.B. 487; 34 L.T. 545; 40 J.P. 468; 24 W.R. 932, H.L.; 7 Digest (Repl.) 345, 34.

Fuller v. Fenwick (1846), 3 C.B. 705; 16 L.J.C.P. 79; 8 L.T.O.S. 162; 10 Jur. 1057; 136 E.R. 282; 2 Digest (Repl.) 656, 1759.

Hodgkinson v. Fernie (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, 1762.

Re Hart v. Duke (1862), 32 L.J.Q.B. 55; 9 Jur.N.S. 119; 11 W.R. 75; 2 Digest (Repl.) 511, 559.

Faviell v. Eastern Counties Rail. Co. (1848), 2 Exch. 344; 6 Dow. & L. 54; 17 L.J.Ex. 297; 154 E.R. 525; 2 Digest (Repl.) 512, 564.

Scott v. Van Sandau (1841), 1 Q.B. 102; 4 Per. & Dav. 725; 113 E.R. 1068; 2 Digest (Repl.) 511, 558.

- A** *Robinson & Co. v. Davies & Co.* (1879), 5 Q.B.D. 26; 49 L.J.Q.B. 218; 28 W.R. 255; 2 Digest (Repl.) 511, 560.
Forwood & Co. v. Watney (1880), 49 L.J.Q.B. 447; 2 Digest (Repl.) 458, 253.
Ching v. Ching (1801), 6 Ves. 282; 31 E.R. 1052; 2 Digest (Repl.) 655, 1742.
Young v. Walter (1804), 9 Ves. 364; 32 E.R. 642; 2 Digest (Repl.) 655, 1743.
Kent v. Elstob (1802), 3 East, 18; 102 E.R. 502; 2 Digest (Repl.) 650, 1714.
- B** *Piercy v. Young* (1879), 14 Ch.D. 200; 42 L.T. 710; 28 W.R. 845, C.A.; 2 Digest (Repl.) 507, 529.
Fraser v. Ehrensperger (1883), 12 Q.B.D. 310; 53 L.J.Q.B. 73; 49 L.T. 646; 32 W.R. 240, C.A.; 2 Digest (Repl.) 508, 544.
Price v. Jones (1828), 2 Y. & J. 114; 148 E.R. 855; 2 Digest (Repl.) 650, 1715.
Ames v. Milward (1818), 2 Moore, C.P. 713; 8 Taunt. 637; 129 E.R. 532; 2 Digest (Repl.) 651, 1720.
- C** *Sharman v. Bell* (1816), 5 M. & S. 504; 105 E.R. 1135; 2 Digest (Repl.) 649, 1701.
Morgan v. Mather (1792), 2 Ves. 15; 30 E.R. 500; 2 Digest (Repl.) 678, 1934.
Irish v. Society v. Bishop of Derry (1846), 12 Cl. & Fin. 641; 8 E.R. 1561, H.L.; 22 Digest (Repl.) 344, 3672.
- D** *Willesford v. Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.J.J.; 2 Digest 491, 430.

Appeal from an order of the Court of Appeal (LORD COLERIDGE, C.J., LINDLEY and LOPES, L.J.J.), affirming an order of the Divisional Court of the Queen's Bench Division (GROVE and STEPHEN, J.J.), discharging an order made by A. L. SMITH and GRANTHAM, J.J., on a motion by the appellants, the East and West India Dock Co., for a rule to show cause why leave should not be given to revoke a submission to arbitration between themselves and the respondents, Kirk and Randall, in order to obtain from the court a direction that evidence admitted by the arbitrator and to which objection had been made by the appellants was inadmissible.

- E** In 1882 Messrs. Kirk and Randall entered into a contract with the East and West India Dock Co. for the excavation and construction up to quay level of their new docks at Tilbury, upon the marshes on the north side of the river Thames. The contract was a measure and value, and not a lump sum, contract, there being a schedule of prices attached to the contract fixing the rates at which the quantities of work actually executed were to be paid for. The contract contained a clause by which it was provided that, in the event of any dispute as to the meaning of the contract, or anything to be done thereunder, the dispute should be referred to an arbitrator to be appointed by the president of the Institute of Civil Engineers.
- G** In July, 1884, disputes arose between the contractors and the company, the contractors alleging that they had not received sufficient payments, and they sent in to the company a claim for £256,660 in excess of the payments they had received, which amounted to £309,000, and demanded arbitration. They at the same time dismissed a large number of the men engaged on the work.
- H** The company thereupon gave to other contractors notice to proceed with the works, and ultimately took them out of the contractors' hands, and the docks were afterwards completed by Messrs. Lucas and Aird. Sir Frederick Bramwell was duly appointed arbitrator under the contract, and the principal questions referred to him were whether or not the contractors had received sufficient payment, and whether or not the company were justified in taking the works out of their hands.

I The arbitration commenced in October, 1884, and the counsel for the contractors contended that the contractors were entitled in respect of a great part of the work done to prices other than the prices specified in the schedule of prices attached to the contract, on the ground that the work done by the contractors was not the work priced in the schedule, but was in fact "other description of work" within a clause in the specification, for which it was contended the arbitrator had jurisdiction under the contract to fix fair prices. In support of this contention the contractors tendered in evidence a section of eight borings seen by the contractors

in the engineer's office, but not forming part of the contract drawings at the time of the tender. It was alleged on the part of the contractors, that the description of certain strata as "clay" in the section of borings was inaccurate and misleading, the soil being, as they alleged, in fact mud, a far more expensive material to work in, and also that the section of borings showed the ballast or soil fit for foundations at depths which, though accurate as far as they went, ought to have been supplemented by other information in the possession of the engineer, which would have shown that in other parts of the work the ballast lay at greater depths, and consequently that the work would be of a far more difficult and expensive character. This evidence was objected to, and similar objections were made to evidence being given of other communications alleged to have been made by the engineer to the contractors before the date of the contract. The contractors also complained that the contract drawings showed slopes at an inclination of $1\frac{1}{2}$ to 1, and alleged that the character of the material on the site was such, in fact, that it would not stand at anything like that inclination, but slipped down unless formed to a very much flatter slope. The company, while denying that any inaccurate or incomplete information had in fact been given to the contractors, objected to the admissibility in evidence of the sheet of borings and other communications between the engineer and the contractors, on the ground that the rights and obligations of the parties were contained in the written contract, and that the prices scheduled to the contract could not be affected by the alleged fact (which was denied) that the soil or the depth of the work proved to be of an unexpected character. The objections of the company having been reserved till the close of the contractor's case, which lasted sixty-seven days, counsel for the company were then heard, and the arbitrator, without calling on the counsel for the contractors, on Jan. 9, 1886, delivered a written judgment overruling the objections, and stating, among other things, that he admitted the evidence in question as illustrating and identifying the subject-matter of the contract.

Sir H. James, Q.C., Pollard, K. Digby and St. John Mildmay for the appellants.

Five classes of evidence were objected to by the appellants and counsel during the course of the argument before their Lordships handed in a paper specifying these classes which were: (i) evidence as to representations made verbally and in writing, and by the borings before the signing of the contract; (ii) evidence as to the nature of the soil; (iii) evidence as to the soil being different from that which could be inferred from the drawings, specifications and schedule; (iv) evidence as to the extra depth of foundations; (v) evidence as to the fair price to be paid for excavation, brickwork, etc.

The Attorney-General (Sir Richard Webster, Q.C.), Fletcher Moulton, Q.C., Cripps and Roger Wallace for the respondents.

During the course of the argument by counsel for the respondents,

LORD HALSBURY, L.C.—Subject to any further argument which may be addressed to them by the learned counsel for the respondents, their Lordships have no doubt that they have ample jurisdiction to give leave to revoke a submission to arbitration, not only on a question of the jurisdiction of the arbitrator, but also if they have reasonable grounds for thinking that he is going wrong in point of law.

Their Lordships took time for consideration.

Aug. 5, 1887. The opinion of the House was read by

LORD HALSBURY, L.C.—For very obvious reasons their Lordships do not desire to say anything which may prejudice either party in any contention before the arbitrator, but they are of opinion that the arbitrator should state, as part of and on the face of his award, all the purposes for which he has received, and the effect, if any, which he has given to, the five different classes of evidence specified in the paper handed in to their Lordships by counsel for the appellants. If, therefore, the respondents will consent to an order to this effect, the rule herein to be

- A** discharged without costs on either side. If such consent be not given, the rule for leave to revoke the submissions will be made absolute, and this case will be in the paper on Tuesday morning for the purpose of giving effect to their Lordships' judgment. The parties quite understand that the statement will appear on the face of the award, and it will be a Special Case under the Common Law Procedure Act, 1854, where power is given by s. 5 [repealed] to state part of the award
- B** in the form of a Special Case. The parties quite understand that otherwise the leave to revoke the submission in this arbitration will be made absolute.

Aug. 9, 1887. The counsel for the parties intimated their consent.

Order accordingly.

Solicitors: *Freshfields & Williams; Mackrell, Maton & Godlee.*

C [Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

D

Re WENMOTH'S ESTATE. WENMOTH v. WENMOTH

[CHANCERY DIVISION (Chitty, J.), November 8, 9, 1887]

E [Reported 37 Ch.D. 266; 57 L.J.Ch. 649; 57 L.T. 709;
36 W.R. 409; 4 T.L.R. 74]

Will—Class gift—Ascertainment of class—Gift of income to children on attaining certain age—Inclusion of children born after period of distribution.

- F** The rule of convenience that, where there is a bequest of a corpus of property to children as a class payable on their attaining a certain age, the period of distribution is the period of ascertainment of the class, thus excluding children born after the period of distribution, does not apply to a bequest of income on similar terms, and any child who at any time attains the age of twenty-one years will be entitled to a share of the income.

- G** A testator who had a son and a daughter gave his residuary estate to trustees upon trust to pay an annuity to his daughter and then to pay and apply the surplus income unto and equally between his grandchildren on their respectively attaining the age of twenty-one years during their respective lives, share and share alike. In the event of a grandchild dying and leaving issue, his share was to be divided among his children who should attain the age of twenty-one years or on marriage in the case of a daughter. On the death of the last surviving grandchild the residuary estate was to be sold and converted and held on certain trusts. It was further provided that any grandchild's share of the income should be invested during that grandchild's minority and should form part of the trust fund. The trustees were also empowered to apply all or any of the share of the income or capital of any minor for his or her maintenance, education or advancement. The testator's daughter had no living children
- H** but his son had eight. These children fell into three categories: (i) those born in the testator's lifetime; (ii) those born after the testator's death and before the eldest grandchild attained the age of twenty-one; and (iii) those born after the eldest grandchild attained the age of twenty-one. Only three of the grandchildren had attained the age of twenty-one.

I **Held:** applying the principle stated above, the income must be divided into eighths since all of the eight living grandchildren were entitled to a share therein; the three grandchildren who had attained the age of twenty-one were each entitled to receive their one-eighth share and the remaining five-eighths

was to be applied by the trustees for the maintenance of the five children under the age of twenty-one under the power given to the trustees in the will. A

Notes. Distinguished: *Re Powell, Crosland v. Holliday*, [1898] 1 Ch. 227. Referred to: *Willerton v. Stocks*, [1892] W.N. 29; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322.

As to gifts on attaining a specified age, see 39 HALSBURY'S LAWS (3rd Edn.) 1037 et seq.; and for cases see 44 DIGEST 768 et seq. B

Cases referred to:

- (1) *Elliott v. Elliott* (1841), 12 Sim. 276; 10 L.J.Ch. 363; 59 E.R. 1137; 44 Digest 567, 3851.
- (2) *Re Coppard's Estate, Howlett v. Hodson* (1887), 35 Ch.D. 350; 56 L.J.Ch. 606; 56 L.T. 359; 35 W.R. 473; 44 Digest 568, 3856.
- (3) *Mogg v. Mogg* (1815), 1 Mer. 654; 35 E.R. 811; 44 Digest 777, 6350. C
- (4) *Pearks v. Moseley* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 44 Digest 760, 6196.

Also referred to in argument:

- Hanson v. Graham* (1801), 6 Ves. 239; 31 E.R. 1030; 44 Digest 435, 2617.
- Andrews v. Partington* (1791), 3 Bro.C.C. 401; 29 E.R. 610, L.C.; 44 Digest 768, 6266. D
- Picken v. Matthews* (1878), 10 Ch.D. 264; 39 L.T. 531; sub nom. *Re Hoof, Picken v. Matthews*, 48 L.J.Ch. 150; 37 Digest 58, 24.
- Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 44 Digest 1056, 9092.
- Whitbread v. St. John* (1804), 10 Ves. 152; 32 E.R. 802; L.C.; 44 Digest 768, 6268.
- Re Sayer's Trusts* (1868), L.R. 6 Eq. 319; 36 L.J.Ch. 350; 18 L.T. 787; 37 Digest 93, 294. E
- Re Emmet's Estate, Emmet v. Emmet* (1880), 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 28 W.R. 401, C.A.; 44 Digest 769, 6282.
- Eddowes v. Eddowes* (1862), 30 Beav. 603; 54 E.R. 1024; 44 Digest 775, 6321.
- Gillman v. Daunt* (1856), 3 K. & J. 48; 69 E.R. 1017; 44 Digest 770, 6292. F
- Re Smith* (1862), 2 John. & H. 594; 70 E.R. 1196; 44 Digest 385, 2200.
- Dias v. De Livera* (1879), 5 App. Cas. 123, P.C.; 44 Digest 181, 104i.
- Re Bedson's Trusts* (1884), 25 Ch.D. 458; 53 L.J.Ch. 308; 50 L.T. 120; 32 W.R. 410; affirmed (1885), 28 Ch.D. 523; 54 L.J.Ch. 644; 52 L.T. 554; 33 W.R. 386, C.A.; 44 Digest 531, 3480.

Originating Summons taken out by Thomas Wenmoth the younger, the surviving trustee of the will of William Wenmoth, asking for the determination of the following questions arising from the administration of the estate of the testator under R.S.C., Ord. 55, r. 3 (a), without an administration of the estate of the testator: (i) whether the trusts of the testator's will for the benefit of his grandchildren (children of his son Joseph Wenmoth and his daughter Eliza McKeever) were confined to such grandchildren as were living at his death or extended (a) to grandchildren born after his death and before the eldest grandchild attained the age of twenty-one years or (b) to all grandchildren whenever born; (ii) whether the grandchildren of the testator who, for the time being had attained the age of twenty-one years, were entitled to the whole of the net income of the testator's estate (subject to Eliza McKeever's annuity), and if not to what part of such income they were entitled, and whether the plaintiff could apply any and what part of such income in or towards the maintenance, education, or otherwise for the benefit of such of the testator's grandchildren as for the time being were under the age of twenty-one years; (iii) whether and to what extent the trusts of the will for the benefit of the great-grandchildren of the testator; (a) concerning the income of his residuary estate before the death of his last surviving grandchild; and (b) concerning the capital thereof after the death of such last surviving grandchild were void for remoteness; (iv) how and out of what fund the costs of this application ought to be provided for. G
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- A William Wenmoth, by his will dated April 19, 1870, appointed as executors and trustees his brother Thomas Wenmoth and his daughter Eliza McKeever, and Thomas Wenmoth the younger. After some pecuniary and specific bequests, the testator gave all the residue of his property to his trustees upon trust to pay to Eliza McKeever during the joint lives of herself and her husband John McKeever the yearly sum of £26, and after the decease of her husband to pay to her the
- B yearly sum of £60 during the remainder of her life. The testator then directed his trustees during the life of his daughter to pay and apply the surplus of the rents, dividends, interest, and annual proceeds, and after her decease the whole of such rents, dividends, interest, and annual proceeds, unto and equally between his grandchildren (being the children of his son Joseph and his daughter Eliza), on their respectively attaining the age of twenty-one years, during their respective
- C lives, share and share alike.

- He then directed that from and after the decease of any of his grandchildren (save and except the last survivor of them) who should die leaving issue, his trustees should pay and apply the share of such income and annual proceeds to such grandchild so dying unto and equally between his or her children (if any) who, being a son or sons, should attain the age of twenty-one years, or, being a daughter
- D or daughters, should attain that age or marry; and if there should be only one such child, then the whole to be paid to that one child. After the decease of the last survivor of his grandchildren the testator directed his residuary estate to be converted into money, and declared the following trusts of the net proceeds of such conversion: Upon trust to pay and divide the same unto and equally between such of his great-grandchildren as should be living at the decease of the survivor of the
- E children of his son Joseph and his daughter Eliza McKeever, and should attain the age of twenty-one years, and if more than one as tenants in common. And the testator declared that the share of any grandchild of his in the rents, dividends, interest, and annual proceeds of his real and leasehold estate should be invested by his trustees during the minority of any such grandchild, and should form part of his trust fund. Another provision of the will empowered the trustees to apply all
- F or any of the share of the income or capital of any minor for his or her maintenance, education, or advancement. The testator died on Feb. 15, 1871. The testator's brother Thomas Wenmoth died, and his daughter Eliza McKeever never acted as an executor or trustee. Eliza McKeever had two children only, both of whom died in infancy in the testator's lifetime. The testator's son, Joseph Wenmoth, had eleven children, five of whom were born during the testator's lifetime, and
- G were all now living; four were born after the testator's death, and two only of them were now living; and two were born after the eldest child attained twenty-one, one only of them being now living. On Mar. 25, 1883, the eldest child of Joseph Wenmoth attained the age of twenty-one years.

Alfred Whitaker for the plaintiff.

- H *Samuel Stephens* for the defendants, the grandchildren living at the testator's death.

Dunham for the defendants, the grandchildren living at the time when the first grandchild attained twenty-one.

Jason Smith for the defendants, the grandchildren born after the first grandchild attained twenty-one.

Ashton Cross for Eliza McKeever and the next-of-kin.

- I **CHITTY, J.**, stated the facts and continued: That this is an immediate gift of personal estate to the children of living persons is free from doubt, and that it is to those who attain twenty-one years of age is also free from doubt. The rule is that the class remains open until the period of distribution, and then closes. It is a condition that each child shall attain the age of twenty-one years. That is established by decisions that cannot be impugned. The court finds two inconsistent intentions together: First, that all children shall take; and secondly, that they shall take at twenty-one years of age. The established rule, excluding as it does

from the class of children to be benefited, any child who shall be born after the period of distribution, has had its origin in an attempt of the court to reconcile the difficulty that under such a bequest the testator has given two inconsistent directions—namely, that the whole class shall take and that the fund shall be distributed among them at a period when the whole class cannot possibly be ascertained. The court has, therefore, held that the period of distribution is the period of ascertainment of the class. The rule has been called a rule of convenience, but as to this I would simply remark that it is a rule which is very convenient for the eldest children and very inconvenient for the younger ones.

That being the rule as regards the corpus of a fund, has the rule any application to the income thereof? As regards the income there is nothing, it seems to me, which requires the application of the rule. Where, as in the will now before me, the distribution is of income and not of corpus, the difficulty does not arise. In the case of the distribution of corpus the trustees can never ascertain what is the aliquot share of a member of the class until the class is closed; but in the case of distribution of income the trustees can distribute periodically. There is no reason therefore why the rule should be applied to the case of income.

Here the gift is as follows. The testator directed his trustees, during the life of his daughter, to pay and apply the surplus of the rents, dividends, interest, and annual proceeds, and after her decease the whole of such rents, dividends, and annual proceeds, unto and equally between his grandchildren (being the children of his son Joseph, and his daughter Eliza), on their respectively attaining the age of twenty-one years, during their respective lives, share and share alike. He then directed that from and after the decease of any of his grandchildren (save and except the last survivor of them) who should die leaving issue, his trustees should pay and apply the share of such income and annual proceeds of such grandchild so dying unto and equally between his or her children (if any) who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry; and if there should be only one such child, then the whole to be paid to that one child. The gift is contingent on the grandchildren attaining twenty-one, and the power of maintenance which follows does not vest the shares, as the presumptive shares of income go into the aggregate trust fund.

It was argued that the case was governed by *Elliott v. Elliott* (1) and *Re Coppard's Estate, Howlett v. Hodson* (2). It seems to me that there is no difficulty upon principle in holding that, in the case of a bequest of income among a class of children to be paid on their attaining twenty-one years, the date of the first attaining twenty-one years of age is not the date of ascertainment of the class; and that any child at any time attaining the age of twenty-one years will be entitled to a share of the income. I am also of opinion that *Mogg v. Mogg* (3) is an authority in support of the view which I have taken, while *Elliott v. Elliott* (1), and *Re Coppard's Estate, Howlett v. Hodson* (2), can be explained on divers grounds. They also were decisions upon ambiguous bequests threatened by the rule of perpetuities, and must, therefore, be ranked in the class of cases where the court thinks it more reasonable to effectuate the intention of a testator than to destroy it by applying the law of remoteness.

In *Pearks v. Moseley* (4), LORD SELBORNE showed how the argument respecting consequent remoteness is to be treated. His Lordship said (5 App. Cas. at p. 719):

“The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not be sometimes given to the consideration that it is better to effectuate

A than to destroy the intention; but I do say that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

B In *Elliott v. Elliott* (1) and *Re Coppard's Estate*, *Howlett v. Hodson* (2) the rule as to remoteness was made a ratio decidendi by the judges. Those cases do not decide the present point.

C With regard to the power of maintenance, the trustees are authorised to apply all or any of the share of the income or capital of any minor for his or her maintenance, education, or advancement. The objects of this power are the grandchildren of the testator. The grandchildren represented by counsel for the defendants are objects of the power, and take an interest under that trust. It is not, in my opinion, prudent to decide any ulterior questions, and the present declaration must be limited to existing circumstances. I hold, therefore, that in events which have happened, and under the existing circumstances, the income must be divided in eighths, three of such eighths being payable to the persons who have attained twenty-one years of age. The remaining five-eighths will be applicable to maintenance.

D HIS LORDSHIP made a declaration that, on the true construction of the testator's will, and in the events which had happened, and under the present circumstances of the case, the income of the trust estate, subject to Eliza McKeever's annuity, was divisible into eighths, one of which was payable to each of the three eldest grandchildren (those three having attained the age of twenty-one years), and that the other five-eighths were subject to the power of maintenance, education, or advancement contained in the will (the five infant grandchildren being objects of such power of maintenance, education, or advancement), and that, subject to the exercise of such power of maintenance, education, or advancement, the surplus of the remaining five-eighths was to be invested as directed by the will. The rest of the summons was ordered to stand over, with liberty to apply. The costs of all parties to be taxed, and those of the trustee as between solicitor and client; as to F the other parties as between party and party; and such costs to be paid by the trustee out of the estate.

Solicitors: *C. G. Hobbs; Wolferstan & Avery.*

[*Reported by A. C. SIM, Esq., Barrister-at-Law.*]

ARMSTRONG v. MILBURN

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), May 7, 1886]

[Reported 54 L.T. 723; 2 T.L.R. 615]

Limitation of Action—Negligence—Solicitor—Accrual of action—No fraudulent concealment.

The plaintiff brought an action against the defendant, who had been her solicitor, for damages for professional negligence. The defendant pleaded that, even if he had been negligent, six years had passed since the negligence and that the plaintiff's claim was statute-barred.

Held: in the absence of any fraudulent concealment on the part of the defendant, the Statute of Limitations had run against the plaintiff, and her claim must fail.

Notes. The Statute of Limitations (1623), s. 3, has been repealed and replaced by the Limitation Act, 1939, s. 26 (13 HALSBURY'S STATUTES (2nd Edn.) 1188). The Limitation Act, 1963, extends in certain cases the time limit for bringing legal proceedings where damages for personal injuries or for death are claimed.

Followed: *Osgood v. Sutherland* (1914), 111 L.T. 529. Not followed: *Legh v. Legh*, [1930] All E.R.Rep. 565; *Lynn v. Bamber*, [1930] 2 K.B. 72.

As to the limitation period in negligence cases, see 24 HALSBURY'S LAWS (3rd Edn.) 223, 224; and for cases see 32 DIGEST 342-343.

Case referred to in argument:

Gibbs v. Guild (1882), 9 Q.B.D. 59; 51 L.J.Q.B. 313; 46 L.T. 248; 30 W.R. 591, C.A.; 32 Digest 526, 1819.

Appeal from an order of the Divisional Court (MATHEW and A. L. SMITH, JJ.), setting aside a judgment in favour of the plaintiff in an action brought by the plaintiff against the defendant for damages for the defendant's professional negligence as her solicitor.

Henn Collins, Q.C., and *Mattinson* for the plaintiff.

Gully, Q.C., and *Henry* for the defendant.

LORD ESHER, M.R.—I am of opinion that the plaintiff has failed to make out any cause of action, and that this appeal must be dismissed. On the facts proved at the trial I can see no evidence of any negligence whatever on the part of the defendant, but, even if there had been negligence, the plaintiff would still fail, for the Statute of Limitations had run as against her claim, and it is clear that she could have no answer to the defence of the statute unless fraudulent concealment on the part of the defendant were proved. I cannot find any evidence of fraud, or, indeed, of any concealment at all. On this latter ground, therefore, as well as upon the ground that there is no evidence of negligence, I am of opinion that the defendant is entitled to judgment.

BOWEN, L.J.—I am of the same opinion. It is clear that concealment without fraud, if it had been proved, would afford no answer to the defence of the Statute of Limitations, and I agree that there is no evidence of fraud. I can see no cause of action on any ground.

FRY, L.J.—I am of the same opinion. There could be no possible answer to the defence of the statute without proof of fraudulent concealment, and I think there is no pretence for charging the defendant with any fraud whatever. I also think there is no evidence of negligence.

Appeal dismissed.

Solicitors: *Specchly, Mumford & Landon* for *Paisley & Falcon*, Workington; *Wood & Wootton* for *T. Milburn*, Workington.

[Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.]

A

HARDY AND OTHERS v. FOTHERGILL

[House of Lords (Lord Halsbury, L.C., the Earl of Selborne, Lord FitzGerald, Lord Herschell and Lord Macnaghten), April 23, June 12, 1888]

B

[Reported 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603]

Bankruptcy—Proof—Debts provable—Contingent liability—Agreement by assignee of lease to indemnify assignor against breach of covenant.

C

By the Bankruptcy Act, 1869, s. 31: "... 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

D

The assignee of a lease for a term of years covenanted with the lessees, the assignors, to indemnify them against damages for breach of a covenant to yield up the demised buildings in good repair at the end of the term. Eight years before the expiration of the term the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees did not prove in the liquidation in respect of any possible liability of the assignee upon his covenant with them, but after the expiration of the term they brought an action against him claiming to be indemnified by him in respect of damages which had been recovered against them by the lessor for breach of the covenant to yield up in good repair.

E

F

Held: a contract to indemnify against the consequence of the non-performance of such a covenant in a lease as that in question was "an obligation, or possibility of an obligation to pay money or money's worth," and also "an engagement to pay, or capable of resulting in the payment of, money or money's worth" on the breach of the covenant, within s. 31 of the Act of 1869; there was no reason to take the view that the liability under such a contract of indemnity was incapable of being fairly estimated; and, therefore, the liability was provable in the assignee's bankruptcy, and his discharge under s. 49 of the Act operated to release him from it.

G

Notes. The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883, itself largely repealed by the Bankruptcy Act, 1914, the present statute: see 2 HALSBURY'S STATUTES (2nd Edn.) 321. The relevant part of s. 31 of the Act of 1869 is re-enacted in s. 30 (8) of the Act of 1914.

II

Followed: *Flint v. Barnard* (1888), 22 Q.B.D. 90; *Wolmerhausen v. Gullick*, [1891-4] All E.R.Rep. 740. Considered: *Re Midland Coal, Coke and Iron Co., Craig's Claim*, [1895] 1 Ch. 267. Distinguished: *Re New Oriental Bank Corpn., Ex parte Hong Kong Land Investment and Agency Co., Ltd.*, [1895-9] All E.R.Rep. 910. Considered: *Kerr v. Kerr*, [1895-9] All E.R.Rep. 865. Followed: *Re Perkins, Poyser v. Beyfus*, [1895-9] All E.R.Rep. 230. Considered: *Re McMahon, Fuller v. McMahon*, [1900] 1 Ch. 173. Distinguished: *Re Reis, Ex parte Clough*, [1904] 2 K.B. 769. Considered: *Victor v. Victor*, [1911-13] All E.R.Rep. 959. Applied: *James Smith & Sons (Norwood), Ltd. v. Goodman*, [1935] All E.R.Rep. 697. Referred to: *Barnett v. King* (1890), 63 L.T. 501; *Re Panther Lead Co.*, [1896] 1 Ch. 978; *Baker v. Lloyd's Bank*, [1920] All E.R.Rep. 262; *Re House Property and Investment Co.*, [1953] 2 All E.R. 1525.

I

As to debts provable in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464-480; **A** and for cases see 4 DIGEST (Repl.) 276 et seq.

Cases referred to:

- (1) *Ex parte Groome* (1744), 1 Atk. 115; 9 Mod. Rep. at p. 471; 26 E.R. 75; 4 Digest (Repl.) 290, 2647.
- (2) *Ex parte Barker* (1803), 9 Ves. 110; 32 E.R. 543; 4 Digest (Repl.) 307, 2779.
- (3) *Re Hide, Ex parte Llynvi Coal and Iron Co.* (1871), 7 Ch. App. 28; 41 B L.J.Bey. 5; 25 L.T. 609; 20 W.R. 105, L.J.J.; 4 Digest (Repl.) 287, 2625.
- (4) *Re Hoyle, Ex parte Waters* (1873), 8 Ch. App. 562; 28 L.T. 757; 21 W.R. 554, L.J.; 4 Digest (Repl.) 287, 2627.
- (5) *Re Batey, Ex parte Neale* (1880), 14 Ch.D. 579; 43 L.T. 264; 28 W.R. 875, C.A.; 4 Digest (Repl.) 325, 2954.
- (6) *Brett v. Jackson* (1869), L.R. 4 C.P. 259; 38 L.J.C.P. 139; 19 L.T. 790; 17 C W.R. 532; 4 Digest (Repl.) 325, 2956.
- (7) *Dodson v. Sammell* (1861), 1 Drew. & Sm. 575; 30 L.J.Ch. 799; 25 J.P. 629; 8 Jur.N.S. 584; 9 W.R. 887; 62 E.R. 498; 24 Digest (Repl.) 662, 6501.

Also referred to in argument:

- Williams v. Earle* (1868), L.R. 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231; 19 D L.T. 238; 33 J.P. 86; 16 W.R. 1041; 31 Digest (Repl.) 410, 5399.
- Mudge v. Rowan* (1868), L.R. 3 Exch. 85; 37 L.J.Ex. 79; 17 L.T. 576; 16 W.R. 403; 4 Digest (Repl.) 324, 2948.
- Breslauer v. Brown* (1878), 3 App. Cas. 672; 47 L.J.Q.B. 729; 39 L.T. 67; 26 W.R. 536, H.L.; 4 Digest (Repl.) 11, 2.
- Re Linton, Linton v. Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 33 W.R. 714; 49 J.P. 597; 2 Morr. 179, C.A.; 4 Digest (Repl.) 329, 2992.
- Collyer v. Isaacs* (1881), 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 4 Digest (Repl.) 339, 3080.
- Robinson v. Ommanney* (1883), 23 Ch.D. 285; 52 L.J.Ch. 440; 49 L.T. 19; 31 W.R. 525, C.A.; 4 Digest (Repl.) 338, 3079.
- Re Blakemore, Ex parte Blakemore* (1877), 5 Ch.D. 372; 46 L.J.Bey. 118; 36 E L.T. 783; 25 W.R. 488, C.A.; 4 Digest (Repl.) 326, 2958.
- Re Batey, Ex parte Neal* (1880), 14 Ch.D. 579; 43 L.T. 264; 28 W.R. 875, C.A.; 4 Digest (Repl.) 325, 2954.

Appeal from a decision of the Court of Appeal (BOWEN and FRY, L.J.J., LORD ESHER, M.R., dissenting), reported sub nom. *Morgan v. Hardy*, 18 Q.B.D. 646, reversing a decision of DENMAN, J., at the trial of the action.

By an indenture of Jan. 9, 1833, lessors demised certain land and buildings to the appellants' predecessor in title for a term of fifty years, the lessees covenanting to keep the buildings in good repair and to yield them up in good repair at the end of the term. In July, 1873, the appellants assigned the lease of 1833 to Fothergill, the respondent, for the residue of the term, and the assignee covenanted to perform all the covenants in the lease of 1833 and to indemnify the appellants in respect of any breach thereof. In June, 1875, Fothergill filed a petition in bankruptcy, his affairs were liquidated by arrangement, and in October, 1875, he obtained his discharge. In February, 1885, the lessors brought an action against the appellants for breach of the covenant in the lease and recovered £1,680 damages, and the appellants now claimed an indemnity from Fothergill. He disputed his liability on the ground that the claim was barred by the discharge in bankruptcy. At the trial at the Swansea Assizes, DENMAN, J., gave judgment against him. This judgment was reversed by the Court of Appeal.

Sir Henry James, Q.C., Lunley Smith, Q.C., and T. Terrell for the appellants.
McIntyre, Q.C., and C. Higgins, Q.C. (Sir Richard Webster, Q.C., with them), for the respondent.

Their Lordships took time for consideration.

June 12, 1888. The following opinions were read.

- A LORD HALSBURY, L.C.**—The question in this case seems to me to depend entirely upon the true construction of s. 31 of the Bankruptcy Act, 1869, but before proceeding to discuss the particular words now under construction it is not unimportant to notice the gradual steps taken by the legislature to extend the application of the bankruptcy law to future and contingent debts. Mr. EDEN, in a treatise published in 1826, points out that one of the most important and most valuable alterations effected by the 6 Geo. 4, c. 16 [Bankrupts Act, 1825], was the provision which it contained with respect to proof of contingent debts. Prior to that Act contingent demands could not be proved under a commission taken out before the contingencies upon which they were made payable had taken effect. Nearly eighty years before that time LORD HARDWICKE expressed a wish (in *Ex parte Groome* (1), 1 Atk. at p. 120), in which LORD ELDON afterwards concurred (*Ex parte Barker* (2), 9 Ves. at p. 112), “that some gentleman might think of a clause which might remedy and settle the matter for the future.” From that time till the year 1869, I think the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof.
- D** The question arises in this case in respect of a lease and of a stipulation in the lease to leave certain premises at the end of the term in good and tenantable repair, and the question is whether the liability of Mr. Fothergill, whose liquidation took place eight years before the lease had come to an end, is barred by that liquidation, equivalent in this respect to bankruptcy, or continued notwithstanding that liquidation, so as to make him liable to be sued for a breach of the covenant. That
- E** question in turn depends upon whether it is a liability which in the language of the statute can be fairly estimated. With all respect for the Master of the Rolls, I think the principle running through his judgment goes much further than the decision of this particular case, and rather suggests that no contingent liability is assessable at all. It is true that there are many contingencies which are practically, as matters of business, valued every day. The risk of a voyage, the duration of a life, the calculation of averages, are fixed by actuaries and others. But if you were to take a single life or the contingency of a single voyage, I think it might as reasonably be said that you could not fairly estimate the value of a contract dependent upon a life or a voyage. It is also true that such liabilities as are now in question are not sufficiently common, or perhaps I should say, are not so much in the habit of being estimated. But what is there in the nature of the thing
- G** which renders it less capable of being estimated? The word “value” itself is one upon which subtle distinctions might be taken; but the moment you introduce contingency as one of the elements which is to enter into the question of value it is apparent that you introduce the element of conjecture and opinion, and get out of the region of actual fact. I do not, therefore, see that, if any contingent liability can be valued, why this cannot be valued, and the introduction of the adverb
- H** “fairly,” giving a jurisdiction to the court to decide whether in particular cases a liability could not be fairly valued, seems to me to involve the principle that all liabilities, subject to the express exception enacted by the statute, were intended to be included, but that in the one case where the court should adjudicate that the liability was such that at that time it could not be fairly estimated, then, and then only, should the debt be deemed to be not provable. It seems to me that the
- I** construction contended for by the appellants strikes this provision out of the statute, which could only be necessary if the legislature had thought that the previous words had comprehended all conceivable liabilities. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and I move your Lordships accordingly.

THE EARL OF SELBORNE.—The question on this appeal is whether the liability of Mr. Fothergill, the respondent, upon a certain covenant of indemnity contained in an indenture dated July 19, 1873, was discharged by his statutory

liquidation under the Bankruptcy Act, 1869. If his contingent liability under the covenant in question was provable in the liquidation (as it was, if it would have been provable in bankruptcy), it was put an end to by the discharge; if not, it is still subsisting, and the appellants are entitled to recover over from the respondent in this action the £1,680 damages which they have been adjudged to pay. DENMAN, J., before whom the action was tried, and the Master of the Rolls in the Court of Appeal, held that the liability in question was not provable in bankruptcy under the Act of 1869. But the majority of the learned judges in the Court of Appeal thought otherwise, and gave judgment for the respondent.

The question is one of general importance, and it is singular that it is not covered by authority. Some authorities were cited at your Lordships' Bar, and some were mentioned in the opinions of BOWEN and FRY, L.JJ., as supporting the conclusion at which they arrived. But all those authorities are, in my opinion, distinguishable from the present case; and the force of the general language of JAMES and MELLISH, L.JJ., in *Re Hide, Ex parte Llynvi Coal and Iron Co.* (3), on which BOWEN, L.J., placed considerable reliance, is (as it seems to me) neutralised by the concluding observations of MELLISH, L.J., himself in *Re Hoyle, Ex parte Waters* (4) (8 Ch. App. at p. 568).

Before saying more about these authorities, I think it right to consider the question as it would stand independently of them. It is not, I conceive, for your Lordships, or for any other court, to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends. For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilities contingent at the time of bankruptcy, much might perhaps be said. It might be a hardship upon the creditors, to whom debts were then due, that a merely possible future liability, which might never have matured into a debt at all, should be valued and admitted to proof and to participation in dividends. In most cases, if any substantial dividend were paid, this would be a benefit to the person interested in the performance of the contract under which such liability would arise, if the contingency happened; but there might also be cases in which it would be a hardship upon him to be compelled to prove such a claim, so valued, at a time when the estate of the bankrupt might be inadequate to pay any substantial dividend, instead of waiting for the occurrence of the contingency (if it ever should occur), and then taking his legal remedies against such property as the debtor might at that time possess, whether previously bankrupt or not. But the legislature, for whatever reason, has gone at least far enough to exclude from the consideration of the present question a priori arguments of that kind.

In interpreting the statute of 1869, it is important to bear in mind the progressive steps taken in that direction. The Bankruptcy Law Consolidation Act, 1849 (s. 177), made "debts payable upon a contingency which should not have happened" at the date of the bankruptcy provable, at a value to be set upon them by the court, with a right to participation in dividends upon the amount so proved. By another section (178) it dealt differently with a "liability to pay money upon a contingency which should not have happened," making this the subject of a claim, convertible into a proof in the event of the contingency happening before the claim was expunged (as it might be, after the lapse of six months, on the application of the assignees, if the court should so think fit); and in that event only. The Bankruptcy Act, 1861, besides making "demands in the nature of damages," to which the bankrupt was liable under any contract or promise at the time of adjudication, provable (though then unliquidated), by s. 154 authorised the person entitled to the benefit of any contract or promise by the bankrupt "to pay premiums upon any policy of assurance, or any other sum of money, yearly or otherwise, or to repay or indemnify any person against such payments," to apply to the court to set a value upon his interest in the bankrupt's liability under such contract or promise, and to prove for such value, and receive dividends on

A the proof. Here it is to be observed that, in the case of a contract to repay or indemnify, if the burden were cast upon the party to be indemnified by reason of the failure of some third person primarily liable to make future payments (nothing being due at the time of proof), exactly the same difficulties which MELLISH, L.J., in *Ex parte Waters* (4) pointed out as standing in the way of valuation in a case more nearly resembling the present would occur. His Lordship said:

B "No one could properly estimate whether an assignee would at any future period commit a breach, or, if he did, whether he would pay it himself."

Nevertheless, the legislature thought fit to enact, in 1861, that such a contingent liability, under a mere contract to indemnify, not only might, but should be, valued and admitted to proof.

C The proof clauses of the Act of 1869, under which the present question arises, are not confined (as those of the former Acts were) to certain specified kinds of contingent debts and liabilities, but they are expressed in general and comprehensive terms, so as (in the language quoted by BOWEN, L.J., from the judgment of the lord justices in *Ex parte Llynvi Coal and Iron Co.* (3) to indicate, *prima facie* at all events, that "it was the object of the legislature to discharge the bankrupt from every possible liability." With a saving, not material for the present purpose,

"all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication"

are to be deemed debts provable in bankruptcy [Bankruptcy Act, 1914, s. 30 (3)], and the word "liability" is, for the purposes of the Act, defined as including

E "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy; and, generally, any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth; whether such payment be as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

[See s. 30 (8) (b), (c) of Act of 1914.] There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc., which, on a fair interpretation of these words, ought to be excluded, as having a different object from the payment of money in any contingency; although, if they were broken, a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or order for specific performance would be the most proper remedy. But the present is not a case of that kind. A contract to indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term, is, to all intents and purposes, "an obligation, or possibility of an obligation, to pay money or money's worth" on the breach of any such covenant; it is "an engagement to pay, or capable of resulting in the payment of, money or money's worth," if the contingency against which the indemnity is provided should occur. Unless excluded (according to the view of the Master of the Rolls) on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this particular liability is not capable of being fairly valued, it is, and must be, included in those words.

What, then, are the provisions of the statute as to valuation? It has been seen that liabilities of which the value is not capable of being ascertained by fixed rules, but which are "assessable only by a jury, or as matter of opinion," are

expressly included. I cannot but think that it would be possible for a jury, or for an arbitrator, to set some value upon a contract of indemnity of this nature, which, beyond all doubt, is valuable to the person entitled to the benefit of it. Suppose, for example, that no bankruptcy had occurred, and that the assignee of the lease, wishing to get rid of it, negotiated with the assignor for a release from this covenant of indemnity, and that the assignor agreed to grant such a release for a price to be fixed by arbitration. I cannot myself doubt that an arbitrator, looking into the nature and actual condition of the demised premises and other material circumstances, might have set some estimated value upon the covenant of indemnity. If an arbitrator might have done so, why not the trustee, or the court, or a jury, under the provision for that purpose contained in s. 31 of the Act of 1869? Why should the difficulty be more insuperable in this case than under such a contract of indemnity as that already mentioned, for which provision was expressly made by s. 154 of the Act of 1861?

The provisions of the Act of 1869, as to the mode of estimating value, are that it is to be done (i) according to the rules of the court as far as applicable; (ii) when those rules are not applicable according to the discretion of the trustee, subject to appeal; and (iii) in case of appeal by the judge (with consent) or a jury, unless the court thinks that "the value of the debt or liability is incapable of being fairly estimated, in which case the court may make an order to that effect, and, upon such order being made, such debt or liability shall, for the purposes of the Act, be deemed to be a debt or liability not provable in bankruptcy" [s. 30 (6) of Act of 1914]. The word "fairly" and the mention of debt (i.e., a debt "not bearing a certain value") in this context are important. I cannot but think that the language of the section would have been different if the legislature had not intended all debts and liabilities coming within the terms of the general definition of the word "liability" to be provable, unless, on consideration of the nature and circumstances of any particular case, the court should think it "unfair" either to the other creditors or to the claimant to attempt to place any value upon them for the purpose of proof. A substantial value might be unfair (if objected to and appealed against) to other creditors; a nominal or very low value might be unfair (if objected to and appealed against) to the claimant. If nobody objected it might, in either case, pass.

According to what seems to be the sound interpretation of the whole clause, the legislature intended that question in all disputed cases to be determined in the course of the proceedings in bankruptcy, and not left open for the determination of other courts after the bankrupt's discharge; and in undisputed cases, or where no claim might be made to prove, all liabilities within the general definition were to be and to remain in the category of provable debts. The authorities (except the dictum of MELLISH, L.J., in *Ex parte Waters* (4)), are all in this direction, though I cannot say that I think the present case strictly governed by them. If in *Ex parte Waters* (4) MELLISH, L.J., meant to intimate an opinion that the liability of a lessee who had assigned his lease, remaining bound to the lessor under his covenants in the lease, would never under the Act of 1869 be provable in bankruptcy or put an end to by the discharge of the bankrupt, I can only say that such an expression of opinion was extra-judicial, and that I am not able myself to find sufficient ground for it in the words of the statute. It is, indeed, possible that in such a case as the present, or in other cases to which fixed rules of valuation may be inapplicable, it might be proper for the court having jurisdiction in bankruptcy, after considering the material facts and circumstances known or capable of being ascertained, and weighing the magnitude of the interest on the one side against the difficulty on the other of measuring those elements of contingency on which the liability might depend by any calculation of probabilities, to make an order to the effect that the liability was "incapable of being fairly valued." But in the present case this has not been done. My conclusion is, that the order appealed from ought to be affirmed.

A **LORD FITZGERALD.**—I agree entirely with the noble and learned Earl, and my excuse for adding anything is the great importance of the principle involved in the decision.

The question arises on the construction of certain provisions of the Act of 1869, and seems to me to be whether the contingent liability of Mr. Fothergill to the appellants constituted a claim capable of proof under the liquidation. This is the only question. The bankruptcy law as it now exists seems to depend upon the great principle of equity—the doctrine of equality—that is to say, equality among the creditors in the common shipwreck, and justice and humanity to the debtor if he gives up all his property—everything that he has—for equal distribution among his creditors, and has conformed to and has not violated the provisions of the bankruptcy law. The present condition of this branch of our law was not accomplished all at once. It proceeded tentatively, and struggled by slow degrees from the time at which it was a code to repress and punish those whom the law considered to be criminals and delinquents, until it threw off its barbarisms and became a code of equity and justice. **LORD HARDWICKE**, who expounded and advanced the true principles of the bankrupt law, is reported more than a century and a half ago to have stated a principle which may be aptly referred to on the present occasion. In *Ex parte Groome* (1) he says (1 Atk. at p. 119):

“The privilege of creditors to come in [under a bankruptcy], and bankrupts to be discharged from debts, is co-extensive and commensurate. . . .”

That great Chancellor, who did so much in the illustration of equitable principles, was not happy in the reporters who have transmitted to us his judicial decisions. **ATKYN'S** REPORTS have been styled “the flimsy notes of Mr. ATKYN'S”; but in the modern editions of his reports the cases have been examined into and verified by the records. The words which I have quoted probably are **LORD HARDWICKE'S**, and state with substantial correctness two of the main objects of the bankrupt laws—that all creditors should be entitled to come in and prove, and that the bankrupt should emerge from the bankruptcy freed from all his liabilities.

The progressive advance of the law as applicable to the question before the House, and its adaptation to existing requirements, is well illustrated by the sections of the Bankruptcy Law Consolidation Act, 1849, referred to by the noble Earl. Section 177 of that Act, which permits a claimant on the ground of a debt payable on a contingency which has not happened to apply, if he thinks fit, to the court, and authorises the court to set a value on such debt, and permit the creditor to prove for the amount, is taken from a prior Act, the Bankrupts Act, 1825, s. 56; but s. 178 of the Act of 1849, which deals with a liability to pay money on a contingency which shall not have happened, was, I think, new. Under the Act of 1869 all the property of the bankrupt then vested in or belonging to him, of every nature and kind, save property held by him in trust and certain excepted articles, and such property as he may acquire or may devolve on him during the continuance of the bankruptcy, is transferred to the trustee to be divided among the creditors in proportion to their proved debts; and when the statute comes to provide for debts and claims provable it would be difficult to string together words more comprehensive than are found in s. 31: “all debts and liabilities, present or future, certain or contingent.” If it had been rested on these words alone I should hold that the contingent liability of the respondent to the appellants came within the language and the intention of the statute; but when we reach the definition of “liability” in s. 31 (5), the interpretation seems to me to be clear of all doubt. Then there is a provision for an estimate by the trustee

“of the value of any liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.”

Having reached the conclusion that the contingent liability of the bankrupt under his covenant with the appellants was the foundation of a claim which might be estimated in the bankruptcy and its estimated value proved as a debt, then the

order of discharge under s. 49 operates as a release to the bankrupt from that contingent liability. There are circumstances in the present case which make the result an apparent hardship on the appellants, but either from ignorance of the law, or want of foresight or of proper advice, they did not take the course pointed out by s. 31, under which they might have obtained a proper estimate of the value of the liability, or on appeal have obtained the order of the court declaring the liability incapable of being fairly estimated. Your Lordships cannot, however, relieve them from the consequences of that oversight.

The progressive character of the bankruptcy statute laws in reference to such a case as is before your Lordships is well illustrated by the provisions of the Act of 1883. That statute repeals the Act of 1869, and its definition of the "property" which is made available for creditors includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising from or incident to property as so defined." The language is stronger, but not more comprehensive, than that of the Act of 1869. The Act of 1883, in dealing with the proof of claims in respect of contingent liabilities, adopts the provisions of the Act of 1869, though possibly in more vigorous language, simplifies the procedure, and adds, as to contingent claims,

"capable of resulting in the payment of money, or money's worth, whether such payment be as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or . . . as matter of opinion."

I have been unable to adopt the ratio decidendi to be deduced from the judgment of LORD ESHER, M.R., or to accept his conclusion that the claim in question was incapable of being fairly estimated. It seems to me that, proceeding on fixed principles, the only decision to be arrived at is to affirm the judgment of the Court of Appeal.

LORD HERSCHELL concurred in the opinion of the **EARL OF SELBORNE**.

LORD MACNAGHTEN.—There is much force in the observations of the Master of the Rolls, but the language of the Bankruptcy Act, 1869, is, I think, too clear to allow your Lordships to give effect to them.

The Act of 1869 was not the first attempt to release bankrupts from liability arising from contract. But for some reason or other the legislature had never succeeded before in hitting the mark. Contrasting the material sections of the Act of 1869 with previous efforts in the same direction, **MELLISH, L.J.**, says:

"It is quite plain that the object of these sections is that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into:"

Ex parte Llynvi Coal and Iron Co. (3). With one qualification that statement is, I think, perfectly correct as regards any liability capable of resulting in payment of money or money's worth. Section 31 of the Bankruptcy Act, 1869, contains one exception, and one exception only. It excepts any case in which the court on appeal thinks the value of the liability incapable of being fairly estimated, and makes an order to that effect [Bankruptcy Act, 1914, s. 30 (6)]. Such a case is conceivable, but it is one, I think, very unlikely to occur. It seems to me that, according to the true construction of the section, unless a judicial declaration has actually been made in the terms of that provision, the liability of the bankrupt under a contract, however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bankruptcy, and, therefore, a debt from which the bankrupt is released by the order of discharge. It will not do to say that

A if there had been an appeal the court would have made such an order, and, therefore, the liability is not a debt provable in bankruptcy. To put that gloss on the Act would defeat the object of the legislature. It would induce persons having claims against bankrupts to stand outside the bankruptcy and take their chance. It would open the door to litigation and compel the court to decide questions under conditions wholly different from those under which they ought to have been presented for decision. It would leave the bankrupt with unknown liabilities hanging over his head. Neither the bankrupt himself nor his friends who might be disposed to help him could tell whether he was really a free man and in a position to make a fresh start in life.

But then it was contended that such a case as the present was not within the section at all. It was said with confidence that the liability was incapable of being fairly estimated. It was argued that the word "liability," as used in the section, must be understood with some large qualification. It was pointed out that the Act speaks of an "estimate" and of a "valuation." Could it have been meant, it was asked, that you are to estimate and value that which everybody knows to be incapable of estimation or valuation? Some stress, too, was laid on the concluding sentence in the section, which speaks of liabilities in regard to the mode of valuation as being "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion" [Bankruptcy Act, 1914, s. 30 (4) (8) (c)]. It was said that the expression "assessable by a jury" meant assessable on some known principle, and that the words "matter of opinion" did not mean any random opinion—mere chance and guesswork—but an opinion founded on some trustworthy data, though reasonable men might differ within certain limits as to the conclusion to be drawn from those data. It is not very easy, I think, to deal with an argument presented in this form. The argument begins with assuming that the liability in the present case was incapable of being fairly estimated. The meaning of that expression, however, was not defined, nor was any attempt made to explain in what respects this liability differs from liabilities which the Act contemplates as capable of being estimated, though they may be affected by more than one contingency.

The argument then proceeds to cut down or qualify the language of the Act so as to make it square with the hypothesis from which the argument started. I should have thought the better course would have been to endeavour to ascertain the meaning of the legislature from the language of the Act, and then to apply the Act to the facts of the case under consideration. The Act no doubt uses the terms "estimate" and "valuation." But at the same time it recognises as capable of being estimated or valued liabilities which depend on any number of contingencies, and may result in payment of money unliquidated in amount. Moreover, the Act seems to treat every liability arising from contract, which may result in payment of money or money's worth, as capable, at least *prima facie*, of being estimated. This, I think, is plain, from the circumstance that the power of determining whether any particular liability is capable of being fairly estimated or not is not given to the trustee in bankruptcy; it is given only to the court on appeal. And I am inclined to agree with what I understand to have been LORD BRAMWELL's view—that this provision is introduced rather *ex majori cautela* to meet a possible case of unforeseen difficulty than as part or parcel of the ordinary administration of bankruptcy law: see *Re Batey, Ex parte Neale* (5).

I The concluding paragraph of the section does not purport to define the meaning of the word "liability." By way of explanation it deals with cases which had occurred under the earlier Acts and with decisions which had limited the operation of those Acts in accordance, no doubt, with their true construction. But for that paragraph the reported cases might have given rise to many arguments tending to narrow the construction of the Act. The last sentence in the paragraph, referring to the mode of valuation, reflects, I think, the language of MONTAGUE SMITH, J., in *Brett v. Jackson* (6), a case which was decided in February, 1869, and must have been brought to the attention of the framers of the Act. It was there held

that an annuity the continuance of which depended on a variety of contingencies and the observance of a multitude of indefinite stipulations was not provable under the Act of 1861. The learned judge said (L.R. 4 C.P. at p. 268):

"Here there are no definite materials for making anything like a valuation. An actuary might form a loose opinion as to the probable continuance of the annuity, or a jury might form a rough estimate of its value. But that is a very different sort of computation from that which the statute means when it says that 'the court shall ascertain the value.' It clearly points to a case where there shall be no difficulty or speculation; a sum to be worked out in figures from some definite and precise data."

The two sorts of estimate, both in substance falling under the head of opinion, which were inadmissible under the Act of 1861, are expressly recognised and adopted by the Act of 1869, though the uncomplimentary epithets which the learned judge applies to them have disappeared.

Turning now to the assumption which lies at the foundation of the appellants' argument, I must say that I cannot see anything so very exceptional about Mr. Fothergill's liability. It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it the court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case. Nor do I think that the court would set aside, as a matter of course, an estimate founded on reasonable probability and practical experience. Why should it be assumed that the courts nowadays are more wise or more incompetent than their predecessors? The Court of Chancery used to be very much in the habit of dealing with estimates of this sort of liability. It was a common thing formerly in the administration of the estates of deceased persons for a fund to be set apart out of the general assets to provide for the possible event of a future breach of any of the covenants contained in a lease held by the deceased. As to the generality of the practice before Lord St. Leonards' Act [Law of Property Amendment Act, 1859], I may quote KINDERSLEY, V.-C., whose experience as master makes his testimony particularly valuable. He said (*Dodson v. Sammell* (7), 1 Drew. & Sm. at p. 577):

"For a long time it has been the practice of the court, when the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach."

There he is speaking of liability under a covenant for payment of rent. But the practice, of course, extended to liability under any covenant in a lease. The practice was open to serious objections, but I am not aware that in a case like the present the master or the judge in chambers found any insuperable difficulty in arriving at a reasonable sum for the purpose in view. If it were possible to make a reasonable estimate for that purpose, I cannot see that there would be any great difficulty in valuing the liability for the purpose of the Act of 1869, or, in other words, in assessing the amount of compensation which, under all the circumstances of the case, ought to be paid for the privilege of having the liability cancelled altogether.

It appears to me, therefore, that the appellants' case entirely fails. They have not brought themselves within the exception mentioned in s. 31. There is no judicial declaration that this liability was incapable of being fairly estimated. But I should be sorry if it were supposed that the appellants have failed on technical

A grounds only. I think the liability in question was, according to the true construction of s. 31, a liability provable in bankruptcy, and, therefore, a liability from which Mr. Fothergill was released by the liquidation proceedings.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.; Field, Roscoe & Co.*

B [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

C

Re FAURE ELECTRIC ACCUMULATOR CO., LTD.

D [CHANCERY DIVISION (Kay, J.), November 3, 5, 6, 7, 13, 1888]

[Reported 40 Ch.D. 141; 58 L.J.Ch. 48; 59 L.T. 918; 37 W.R. 116;
5 T.L.R. 63; 1 Meg. 99]

Company—Director—Misfeasance—Breach of trust—Application of company's money—Grave error of judgment.

E The position of the directors of a company is peculiar because of the very great extent of their powers and the absence of control over them except by the action of shareholders. The strict rules prescribed by the Court of Chancery with regard to trustees of such instruments as settlements and wills are not applicable to directors, for they might fetter their actions to an extent which would be disadvantageous to the companies they represent. If directors apply money of the company for purposes so outside its powers that the company could not sanction the application, they may be made personally liable as for a breach of trust. On the other hand, if they apply the money of the company, or exercise any of its powers, in a manner which is not ultra vires, then a strong and clear case of misfeasance must be made out to render them liable. Even if an act done by a director was, with the knowledge which he had at the time, a grave error of judgment, that is not a ground on which the court can properly hold him liable on a misfeasance summons.

G

Notes. Considered: *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood*, ante p. 105. Distinguished: *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q.B. 604. Considered: *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331; *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378. Referred to: *Re Liverpool Household Stores Association* (1890), 59 L.J.Ch. 616; *Re New Mashonaland Exploration Co.* (1892), 8 T.L.R. 738; *Re Lands Allotment Co.* (1894), 63 L.J.Ch. 291.

H

As to the powers, duties and liability of directors and misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 293 et seq., 621–628; and for cases see 9 DIGEST (Repl.) 497 et seq., 10 DIGEST (Repl.) 943 et seq.

I

Cases referred to:

- (1) *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 9 Digest (Repl.) 631, 4210.
- (2) *York and North Midland Rail. Co. v. Hudson* (1845), 16 Beav. 485; 22 L.J.Ch. 529; 22 L.T.O.S. 29; 1 W.R. 187, 510; 51 E.R. 866; 9 Digest (Repl.) 487, 3194.
- (3) *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450; 40 L.T. 287; 27 W.R. 594; 9 Digest (Repl.) 508, 3347.

- (4) *Smith v. Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 A W.R. 21, C.A.; 9 Digest (Repl.) 487, 3200.
- (5) *Overend and Gurney Co. v. Gibb* (1872), L.R. 5 H.L. 480; 42 L.J.Ch. 67, H.L.; 9 Digest (Repl.) 489, 3213.
- (6) *Re Railway and General Light Improvement Co., Marzetti's Case* (1880), 42 L.T. 206; 28 W.R. 541, C.A.; 9 Digest (Repl.) 489, 3215.

Also referred to in argument :

Lydney and Wigpool Iron Ore Co. v. Bird (1885), 31 Ch.D. 329; 55 L.J.Ch. 383; 54 L.T. 242; 34 W.R. 487; 2 T.L.R. 722; reversed (1886), 33 Ch.D. 85; 55 L.J.Ch. 875; 55 L.T. 558; 34 W.R. 749; 2 T.L.R. 722, C.A.; 9 Digest (Repl.) 732, 4870.

Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 9 Digest (Repl.) 473, 3094.

Cavendish Bentinck v. Fenn (1887), post p. 333; 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 36 W.R. 641, H.L.; 10 Digest (Repl.) 945, 6493.

Moffat v. Farquhar (1878), 7 Ch.D. 591; 47 L.J.Ch. 355; 38 L.T. 18; 26 W.R. 522; 9 Digest (Repl.) 392, 2522.

Re County Marine Insurance Co., Rance's Case (1870), 6 Ch. App. 104; 40 L.J.Ch. 277; 23 L.T. 828; 19 W.R. 291; 9 Digest (Repl.) 527, 3474.

Re Denham & Co. (1883), 25 Ch.D. 752; 50 L.T. 523; 32 W.R. 487; 9 Digest (Repl.) 526, 3462.

Joint Stock Discount Co. v. Brown (1869), L.R. 8 Eq. 381; 17 W.R. 1037; sub nom. *London Joint-Stock Discount Co., Ltd. v. Brown*, 20 L.T. 844; 9 Digest (Repl.) 550, 3620.

Weir v. Bell (1878), 3 Ex.D. 238; 47 L.J.Q.B. 704; sub nom. *Weir v. Barnett, Bell, etc.*, 38 L.T. 929; 26 W.R. 746, C.A.; 9 Digest (Repl.) 129, 705.

Simpson v. Westminster Palace Hotel Co. (1860), 8 H.L.Cas. 712; 2 L.T. 707; 6 Jur.N.S. 985; 11 E.R. 608, H.L.; 9 Digest (Repl.) 713, 4727.

Re Baglan Hall Colliery Co. (1870), 5 Ch. App. 346; 9 L.J.Ch. 591; 23 L.T. 60; 18 W.R. 499; 9 Digest (Repl.) 312, 1956.

Bagnall v. Carlton (1877), 6 Ch.D. 371; 47 L.J.Ch. 30; 37 L.T. 481; 26 W.R. 243, C.A.; 9 Digest (Repl.) 44, 88.

London Financial Association v. Kelk (1884), 26 Ch.D. 107; 53 L.J.Ch. 1025; 50 L.T. 492; 9 Digest (Repl.) 665, 4402.

Tomkinson v. South-Eastern Rail. Co. (1887), 35 Ch.D. 675; 56 L.J.Ch. 932; 56 L.T. 812; 35 W.R. 758; 10 Digest (Repl.) 1255, 8843.

Pickering v. Stephenson (1872), L.R. 14 Eq. 322; 41 L.J.Ch. 493; 26 L.T. 608; 20 W.R. 654; 9 Digest (Repl.) 504, 3316.

Studdert v. Grosvenor (1886), 33 Ch.D. 528; 55 L.J.Ch. 689; 55 L.T. 171; 50 J.P. 710; 34 W.R. 754; 2 T.L.R. 811; 9 Digest (Repl.) 538, 3537.

Re Oxford Benefit Building & Investment Society (1886), 35 Ch.D. 502; 55 L.T. 598; 35 W.R. 116; 3 T.L.R. 46; sub nom. *Re Oxford Building Society, Ex parte Smith*, 56 L.J.Ch. 98; 9 Digest (Repl.) 480, 3135.

Ashbury Railway Carriage and Iron Co. v. Riche (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 648, 4309.

Re Peruvian Railways Co., Crawley's Case, Robinson's Case (1869), 4 Ch. App. 322; sub nom. *Re Peruvian Railways Co., Crawley's Case, Robinson's Case, International Contract Co.'s Case*, 20 L.T. 96; 17 W.R. 454; 9 Digest (Repl.) 708, 4697.

Re Almada and Tirito Co. (1888), 38 Ch.D. 415; 57 L.J.Ch. 706; sub nom. *Re Almado and Tirito Co., Allen's Case*, 59 L.T. 159; 36 W.R. 593; 4 T.L.R. 534; 1 Meg. 28, C.A.; 9 Digest (Repl.) 324, 2035.

Adjourned Summons taken out by the liquidators of the Faure Electric Accumulator Co., Ltd., for a declaration that certain directors of the company had com-

A mitted breaches of trust and been guilty of misfeasance in the circumstances set out in the judgment of KAY, J., *infra*.

Sir Horace Davey, Q.C., and Grosvenor Woods for the liquidators.

John Henderson and Merrick for Simon Philippart, a director.

Ince, Q.C., Buckley, Q.C., and Woodroffe for the other directors.

B

Cur. adv. vult.

Nov. 13, 1888. **KAY, J.**, read the following judgment.—The liquidators of this company, which is being wound-up, have taken out the present summons against certain gentlemen who were formerly directors of the company, under s. 165 of the Companies Act, 1862 [see now s. 333 of the Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452], seeking to make them personally liable for alleged misfeasances as such directors. No imputation whatever is made upon the honesty or honourable conduct of any of these gentlemen, but it is alleged that they have committed breaches of trust in making certain payments out of the moneys of the company and in permitting the transfer of certain of its shares. These questions involve a consideration of what is the real position of the directors of a joint-stock trading company.

D With respect to the capital of the company which is under their management, it has been said that they are "quasi-trustees" for the company: *Flitcroft's Case* (1). 21 Ch.D. at p. 534. In that and other respects they are "to a certain extent trustees": LINDLEY ON PARTNERSHIP (4th Edn.), p. 587. In the language of LORD ROMILLY in *York and North Midland Rail. Co. v. Hudson* (2) (16 Beav. at p. 491):

E

"The directors are persons selected to manage the affairs of the company for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely."

F They certainly are not trustees in the sense of those words as used with reference to an instrument of trust such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them. Another, and perhaps still broader, difference is that they are the managing agents of a trading association, and such control as they have over its property and such powers as by the constitution of the company are vested in them are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large powers for the management of its business were confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control except by the action of the shareholders of the company.

H

However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent. In *Re Forest of Dean Mining Co.* (3) SIR GEORGE JESSEL, M.R., said (10 Ch.D. at pp. 451, 453):

I

"Directors have sometimes been called trustees, and sometimes they have been called managing partners. It does not much matter what you call them as long as you understand what their true position is, which is that they are really commercial men, managing a trading concern for the benefit of themselves and of all the other shareholders in it. . . . They are no doubt trustees of assets which have come into their hands or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners."

In *Smith v. Anderson* (4), JAMES, L.J., said (15 Ch.D. at p. 275):

"The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his cestuis que trust. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself but he enters into contracts for his principal—that is, for the company of whom he is a director, and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors."

If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust. On the other hand, if they apply the money of the company or exercise any of its powers in a manner which is not ultra vires, then a strong and clear case of misfeasance must be made out to render them liable. LORD HATHERLEY, in *Overend and Gurney Co. v. Gibb* (5), intimates that in such a case their conduct must amount to crassa negligentia. In *Marzetti's Case* (6) a definite test is applied. JAMES, L.J., said (28 W.R. at p. 542):

"A director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable. Directors are not to be made liable on those strict rules which have been applied to trustees."

And he intimates that the negligence for which a director would be held liable must be such as would make a managing director of a business liable to his employers. BRETT, L.J., said (28 W.R. at p. 543) the director must be

"guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence; want of judgment is not; it must be such negligence as would make a man liable in point of law."

With this COTTON, L.J., concurs. That is the law which must be applied to the circumstances of this case.

The Faure Electric Accumulator Co. was formed on Feb. 13, 1882, for the purpose of making and carrying out an agreement for the purchase of certain patents and to carry on the business of electricians, and other matters. The capital was £1,000,000, divided into 80,000 ordinary shares of £10 each, and 200,000 deferred shares of £1 each. Article 92 of the company's articles of association authorised the directors, out of the funds of the company, to pay the necessary legal and other expenses of and incident to the promotion, formation, and registration of the company, and all other preliminary expenses of the company. Article 28 provided:

"No transfer of shares not being fully paid up shall be registered unless and until the transferee is approved by the board of directors, and the board at their discretion may decline to register any transfer of shares upon which the company has a lien."

On Feb. 15, 1882, the company entered into an agreement for the purchase of certain patents under which large payments had to be made in shares of the company. Subsequently, 20,128 shares of £10 each were allotted to the general public, and in this manner all the original £10 share capital was issued, except about 20,000 shares.

It appears that the company got into litigation in May of that year with another company who, they alleged, were infringing their patents. M. Philippart, who, it seems, was very familiar with the working of their patents, attended in that month at a meeting of the board, accompanied by a Mr. Pincoffs, a London stockbroker, who acted as his interpreter. Philippart was a holder both of original and deferred

A shares. He had made himself very active in the company's affairs; and upon May 22, 1882, he wrote to the board offering to take up the unsubscribed capital of the first issue—that is, the £10 shares, by taking 5,000 shares himself and 5,000 by his friends, on condition that his friends should have the option, till June 15, of taking up the remaining 10,000 shares, and that he (Philippart) should be elected a director, and that no brokerage should be paid in respect of the allotment of these shares. This was considered at a board meeting on the next day (May 23) and declined. On that day Pincoffs wrote to the company :

"I beg to offer to place 7,500 shares of your company at par upon condition of your giving my client the option of taking the remaining 12,382 unapplied-for shares at par until June 23 next, and subject to the usual brokerage of 2s. 6d. per share to myself."

C The board appeared to have taken the advice of their solicitors, who advised them by a letter, which is in evidence, that there was no objection in law to the acceptance of these terms, provided the board were satisfied with the allottees, and that the brokerage was paid by the company, and not deducted from the price of issue. Thereupon the board assented to the proposal, and later in the day a letter was handed to them from Mr. W. Morris, a stockbroker, stating that he was willing to take 7,500 shares at par, and pay £2 a share at once, provided he had the option of taking at par, on or before June 23, the balance of the unallotted shares amounting to about 12,500, and that the board would allow 5s. per share commission on the whole number of shares taken by him, the commission on the 7,500 to be paid at once to Mr. Pincoffs. It is stated in the evidence that Morris was known to the directors to be a stock-jobber of very large means. A formal application followed, and on the same May 23 the directors allotted 7,500 £10 shares to Morris, and paid £937 to Pincoffs as commission. Subsequently, about June 17, they allotted the remaining 12,382 £10 shares to Morris, and paid £1,547 15s. as commission to Pincoffs. They received from Morris £2 a share on these allotments—that is, nearly £40,000.

F In the meantime, the board, on May 24, 1882, had received notice of a charge by Philippart to Seavar on all his shares in the company; and on May 30, 1882, they had notice of an injunction as to the deferred shares of Philippart in the company. They referred this to their solicitor, who wrote on June 7, 1882 :

"The directors should consider whether, in the circumstances, any transfers of shares to M. Philippart should be registered before being fully paid."

G On June 30, 1882, Philippart was elected a director of the company. On Sept. 27, 1882, the company had notice of two charging orders on Philippart's shares for £420 and £1,355 respectively. Morris seems to have been at this time in communication with the board, being called in by them to advise, he having a large stake in the company. It appears that he was desirous to transfer the shares he held; and on Oct. 11, 1882, the board sanctioned and subsequently passed a transfer of about 19,528 shares from Morris to Philippart. The transfer was completed on Oct. 18. Shortly afterwards the directors against whom this claim is made resigned. A call of £1 a share had been made, and on Jan. 3, 1883, Philippart and his brother directors forfeited his shares, which were then about 18,500 in number, for non-payment of that call. Subsequently, two other calls of £1 a share were made. On April 10, 1883, Philippart became bankrupt. In July, 1884, a winding-up order was made; 80s. a share has been called up in the liquidation. The debts of the company, which were admitted, have all been paid. Claims to a large amount are outstanding, which the liquidator is resisting, and there are, I am told, some costs of the liquidation still to be provided for.

The claims made by this summons are—first, damages for the alleged misfeasance of the former directors in allotting 7,500 shares on May 25, 1882, and 12,372 shares on June 19, 1882, to Morris, as nominee of Philippart, or in allowing 18,500 of such shares to be transferred on Oct. 18, 1882, to Philippart; and, secondly, that they may be ordered to repay the sums paid to Pincoffs for brokerage on such

allotment, with interest. The summons also contains two other claims, which have not been opened before me, and which of course must be refused. I will deal with these claims in the order in which they are made. It has not been attempted at the Bar to urge that the directors are liable in respect of the allotment to Morris. Morris was a very substantial person, and I have no reason to doubt that the allotment to him was an advantage to the company. He paid £2 a share, and was liable for the uncalled £8 on all the shares allotted to him. The stress of the argument on the first point related to the transfer to Philippart, as to which the case is put, as I understand, in two ways. It is urged that the directors did not in fact "approve" Philippart as a transferee under art. 28. That is, although they allowed the transfer to him, they did not exercise the judgment and discretion which they were bound to exercise according to that article. And the second contention upon this point is that, if they did, the transaction was so utterly improper that it amounted to a gross breach of duty for which they may be rendered liable. A B C

The first of these two arguments rests mainly upon a passage in the cross-examination of one of the directors. He states that he recollects the attention of the board being drawn on Oct. 11, 1882, to the large number of shares which it was proposed that Morris should transfer to Philippart, and he says the matter was well considered, and the directors came to the conclusion that the transfer should be passed, as there was no valid objection. This gentleman, who said that at this distance of time he found it very difficult to recollect what took place, added: D

"I cannot say whether a discussion of any duration took place on it. No one threw a doubt on the prudence of sanctioning such transfer. We were told by our solicitor at that meeting that as there was no valid objection we had no option in the matter. I believe the solicitor was present at that meeting. At all events, it was at a meeting at which the solicitor happened to be present." E

Another of these gentlemen gives pretty much the same account, and says the solicitor advised them to sanction the transfer, and said they must do so, and could not help themselves. If it is right to rely on the imperfect recollection of these gentlemen of a transaction which took place five-and-a-half years before, I must say that these extracts produce in my mind exactly the contrary effect to that for which they were cited. I should infer *prima facie* from the mere circumstance of the transfer that, rightly or wrongly, the directors did in fact approve the transferee, and these statements of the directors confirm that view. They show that the matter was discussed, and that the advice of the solicitor of the company was taken upon it. The argument has rather been upon the other point—whether such approval was a misfeasance for which the directors are liable. They have made an affidavit in which they say that when they sanctioned the transfer from Morris to Philippart they did not know or believe that he would be unable to pay the amount uncalled—i.e., £8 a share. F G H

Looking at the matter in the light of the later occurrences, the failure of Philippart to pay the calls on his shares, his bankruptcy, and the ruin and winding-up of the company under his management, it is easy to see that the transfer was an act much to be regretted; but, anything like corrupt or dishonest dealing being out of the question, the difficulty is—can the court, putting itself as completely as is now possible in the position of the directors in October, 1882, say that their conduct in then sanctioning this transfer was so grossly improper that they must be made liable personally for the consequences? They have been cross-examined at enormous length for eight days, and their depositions, without the questions, cover thirty-five pages of printed matter. I have read with care all portions of them which relate to this transaction and a great deal besides. The case made against them may be shortly summed up thus. On May 23, 1882, the directors had declined to allot to Philippart the 20,000 unallotted £10 shares. They did I

- A not particularly like his manner, which was overbearing. They or some of them knew that he had been engaged in large financial operations abroad, and had failed some time previously. It had been brought to their attention that there were judgments against him and charging orders upon the other shares which he then held in this company, and their solicitor had suggested that they should hesitate to allow any shares to be transferred to him unless they were fully paid. Nevertheless, on June 30, 1882, he was elected a director, and on Oct. 11, at a meeting of the board at which he attended part of the time, this transfer was approved. On the other hand, the directors say that they understood that, although he had failed for a very large amount before the company was formed, he was "up again" and had made a largish sum of money. The judgments against him had been brought to his attention, and he had said they were all nonsense, and he was not going to be blackmailed. They understood—though not, it would seem, according to their present recollection, from any definite information—that he was being backed by some of the most powerful people in France, and had considerable means of his own. They found that Faure accumulators, the subject of their patents, were very difficult to manage, and that Philippart had an intimate knowledge of their construction which would be of great use to the company, and for that reason principally, and also because of his activity as a shareholder, he was made a director.

- I have no doubt that when the question concerning the transfer of Morris's shares to him arose it seemed to them that they had no valid reason for not approving him as a transferee. They knew, of course, as men of business, that he could not possibly obtain the transfer from Morris without satisfying the very large sum of £40,000 which Morris had actually paid to the company. He did this to some extent by transferring other shares in the company to Morris, but he must have provided a large sum in cash. Anything like corruption or dishonesty on the part of the directors being out of the question, I am unable to treat them as responsible for the consequences of permitting this transfer. Even if the act was, with the knowledge which they had at the time, a grave error of judgment, that is not a ground upon which the court could properly hold them liable.

- Upon the second point I have felt much more difficulty. It was said in argument against the directors that the payment of brokerage to Pincoffs was analogous to issuing the shares at a discount. [On this point his LORDSHIP held that the payment of brokerage was not legitimate and was ultra vires the board, with the result that the directors who made the payments were liable to repay the same to the company with interest, but a report of the reasons for his decision is now unnecessary, for by s. 53 of the Companies Act, 1948, a company may pay a commission to any person in consideration of his subscribing, or procuring subscriptions, for shares in the company, and by s. 57 it is lawful for a company to issue shares at a discount.]

Solicitors: *Snell, Son & Greenip; Campbell, Reeves & Co.; Merrick & Co.*

- H [Reported by F. E. ADY, Esq., Barrister-at-Law.]

Re BETHELL. BETHELL v. HILDYARD

[CHANCERY DIVISION (Stirling, J.), December 15, 20, 1887, February 1, 15, 1888]

[Reported 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674;
36 W.R. 503; 4 T.L.R. 319]

Conflict of Laws—Marriage—Validity—Solemnisation abroad—Marriage in form recognised by native tribe—Permission of polygamy—Residence of parties abroad.

An Englishman, while in Africa, went through a ceremony of marriage with a native woman which was in accordance with the customs of her tribe, he having declined to marry her according to the rites of a Christian church. Polygamy was permitted by the tribe, but the man in question did not contract any further marriage. The parties resided in the country occupied by the tribe, and, though the man communicated with his relatives in England, he never mentioned his marriage to them, nor did he ever introduce the woman, or speak of her, to any European as his wife.

Held: the proper inference to be drawn from the facts was that the man never meant to enter into any higher or other union than that which was regarded as a marriage by the members of the tribe, and such a marriage was not a valid marriage according to English law.

Notes. Considered: *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1916-17] All E.R.Rep. 464. Explained and Distinguished: *Nachimson v. Nachimson*, [1930] All E.R.Rep. 141. Referred to: *Brinkley v. A.-G.*, ante p. 255; *Apted v. Apted and Bliss* (1930), 143 L.T. 353.

As to the validity of marriage contracted abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

- (1) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.
- (2) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 12 Jur.N.S. 414; 14 W.R. 517; 11 Digest (Repl.) 455, 906.
- (3) *Johnson v. Johnson's Administrator* (1860), 30 Missouri State Rep. 72.
- (4) *Connolly v. Woolrich* (1867), 11 L.C.J. 197; 3 C.L.J.N.S. 14; 11 Digest (Repl.) 350, *135.

Also referred to in argument:

Dalrymple v. Dalrymple (1811), 2 Hag. Con. 54; 161 E.R. 665; 22 Digest (Repl.) 618, 7112.

Brook v. Brook (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, 915.

Sastry Velaider Aronegary v. Sembacutty Vaigalie (1881), 6 App. Cas. 364; 44 L.T. 895; sub nom. *Sastry Velaider Aronegary & Sembacutty Sinnepullei v. Kissanader Sambonada*, 50 L.J.P.C. 28, P.C.; 27 Digest (Repl.) 69, 476.

Shaw v. Gould (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, 1081.

Harvey v. Farnie (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, 1084.

Re Goodman's Trusts (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 29 W.R. 586, C.A.; 3 Digest (Repl.) 420, 185.

Re Andros, Andros v. Andros (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 32 W.R. 30; 3 Digest (Repl.) 420, 181.

Piers v. Piers (1849), 2 H.L.Cas. 331; 13 L.T.O.S. 41; 13 Jur. 569; 9 E.R. 1118, H.L.; 27 Digest (Repl.) 75, 555.

Ruding v. Smith (1821), 2 Hag. Con. 371; 1 State Tr.N.S. 1054; 161 E.R. 774; 11 Digest (Repl.) 459, 930.

- A *Armitage v. Armitage* (1866), L.R. 3 Eq. 343; 27 Digest (Repl.) 75, 560.
Collins v. Hector (1875), L.R. 19 Eq. 334; 44 L.J.Ch. 267; 39 J.P. 295; 23 W.R. 485; 11 Digest (Repl.) 491, 1134.
Maclean v. Cristall (1849), Per. Oriental Cas. 75; 7 Notes of Cases, Supp. xvii; 27 Digest (Repl.) 68, *157.
Beamish v. Beamish (1861), 9 H.L.Cas. 274; 5 L.T. 97; 8 Jur.N.S. 770; 11 E.R. 735, H.L.; 27 Digest (Repl.) 67, 454.
 B *R. v. Millis* (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E.R. 844, H.L.; 27 Digest (Repl.) 45, 232.

Adjourned Summons taken out by the Official Solicitor to determine the validity of a marriage.

- C Christopher Bethell, who left England in 1878, was on his arrival in South Africa appointed British resident with Montsoia, the chief of the Baralongs, a tribe who inhabited a portion of Bechuanaland, beyond the limits of the British dominion. This appointment was afterwards cancelled, but Bethell continued to reside among the Baralongs, and became a storekeeper at Maffeking, within their territory. Polygamy prevailed among the Baralongs. According to one witness, each male was allowed one "great wife" and several concubines, who had almost the same status in the house as the "great" or principal wife. They had no religion or religious ceremonies, but the marriage ceremony was conducted in the following way: When the consent of the parents had been obtained, the bridegroom slaughtered a sheep, a buck, an ox, or a cow. The heads of these animals were taken to the bride's parents, as also was the hide, which was cleaned and softened. The parties were then considered married, and after the birth of the first child the number of the cattle previously agreed upon was handed over to the wife's parents. In October, 1883, Bethell went through this ceremony with Teepoo, a niece of Montsoia, the chief of the tribe, who gave the following account of what took place:

- "Bethell came to me and said he wanted a woman to take and marry according to the Baralong custom. I said to him: 'You know we Baralongs have a different custom from other tribes. The custom is that during courtship and after marriage the man, when he kills an ox, sends the head to the girl's mother, so if you do this the mother will know your intentions are honourable.' Bethell said: 'Well, I want to marry a Baralong, and I will do so according to Baralong custom: I also am a Baralong.' I said: 'Will you not marry her in church?' He said, 'No, I am a Baralong; did you marry your wife in church, did you not also marry in the custom as I am about to do?' I said: 'Very well, if that is the case you can take one,' and of a truth he did take one. He slaughtered an ox, and sent the head to Makwas, the mother of Teepoo. I then went to Makwas and said: 'Give your daughter to Bethell; you see he really means it. See he has sent you the head.' She did, and he married Teepoo exactly in accordance with our customs. There is no other ceremony except taking the girl. The paying of cattle is no part of the ceremony of marriage, and may be done years after the consummation of the marriage. Bethell took the girl to his house. Bethell gave a span of oxen and trekgoed and plough to Teepoo's father Kakwas, saying: 'Plough Makwas's garden with this.' It is one of our customs for the son-in-law to plough the mother-in-law's gardens, or have it ploughed. I know that Bethell really married Teepoo, that she was his wife, and not his paramour."

I On Dec. 3, 1883, Bethell signed the following document:

"I hereby desire that, in the event of my decease here in Maffeking, and in the absence of any other will, Mr. E. Rowland shall take over all my arms, ammunition, cannon, waggon, oxen, horses, and any other property that may be in my possession, and shall sell them to the best advantage. I desire that he will realise all the property as quickly as possible, and shall apply the proceeds to the payment of Taylor and Leark's (Klersdup) account, the balance

he shall have and hold as a bequest and present from me. And he shall inform my relatives in England of my decease and of the manner in which my property is disposed of. Always providing that before disposing of any of the proceeds of the sale of my property he shall purchase or put aside (30) thirty heifers, (10) ten three-year-olds, (10) ten two-year-olds, (10) ten one-year-olds, and shall use them for the benefit of Teepoo in the following manner: he shall keep the heifers for the space of one year from my decease, and in case she (Teepoo) has no child by me he shall hand the said (30) thirty heifers over to her for her own property and use. If she has a child after my decease, he shall keep the heifers and their produce until the said child be arrived at the age of (21) twenty-one years, selling any full-grown oxen and old cows, and investing the proceeds in land or English government securities. The milk of the cattle and the use of the young oxen to be applied to the use of Teepoo and the child. At the end of eight years the child is to be removed from its mother and placed at a school for the time of ten years, either in the colony or in England, and if a boy shall be taught a profession, or enter Her Majesty's service as a soldier. In order to repay the work of Mr. Rowland in the case of a child being born, I desire that he shall take (20) twenty per cent. of all sales of oxen and cows as before mentioned. In case Teepoo re-marries, or has any more children, or conducts herself in an improper way, she shall be debarred from any participation in the heifers, and shall give up the guardianship of the child at once to E. Rowland, and shall receive ten yearly heifers only as a dowry. But in case she have no child by me at the expiration of the year she will be at liberty to do as she likes, and will receive the (30) thirty heifers as before mentioned. And Ragnassie, her father, shall receive eight young heifers as dowry, and thereby relinquishes by Bechuana law all command over Teepoo and the child."

On the breaking out of disturbances in Bechuanaland, Bethell joined the Bechuana Mounted Police, a corps in the employment of the British government, and he met with his death on July 30, 1884, in an encounter between that force and the Boers. He had kept up communication with various members of his family down to shortly before his death. He from time to time expressed his intention to return to England, but never mentioned this marriage to any of his relatives; and there was no evidence that he ever introduced Teepoo, or spoke of her to any European as his wife, one of the witnesses stating that he always called her "that girl of mine."

W. F. Bethell, the father of Christopher Bethell, who died in 1879, devised his real estate at Burnhill and Hallatreeholme, in the county of York, to trustees upon trust for his son Christopher Bethell during his life, and in case he should die leaving a child or children, to sell the estate and to hold the proceeds for such child or children, and if there was no such child, then the said real estate, or the proceeds of sale thereof, were to be held upon certain trusts under which the plaintiff, in the present action, William Bethell, would take as tenant for life. The contents of this will were communicated to Christopher Bethell shortly after his father's death in 1879, and the income of the property, amounting to £600 a year, was regularly remitted to him down to the time of his death in 1884. Some time after Christopher's death, William Bethell took out a summons to which the trustees of the will of W. F. Bethell were respondents, and on June 12, 1885, an inquiry was directed whether Christopher Bethell was ever married, and if so, when, and to whom, and whether he left any and what children him surviving. In answer to this inquiry the chief clerk by his certificate, dated Aug. 5, 1886, found that in October, 1883, Christopher Bethell, being then resident at Maffeking, in Bechuanaland, went through a form of marriage according to the custom of the Baralong tribe with Teepoo, a Baralong girl, and had issue by her a female child, which was born ten days after his death; that the Baralongs had no religion nor any religious customs, and that polygamy was allowed in that tribe; that at the time

A of the marriage the domicile of Christopher Bethell was English, and that, save as aforesaid, he never was married. Upon that certificate the matter came on for further consideration, and, in order that the infant child mentioned in the certificate might be represented, an order was made appointing the official solicitor her guardian, and notice of the order of June 12, 1885, was served on him. On October 25, 1887, the official solicitor, as guardian to the infant, took out a summons B that the certificate of the chief clerk might be varied by finding that Christopher Bethell was married to Teepoo, and left one child him surviving, a girl born on Aug. 9, 1884, thus raising the question of the validity according to English law of the marriage.

Pearson, Q.C., and G. Williamson for the plaintiff.

C Graham Hastings, Q.C. (E. W. Byrne with him), for the infant child.

Cur. adv. vult.

Feb. 15, 1888. **STIRLING, J.**, read the following judgment.—The question here raised is whether a marriage valid according to English law took place between Christopher Bethell and Teepoo, and it has been very fully and ably argued by D counsel both on behalf of the infant and of William Bethell.

LORD BROUGHAM thus lays down the law in *Warrender v. Warrender* (1) (2 Cl. & F. at pp. 530, 531):

E “A marriage good by the laws of one country is held good in all others where the question of its validity may arise. For the question always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract.”

That states the law as clearly as possible, but his Lordship goes on to qualify it thus (*ibid.* at pp. 531, 532):

F “But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If, indeed, there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. G But marriage is one and the same thing substantially all the Christian world over. Our whole law of marrying assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages notwithstanding the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational H ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with, and know how to deal with, I has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted, and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.”

This statement of the law was adopted by LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (2), who, in dealing with the case of a Mormon marriage at Salt Lake City, observed (L.R. 1 P. & D. at pp. 133, 134):

"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.' In some parts they are slaves, in others perhaps not; in none do they stand as in Christendom upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word 'wife.' But there is no magic in a name; and if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer."

I conceive that, having regard to those authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others." It is plain that Christopher Bethell intended that Teepoo should have a status different from and higher than that of a mere concubine. Indeed, the attempt to form such a connection with any woman of the tribe, and still more with one nearly related to its chief, would probably have been attended with unpleasant, not to say dangerous, consequences. The evidence clearly proves that Bethell intended that the relationship between himself and Teepoo should be that of husband and wife in the sense in which those terms are used among the Baralongs. This relationship, however, is essentially different from that which bears the same name in Christendom, for the Baralong husband is at liberty to take more than one wife; and it must, therefore, be determined whether the union between Christopher Bethell and Teepoo was a marriage in the Christian or merely the Baralong sense.

In my opinion, the latter alternative is the conclusion to be arrived at upon the evidence before us. To begin with, the cohabitation between Christopher Bethell and Teepoo lasted for only a few months. During that time both resided in the Baralong country. Bethell, although he kept up communication with his relatives at home, never mentioned his marriage to them. He never introduced Teepoo, or spoke of her, to any European as his wife. In short, there is an absence of that reputation of marriage (in the Christian sense) which has in many cases afforded weighty evidence of the actual existence of such a union. Next, it is to be observed that Bethell positively and emphatically refused to marry Teepoo in church, and that not on the ground that there was any difficulty in finding a place of religious worship where the marriage ceremony might have been performed, but upon the allegation which he repeated more than once that he was a Baralong, and wished to marry according to Baralong customs. He thus desired to be regarded as being (for the purpose of the relationship he was about to form) a member of the tribe. I think that the proper inference is that he meant to enter into no higher or other union than that which, between members of the tribe, was regarded as a marriage.

A This conclusion appears to me to be strongly confirmed by the document of Dec. 3, 1883. It can scarcely be supposed that, if Bethell regarded his union with Teepoo as a marriage in the sense in which it is understood among Englishmen, and the child referred to in that document as legitimate, he would have made such provisions as are therein contained for the maintenance, education, and advancement in life of the child. He was in receipt of an income of £600 a year from an estate in Yorkshire; he knew of the provisions of his father's will under which a legitimate child of his would succeed to the property; yet he directs his child by Teepoo to be maintained and educated up to the age of twenty-one on the proceeds of thirty heifers to be purchased out of the proceeds of a sale of his property at Maffeking, to be effected by his friend Mr. Rowland, who was a resident among the Baralongs. It is true that he speaks of the "marriage" of Teepoo, and makes provisions for the "dowry" to be received by her, and by her father; but, in my opinion, he used these terms in the sense in which they were understood among the Baralongs, and his instructions were directed simply to ensure the fulfilment of obligations which he conceived to be cast upon him by their laws or customs. Finally, Teepoo herself has given no testimony in this case. No doubt the evidence was completed before her child was made a party to the cause, but I should willingly have listened to any application on the infant's behalf for leave to adduce further evidence. No such application has been made; and there is nothing to show that Teepoo regarded herself as entering into any other union than such as prevails among the tribe to which she belongs, or would have been, or would have considered herself to be, aggrieved, if Bethell had, in accordance with the Baralong custom, introduced a second or third wife into his household.

E I am, therefore, of opinion that the union between Bethell and Teepoo was a marriage in the Baralong sense only, and was not a valid marriage according to the law of England.

In the view I have taken it is unnecessary for me to express my opinion on any of the numerous points relating to the law of marriage which were discussed before me; but I ought, perhaps, to refer to two cases which were cited in support of the contention on behalf of the infant, viz., *Johnson v. Johnson's Administrator* (3), and *Connolly v. Woolrich* (4). These decisions are not, of course, binding on me, but they are entitled to most respectful consideration, and in the absence of direct English authority might exercise a weighty influence on my decision. The former of these cases was decided in 1860, before *Hyde v. Hyde* (2). In the latter judgment was given on July 9, 1867, but *Hyde v. Hyde and Woodmansee* (2) (decided on Mar. 20, 1866) was not referred to. I am not sure that the learned judges who decided those cases took the same view of the law as is expressed by LORD PENZANCE, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case, and circumstances were proved which might, in my judgment, well lead to the conclusion (consistently with the doctrine laid down in *Hyde v. Hyde and Woodmansee* (2) that the marriages there under consideration were valid according to the law of England.

H The summons taken out on behalf of the infant must be dismissed, but the costs of the infant will be paid out of the estate. Beyond this I have no power to make any order.

Solicitors; *Official Solicitor; Oldman & Clabburn.*

[Reported by A. PULLING, Esq., Barrister-at-Law.]

I

BIRMINGHAM AND DISTRICT LAND CO. v. LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), November 27, 29, 30, December 5, 1888]

[Reported 40 Ch.D. 268; 60 L.T. 527]

Compulsory Purchase—Compensation—Unauthorised entry on land by undertakers—Declaration of rights of persons having interest in land—Jurisdiction to grant—Extent of interest.

A land company was in possession of certain lands under building agreements from B., under which houses were to be erected within a specified time. Shortly after the agreements had been entered into B. told the company that the building should be suspended until the result of a railway scheme was known. In 1883 the railway company obtained an Act which enabled them to take a strip of land going through the lands in possession of the land company, and they then bought that strip of land from B., the purchase being made subject to the agreements between B. and the land company. In 1884 the railway company gave the land company notice to treat, but the land company did not send in any claim. In 1886 the railway company entered into possession without giving the land company any bond or making any deposit as required by s. 85 of the Lands Clauses Consolidation Act, 1845. In an action by the land company for an injunction and a declaration as to their rights,

Held: the court had jurisdiction to make a declaration of rights and would declare that when the notice to treat was given the land company were entitled as against the railway company to the benefit of their building agreements with B.; and, further, on the expiration of the agreements the land company continued for a reasonable time to have an interest in the land, for B.'s direction to them to suspend work raised an equity against him which would prevent him ejecting them at the end of the terms limited by the agreements until they had had a reasonable time, after notice given by him, to complete the building operations which had been stopped.

Notes. Considered: *Foot Clinics (1943), Ltd. v. Cooper's Gowns, Ltd.* (1946), 91 Sol. Jo. 309. Referred to: *London and North Western Rail. Co. v. Boulton* (1890), 62 L.T. 393; *Salisbury v. Gilmore and Marcel*, [1942] 1 All E.R. 457; *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (1946), [1956] 1 All E.R. 256; *Tool Metal Manufacturing Co. v. Tungsten Electric Co.*, [1955] 2 All E.R. 657; *Lyle-Mellor v. A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 All E.R. 247.

As to unauthorised entry on land by undertakers, see 10 HALSBURY'S LAWS (3rd Edn.) 76, 77; and for cases see 11 DIGEST (Repl.) 225-229.

Cases referred to:

- (1) *Hughes v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 25 W.R. 680, H.L.; 21 Digest (Repl.) 393, 1221.
- (2) *London and Blackwall Rail. Co. v. Cross* (1886), 31 Ch.D. 354; 55 L.J.Ch. 313; 54 L.T. 309; 34 W.R. 201; 2 T.L.R. 231, C.A.; 11 Digest (Repl.) 204, 709.

Also referred to in argument:

- Brierley Hill Local Board v. Pearsall* (1884), 9 App. Cas. 595; 54 L.J.Q.B. 25; 51 L.T. 577; 49 J.P. 84; 33 W.R. 56, H.L.; 11 Digest (Repl.) 307, 2128.
- Doe d. Armitstead v. North Staffordshire Rail. Co.* (1851), 16 Q.B. 526; 20 L.J.Q.B. 249; 17 L.T.O.S. 59; 15 Jur. 944; 117 E.R. 980; 11 Digest (Repl.) 231, 955.

- A *Adams v. London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118; 6 Ry. & Can. Cas. 271; 2 H. & Tw. 285; 19 L.J.Ch. 557; 16 L.T.O.S. 277; 14 Jur. 679; 42 E.R. 46; 11 Digest (Repl.) 236, 1016.
- R. v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443; 23 L.J.Q.B. 185; 22 L.T.O.S. 346; 18 Jur. 993; 2 C.L.R. 1157; 118 E.R. 1208; 11 Digest (Repl.) 202, 692.

- B **Appeal** by the defendants from a decision of KEKEWICH, J., in an action for an injunction and declaration.

- The plaintiffs, the Birmingham and District Land Co., entered into three agreements with one Matthew Boulton and his trustees, who had power to grant leases. The first agreement was dated Feb. 5, 1877, and the second April 5, 1877. The agreement of Feb. 5, 1877, comprised a plot of eight and a half acres near Birmingham, of which the plaintiffs got an agreement for a building lease which gave them power, within ten years from Nov. 30, 1875, to enter upon the land and build, within a certain time, a certain class of houses. The agreement, dated April 5, 1877, was a similar agreement relating to three and a half acres of land, and it was for a period of six years from Nov. 30, 1875. Therefore, the second agreement would come to an end in 1881 and the first agreement in 1885. The third agreement, dated Oct. 27, 1879, modified the others as regarded the class of houses to be built. There was a provision in that agreement that leases should be granted when houses had been erected, and leases of some of the houses were granted accordingly. There was also a provision that after a certain number of houses producing a certain rental had been built the leases of the other houses should be granted at a peppercorn rent. Soon afterwards a railway scheme was started by the defendant company which, if carried into effect, might materially affect the building operations by enabling the defendant company to take part of the lands included in the agreements. In 1883 the defendant company obtained an Act which enabled it to take a strip of land going through both the eight and a half acres and the three and a half acres, and in July, 1883, they bought that strip of land from Mr. Boulton and his trustees. The agreement for sale expressly made the purchase by them subject to the three contracts of Feb. 5, 1877, April 5, 1877, and Oct. 27, 1879, which were set forth in a schedule. On Sept. 16, 1884, the railway company gave the plaintiff company notice to treat, but that notice was not followed up by any step on either side. The plaintiff company did not send in any claim to show what interest they claimed, and nothing further was done till February, 1886, when the railway company entered into possession without giving the plaintiff company any bond or making any deposit, as required by s. 85 of the Lands Clauses Consolidation Act, 1845. The plaintiffs thereupon brought their action for an injunction and to have it declared what their rights were, the railway company asserting that the rights of the plaintiff company were altogether gone at the time when the railway company took possession. KEKEWICH, J., did not grant any injunction, because the railway company, after the action was brought, had given a bond which, though not in accordance with the Act, the plaintiff company agreed to accept as sufficient, but he declared that the agreements were still subsisting, and that the compensation and damages payable to the plaintiff company must be assessed on that footing. From that judgment the railway company appealed.

- I *Ince, Q.C., Greene, Q.C., and Clare* for the defendants.
Romer, Q.C., Warmington, Q.C., Woodroffe and Alfred Young for the plaintiffs.

Cur. adv. vult.

Dec. 5, 1888. The following judgments were read.

COTTON, L.J., stated the facts, and continued: Several contentions were raised on behalf of the defendants which showed great ingenuity on the part of the counsel who argued the case. The first contention was that even if the plaintiff

company were entitled to an injunction, yet it would be wrong under the circumstances of the case to make any declaration establishing their title. He said there were cases which established that where a railway company has given a notice to treat under the Lands Clauses Consolidation Act, 1845, this court will not interfere except to grant an injunction against taking possession if the railway company has not done what it ought to do under s. 85. There are cases to this effect, that when a notice to treat has been given and a claim sent in, although the parties to some extent may be said, though inaccurately, to stand in the position of vendor and purchaser, yet their rights are only rights given by the Act, that any proceedings to enforce those rights must be taken under the Act, and that the court will not interfere as it would do in the ordinary case of vendor and purchaser, since the Act provides a way of dealing with the matter. That is very different from the present case. There are also cases where a railway company has ineffectually sought to get relief in Chancery, on the ground that the claim is made against it by a person who has no right at all. That is not the present case. Here the plaintiffs allege that they have an interest, and that the railway company deny their having any, and have acted in a manner which, if the plaintiffs have an interest, is unlawful as against them. The cases cited do not support the contention of the defendants, that in such a case the court will not make any declaration of right, especially where as here the railway company as regards the plaintiff company stands in a position independent of the Act of Parliament, inasmuch as the railway company bought from Mr. Boulton, subject expressly to such rights (if any) as the plaintiffs had under the agreements between them and Mr. Boulton. Therefore, there is a right on the part of the plaintiffs, independently of the Lands Clauses Consolidation Act, 1845, to prevent the railway company who bought with notice of their rights, whatsoever they were, from acting in violation of these rights.

In my opinion, the contention of the defendants cannot prevail. They bought subject to such rights as the plaintiff company may yet have, and we have to consider what those rights are. I should have thought myself that it would be more convenient to the railway company to have it decided before they went to a jury what was the nature of the rights of the plaintiffs, and what the plaintiffs could insist upon. Of course, there may be some matters which will have to be considered then, and which we ought not to decide now, but, in my opinion, it will be right, having regard to the position of the parties, to declare as far as we can what the interest of the plaintiff company is. I have already mentioned the facts of the case, and stated my conclusion on the evidence, that, before either of the terms mentioned in the agreements came to an end, communications took place between the plaintiff company and the agent of Mr. Boulton and his trustees, and the agent then told the plaintiff company to "stop the building operations till it is seen what becomes of the railway scheme." The appellants founded an argument on the special form of the agreements, which were not agreements that the plaintiffs should for a certain number of years have the land to build upon, but agreements that they should for ten years from a past date in one case, and six years in the other case, have liberty to enter upon the land for the purpose of building houses, and it was urged that nothing took place which could have the effect of making a new agreement, or extending the old agreements. I quite agree that what passed did not make a new agreement, but, in my opinion, what took place between Mr. Boulton's agent (I need not on every occasion refer to the trustees) and the plaintiffs would have prevented Mr. Boulton from bringing ejectment or taking possession of the land as soon as the terms of years limited by the agreements respectively came to an end. It raised an equity against him which would prevent his so doing, and would oblige him, after notice given by him to the plaintiff company, to give them a reasonable time to complete the building operations which had been stopped by the action of his agent. *Hughes v. Metropolitan Rail. Co.* (1) referred to by LINDLEY, L.J., during the argument, amply supports

A that proposition. I think, therefore, that this contention of the defendants also fails.

Then, as to the notice to treat given by the railway company. There has not been any notice by Mr. Boulton to the plaintiff company to go on with the building, and, in fact, after the sale to the railway company it would be impossible for him, as regards the land taken by the railway company, to give any such notice. As
B to the rest, he had a right to give the notice, but we need not enter into any question as to the rights between him and the plaintiffs. The effect, in my opinion, of the notice to treat was to put an end to all possibility of building by the plaintiff company on the land comprised in the notice. It was argued that what took place between Mr. Boulton's agent and the plaintiff company applied only to such land, if any, as might not be taken by the railway company, but I cannot so understand
C it. At that time there was no land designated as going to be taken by the railway company, and it would, I think, be impossible to hold that what Mr. Thynne [the agent] said to the plaintiff company amounted to this: "As regards any land which the railway company do not take, you shall have an extended time to build." He gave them a general direction to stop building. The consequence of this may now be different as regards the land taken by the railway company and the land
D remaining in Mr. Boulton, but, as regards the former, the effect must be that the plaintiff company were entitled to a reasonable time from the time of the notice to treat.

I do not think it advisable to go in detail into the facts of this case, but the accounts which have been put in showing the claim made for rent as against the plaintiff company after the period when, according to the defendants' contention,
E all right and interest on their part had come to an end, strongly supports the view which I take of the parol evidence in this case. I do not decide, and I do not think my brothers are inclined to decide, whether as regards the second agreement (that of April 5, 1877), the time had expired when the railway company took possession. That question will not affect the decree, for the railway company took possession of
F parts, both of the eight and a half acres and the three and a half acres, and it is enough to support their application to the court for relief that the plaintiffs were in possession under these agreements or one of them, of the land, or part of it, comprised in them.

I will notice another point which was first brought forward in reply, and on which, therefore, we should have given the plaintiffs an opportunity of being heard
G if we had thought it necessary. It was said "the plaintiffs, even if the agreement was still subsisting in their favour when the railway company took possession, were not persons to whom any bond was required to be given." This is ingenious, but, in my opinion, wrong. The plaintiff company were in occupation. I will not say whether they were in possession or not. Their agreements gave them a right to enter upon the land in order to build. They, in fact, did enter upon both
H parcels of land, and they did in fact build upon both parcels, and, more than that, the contract bound them to put a fence round the land, which they did, although it was shown that this fence was in some parts broken down, still the existence of the fence would be evidence that the plaintiff company were in occupation. Not only so, but they also, as I understand from the evidence, had a man there to look after the land, who lived in a house on the land and warned off trespassers, though
I not always effectually. In my opinion, therefore, the plaintiff company were in occupation of both the plots of land.

The Lands Clauses Consolidation Act, 1845, s. 84, says :

"The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special Act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank in the manner herein mentioned, the purchase

money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

Section 85 empowers the railway company, if they desire to enter before they have complied with the provisions of s. 84, to do so upon making a deposit and giving a bond, which was not done in the present case. The plaintiffs were in occupation, and the railway company, if they desired to take possession, as they did, were bound before they did so to make a deposit and give a bond to the plaintiffs. In my opinion, therefore, the plaintiffs are right in their contention throughout, and the railway company are wrong. We think, however, that it would be advisable to make some slight variation in the form of the decree. LINDLEY, L.J., will read what he has prepared, but that will not affect the costs of the appeal, because in substance we affirm the decision of KEKEWICH, J., though in form we slightly vary it. We doubt whether it would be right to give any direction as to what should be done by the jury. We declare the rights of the plaintiffs, and then trust to the judge to give a proper direction to the jury in order to ascertain what compensation is properly payable to the plaintiffs.

LINDLEY, L.J., read the following judgment.—I am of the same opinion, and have very little to add. Counsel for the defendants made two points in his opening. First of all he said that the procedure was wrong, that the action was wrong, and that the parties ought to have proceeded under the Lands Clauses Consolidation Act, 1845. Then he said on the merits that the building agreements were still subsisting when the notice to treat was given. I propose to say a few words upon each of these points.

With respect to the wrong procedure, counsel relied upon *London and Blackwall Rail. Co. v. Cross* (2), which decided that this court would not grant an injunction to restrain proceedings under the Lands Clauses Consolidation Act on the ground that the person claiming compensation had no interest in the land entitling him to take the proceedings. That point, as a matter of practice, has been settled, and it does not appear to me to apply to this case at all. If any lingering doubt could remain on that point it would be more than removed by the extremely able argument of the junior counsel for the defendants, who showed to demonstration that the railway company were entering, not under the provisions of the Lands Clauses Consolidation Act, but because they had bought the reversion of the lessor's interest in these lands, and they considered the agreement between the plaintiffs and the lessors as at an end, in which case, of course, the company would have been entitled to enter, whether the Lands Clauses Consolidation Act had been passed or not. In a controversy of that kind it obviously is perfectly competent to the person claiming the benefit of the agreement to bring an action for specific performance of that agreement, or at all events, to protect his interest under it, leaving the Lands Clauses Consolidation Act altogether on one side. I do not say that could have been done if the railway company had proceeded under the Lands Clauses Consolidation Act, but they did not. That puts an end to the first point as regards procedure.

The second point is the really important one, viz., whether the building agreements of Feb. 5, 1877, and April 5, 1877, were in any sense subsisting when the notice to treat was given on Sept. 16, 1884. The agreement of April 5, 1877, was to have come to an end at Michaelmas, 1881; that of Feb. 5, 1877, ran on to 1885, and clearly was subsisting at the time of the notice to treat. It is said that, at all events, when the railway company entered, which was not till 1886, both these agreements were at an end, and, looking at the agreements alone, unquestionably the periods of ten years and six years, which were mentioned, had come to an end before the railway company entered. But that is not conclusive, and the plaintiffs adduce evidence to show that there had been conduct on the part of their lessor which, notwithstanding the expiration of these terms, disentitled him to treat the agreements as at an end. The legal principle applicable to this case appears to me to have been settled in *Hughes v. Metropolitan Rail. Co.* (1), a case something like

A this, in which persons were held to have so conducted themselves as to have enlarged the time for doing what had agreed to be done by a particular date. I cannot express the principle better than by reading a short passage from the judgment of LORD CAIRNS. He says (2 App. Cas. at p. 448):

B "It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

C That is the general principle, and I think that it is plainly applicable here.

In or about 1880 the railway company had begun to advertise their intention to apply for a Bill. I am satisfied from the evidence that soon after those advertisements appeared the building operations under these agreements were suspended—
D they were certainly suspended before the end of 1881, though we cannot make out the exact date. There is a great mass of evidence, the general short effect of which appears to be that all parties understood that these building operations were to be suspended until the result of the railway scheme was known. In addition to that the applications made in June, 1882, for rent under the agreement expiring in November, 1881, and the accounts sent in, show conclusively that these agree-
E ments were then treated as still subsisting between the parties to them. The railway company bought the lessor's interest in July, 1883, the conveyance was much later. They entered in January, 1886, and this action was commenced immediately afterwards. Certainly, the railway company bought with the clearest possible notice of the rights of the plaintiffs, if any. In fact, the conveyances to them were made very cautiously and clearly, for the agreements were scheduled, which is, perhaps, a somewhat unusual thing. If they were treated as at an end, we should
F not expect to find them in the schedule, though it does not necessarily follow because they were in the schedule that they had not come to an end. It is perfectly competent for the railway company to contend that, although they had notice of the plaintiff's rights, those rights were really determined.

G What were the railway company's rights under those circumstances? When the notice to treat was given, the building agreements, in my opinion, were not at an end. There had not, it is true, been any agreement to enlarge the time, but there had been such conduct as to preclude the lessors, and the railway company claiming under them, from treating the agreements as at an end upon the expiration of the term of years mentioned in them. That is in substance what KEKEWICH, J., has declared. The whole question in the action has really been: Were these
H agreements at an end when the railway company entered, or were they not? KEKEWICH, J., made a declaration that the building agreements were still subsisting, and he also made a declaration that the price or value of the interest of the plaintiff company in the lands, and compensation for severance, etc., ought to be assessed upon the footing that the agreements were still subsisting. That is open to an
I objection in point of form, that it looks like anticipating the function of those who had to decide the value of the land; but in substance I think the declaration that those agreements were subsisting was right, though there is a little ambiguity about it. The ambiguity becomes more apparent when we bear in mind the different periods at which the agreements came to an end according to their tenour. In order to avoid ambiguity, it appears to me and my learned brothers that we should be a little more explicit. We propose to strike out the declarations contained in KEKEWICH, J.'s judgment, and to substitute for them the following declarations:

"Declare that on Sept. 16, 1884, when the notice to treat was given, the plaintiffs were entitled as against the defendants to the benefit of the three agreements of Feb. 5, 1877, April 5, 1877, and Oct. 27, 1879, for the following periods respectively, viz., as regards the agreement of Feb. 5, 1877, for the portion of the ten years mentioned in the said agreement unexpired on Sept. 16, 1884, and further, for such extended time as on that day was reasonably necessary to enable the plaintiffs to build the houses to be erected under the said agreement; and as regard the agreement of April 5, 1877, for such extended time as on Sept. 16, 1884, was reasonably necessary to enable the plaintiffs to build the houses to be erected under the said agreement. And declare that at the commencement of this action the plaintiffs were rightfully in occupation under the aforesaid agreements of the land comprised in the notice to treat or some part thereof, and that the defendants were not entitled to enter upon and take possession of the lands comprised in the said notice to treat except under the provisions of the Lands Clauses Consolidation Act, 1845."

The rest of the order will stand as before. The defendants must pay the costs of the appeal.

BOWEN, L.J.—I only propose to add some words upon the legal principles to be applied to this case, which, after the discussion we have heard, appears to me to be perfectly clear. We took time to consider, not from any doubt as to what the substance of the judgment in this case should be, for I believe we were all perfectly agreed about it, but because we thought that alterations were necessary in *KEKEWICH, J.*'s declarations, and wished carefully to consider what the declarations ought to be.

The first point, which was a double one, made on behalf of the defendants, was this. They said the plaintiffs are not entitled to an injunction at all, and if they are entitled to an injunction they are not entitled to such a declaration of interest as *KEKEWICH, J.*, has given them. The defendants urged, in the first place, that a person upon whom a railway company enters, ought to go to a jury, putting forward at his own risk the title upon which he wishes to rely, and must be left to make good that title afterwards, according to the ordinary machinery under the Lands Clauses Act, and that it was not only wrong for him to come to this court for an injunction, but it was also wrong for this court prematurely to declare the interests of the plaintiffs instead of leaving the plaintiffs to put them forward at their own peril and prove them in an action upon the award or verdict. Is this, then, a case in which the plaintiffs in the first instance were right in coming to the court for an injunction, and, if so, ought we to make a declaration as to the character of the plaintiffs' possession, and to what extent ought the declaration to go?

It appears to me that both those questions are answered by considering what is the character of the entry which the railway company here are making. They are not entering under the Lands Clauses Act; they have deliberately abstained from taking the proceedings which would give them a right to make an entry under that statute. In the second place, they are entering upon the land of persons who are in occupation. I will not go through what has been said already upon that subject by *COTTON, L.J.* I have come to the conclusion, like my brothers, that at the time when the entry was made the plaintiff company were in occupation of the lands in question. The railway company, therefore, entered upon persons who were in occupation, and who, as will appear from what I say hereafter, were in lawful occupation, and they did not enter under the Lands Clauses Act. They were bound, therefore, to rely on the strength of such right to possession as they possessed paramount to the right of occupation which the plaintiffs were enjoying. In such a case the plaintiffs were justified in insisting that until the provisions of the Lands Clauses Act were complied with they were entitled to remain in occupation, and that the railway company had no right to interfere

A with their occupation. This was, therefore, a case in which relief might properly be asked at the hands of a court of equity.

But that does not dispose of the entire difficulty which the defendants put forward, because they said that, even if that were so the court ought not to make a declaration as to what the exact character of the plaintiffs' interest was, but ought to leave that to be decided after the jury had given their verdict. The answer to
B that contention appears to me to be that inasmuch as the railway company could only lawfully enter by virtue of such right of possession as they had paramount to the rights of occupation of the plaintiffs, the railway company's defence could only be sustained by showing that they had some such paramount interest, and inasmuch as they took with notice of the title of the plaintiffs as against Boulton, such paramount interest could only exist upon the ground that the title of the
C plaintiff company under the agreements had come to an end. That is the only answer the railway company could have to the action, and whether the agreements had been so extended that the plaintiff company still had an interest under them was the plain issue raised in the case. It ought not to be supposed that in making the declaration which we do we are in any way intentionally departing from the ordinary course which is pursued in these cases. The declaration is made, not in
D order to assist the jury, but in order to determine the sole issue in the case. The railway company, if they wished to avoid this declaration, ought to have done their best to put an end to the action, and the proper course for them to pursue, if they had entered on the land without complying with the provisions of the Lands Clauses Act, was to comply with the provisions of the Lands Clauses Act after action brought, and then to take out a summons to stay the action upon pay-
E ment of costs, because there would be nothing further to decide. As long as they abstained from doing that the plaintiffs were driven to go down to trial in order to decide the issue which was raised, which is the issue we have to decide.

So much for the defendants' first point. The next point is a simple one—perfectly simple as regards the principle of law and equity to be applied. As LORD CAIRNS put it in the passage which has been read (and which I read again simply
F because I desire to add one word of answer to the argument which was addressed to us) in *Hughes v. Metropolitan Rail. Co.* (1) (2 App. Cas. at p. 448):

“If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising
G under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

It was suggested that that proposition only applied to cases where penal rights
H in the nature of forfeiture, or analogous to those of forfeiture, were sought to be enforced. I entirely fail to see any such distinction. The principle has nothing to do with forfeiture. It is a principle which lies outside forfeiture, and everything connected with forfeiture, as will be seen in a moment by reflection. It was applied in *Hughes v. Metropolitan Rail. Co.* (1) in a case in which equity could not relieve against forfeiture upon the mere ground that it was a forfeiture, but
I could interfere only because there had been something in the nature of acquiescence, or negotiations between the parties, which made it inequitable to allow the forfeiture to be enforced.

The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that, if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced, or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the

parties in the same position as they were before. That is the principle to be applied. I will not say it is not a principle that was recognised by courts of law as well as of equity. It is not necessary to consider how far it was always a principle of common law. A

Applying that principle to the facts here, I think nobody can come to any but one conclusion—viz., that Mr. Boulton (and the railway company took subject to his liabilities) had induced the plaintiff company reasonably to believe that time would not run against them as regards the building agreements, and that he would not enforce his rights, as regards time for building, until a reasonable period had elapsed after they should have received notice from him. As soon as the railway company served notice to treat, the reasonable time, it seems to me, necessarily began to run. It is true that no fresh agreement was made as to what should be done with regard to these lands, but that does not prevent the equity arising as regards the running of the time, though, of course, it makes the extension of the time less valuable because, to a certain extent, the plaintiffs would remain at Mr. Boulton's mercy as to the limits of the extension. As soon as we find that the plaintiffs were in lawful occupation under these agreements, the rest of our judgment seems to me necessarily to follow. B

Solicitors: C. H. Mason; Robinson, Preston & Stow for Rowlands & Co., Birmingham. D

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

BIRCH v. CROPPER. Re BRIDGEWATER NAVIGATION CO., LTD. E

[House of Lords (Lord Herschell, Lord FitzGerald and Lord Macnaghten), July 23, 25, August 9, 1889] F

[Reported 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621;
38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372]

Company—Winding-up—Voluntary winding-up—Distribution of assets—Different classes of shareholders—Shares of same nominal value—Different amounts paid up. G

A company, incorporated under the Companies Acts, consisted of preference shareholders entitled to a fixed dividend, and ordinary shareholders, the shares, whether preference or ordinary, being of the same nominal value. The preference shares were fully paid up, but the ordinary shares were not. The undertaking of the company was bought by another company at a price which, after payment of all liabilities and return of the paid-up capital, left a surplus. There was no provision in the articles of the vendor company for the distribution of the assets of the company on a winding-up. H

Held: the surplus was divisible among all the shareholders, both preference and ordinary shareholders, each of whom was entitled to receive a sum in proportion to the amount of his shareholding. I

Notes. Considered: *Re Sheppard's Corn Malting Co., Ex parte Lowenfield* (1893), 70 L.T. 3; *Re Anglo-Continental Corp'n. of Western Australia*, [1898] 1 Ch. 327; *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451; *Re Mutoscope and Biograph Syndicate*, [1899] 1 Ch. 896; *Re Odessa Waterworks Co.*, [1901] 2 Ch. 190, n.; *Collaroy Co., Ltd. v. Giffard*, [1927] All E.R.Rep. 346; *Re William Metcalfe & Sons, Ltd.* (1932), 48 T.L.R. 651; *Re Isle of Thanet Electric Supply Co.*, [1949]

- A** 2 All E.R. 1060; *Re John Smith's Tadcaster Brewery Co., The Co. v. Gresham Life Assurance Soc., Ltd.*, [1952] 2 All E.R. 751; *I.R.Comrs. v. Pollock and Peal, Ltd.*, [1956] 2 All E.R. 776. Referred to: *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] Ch. 66; *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Welsh Whisky Distillery Co.* (1900), 16 T.L.R. 246; *Re Epsuela Land and Cattle Co.*, [1909] 2 Ch. 187; *Will v. United Lankat Plantations Co., Ltd.*, [1911-13] All E.R.Rep. 165; *Re Fraser and Chalmers, Ltd.*, [1918-19] All E.R.Rep. 756; *Re E. W. Savory, Ltd.*, [1951] 2 All E.R. 1036; *Dimbula Valley (Ceylon) Tea Co., Ltd. v. Laurie*, [1961] 1 All E.R. 769.

As to the distribution of assets on a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 678-682, 751-753; and for cases see 10 DIGEST (Repl.) 1008-1012, 1065 et seq.

C Cases referred to:

- (1) *Sheppard v. Scinde, Punjab & Delhi Rail. Co.* (1887), 56 L.J.Ch. 866; 57 L.T. 585; 36 W.R. 1; 3 T.L.R. 721, C.A.; affirmed (1889), 60 L.T. 641, H.L.; 10 Digest (Repl.) 1066, 7392.
- (2) *Re Anglesey Colliery Co.* (1866), L.R. 2 Eq. 379; 35 L.J.Ch. 546; 14 L.T. 355; 14 W.R. 708; affirmed, 1 Ch. App. 555; 35 L.J.Ch. 809; 15 L.T. 127; 30 J.P. 692; 12 Jur.N.S. 696; 14 W.R. 1004, L.J.J.; 10 Digest (Repl.) 954, 6562.
- (3) *Re Hodge's Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; 40 L.J.Ch. 21; 23 L.T. 749; 19 W.R. 113; 10 Digest (Repl.) 1010, 6945.
- (4) *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65; 10 R. (Ct. of Sess.) 11; 20 Sc.L.R. 244; 9 Digest (Repl.) 634, *1780.
- (5) *Re London and Brighton Stock-Exchange Co., Ltd.* (1887), 4 T.L.R. 2; 10 Digest (Repl.) 1065, 7390.
- (6) *Webb v. Whiffin* (1872), L.R. 5 H.L. 711; 42 L.J.Ch. 161, H.L., 10 Digest (Repl.) 931, 6367.

Also referred to in argument:

Binney v. Mutrie (1886), 12 App. Cas. 160; 36 W.R. 129, P.C., 36 Digest (Repl.) 629, 1928.

Griffith v. Paget (1877), 6 Ch.D. 511; 37 L.T. 141; 25 W.R. 821; 10 Digest (Repl.) 1069, 7411.

Robinson v. Ashton, Ashton v. Robinson (1875), L.R. 20 Eq. 25; 44 L.J.Ch. 542; 33 L.T. 88; 23 W.R. 674; 36 Digest (Repl.) 539, 1001.

Watney v. Wells (1867), 2 Ch. App. 250; 36 L.J.Ch. 861; 16 L.T. 248; 15 W.R. 627; 36 Digest (Repl.) 563, 1216.

Somes v. Currie (1855), 1 K. & J. 605; 26 L.T.O.S. 38; 1 Jur.N.S. 954; 69 E.R. 602; 10 Digest (Repl.) 1291, 9136.

Re Exchange Drapery Co. (1888), 38 Ch.D. 171; 57 L.J.Ch. 914; 58 L.T. 544; 36 W.R. 444; 4 T.L.R. 381; 10 Digest (Repl.) 1065, 7387.

- H** **Appeal** from a decision of the Court of Appeal (COTTON, FRY and LOPES, L.J.J.), reported sub nom. *Re Bridgewater Navigation Co.*, 39 Ch.D. 1, affirming a decision of NORTH, J.

The question for decision in the case was in what mode a surplus of about £550,000, which had arisen out of the purchase of the undertaking of the company by the Manchester Ship Canal Co. was to be divided among the shareholders, ordinary and preference. The articles of association contained the following provisions:

"Article 4. The company may, by the resolution of a general meeting, increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend or such priority in the distribution of assets, or be subject to such postponement of dividends or in the distribution of assets, as any resolution of a general meeting, passed previously to the issue of any such

new capital, shall direct. But, save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association."

In 1874 the company passed a special resolution repealing the old articles of association and substituting new ones. The new articles contained the following article in lieu of the one above stated:

"Article 3. The company may, by the resolution of a general meeting, increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share and in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend or such priority in the distribution of assets, or be subject to such postponement of dividends or in the distribution of assets, as any resolution of a general meeting passed previously to the issue of any such new capital shall direct. But, save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association."

"Article 85. Subject to the last preceding article [empowering the directors to form a reserve fund out of profits], and subject to any arrangement which may from time to time have been entered into relative to the remuneration of any manager or other officer of the company by way of commission or percentage on the net profits of the company, or on any part thereof, the entire net profits of each year shall belong to the holders of the shares of the company, and be divided pro rata upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon."

Sir Horace Davey, Q.C., Cozens-Hardy, Q.C., and O. L. Clare for the appellant representing the ordinary shareholders.

Rigby, Q.C., Buckley, Q.C., and Swinfen Eady for the respondent representing the preference shareholders.

S. A. Sampson for the liquidators.

Their Lordships took time for consideration.

Aug. 9, 1889. The following opinions were read.

LORD HERSCHELL.—The only question for determination in this case is upon what principle the balance of the proceeds of the realisation of the assets of the Bridgewater Navigation Co. remaining after satisfying all the liabilities of the company and returning to the shareholders the paid-up capital, is to be distributed as between the holders of the ordinary and preference shares of the company. The company was formed in 1872 for the purpose of acquiring the Bridgewater and other canals with a capital of £500,000 divided into 500 shares of £1,000 each. By resolution duly passed in September of that year it was provided that the capital, instead of being divided into shares of £1,000 should be divided into 50,000 shares of £10 each, and should be increased to £1,300,000 consisting of 130,000 shares of that amount. Prior to April, 1880, 100,000 shares [representing £1,000,000 capital] had been issued as ordinary shares, upon which £2 10s. per share had then been paid, and on the 27th of that month it was resolved at an extraordinary meeting that the balance of the uncreated capital, viz. £300,000 should be created, and that the 30,000 new shares should be issued as preference shares, entitling the holder to a preferential dividend of 5 per cent. In pursuance of this resolution the shares were issued accordingly, and the additional capital of £300,000 was paid up. At the same time a call of £1 was made on the ordinary shares, raising the amount paid up on them to £3 10s. per share. In 1887 the Manchester Ship Canal Co. purchased the undertaking and assets of the Bridgewater Canal Navigation Co. for the sum of £1,710,000, and it was thereupon

A resolved that the latter company should be wound-up voluntarily. In the September following, the liquidators repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. After making this return to the shareholders, and, after discharging all the debts and liabilities of the company, there remained in the hands of the liquidators a surplus of about £550,000. The question is how this surplus ought to be distributed among the ordinary and
B preference shareholders. The court below has determined that the distribution ought to be made in proportion to the amounts respectively paid upon their shares, and your Lordships have to determine whether this is the correct principle to apply.

It is contended on behalf of the appellant, who represents the ordinary shareholders, that they are entitled to the whole of the surplus, but, failing this contention, it is insisted that the division ought to be made according to the capital
C subscribed, and not to the amount paid up on the shares. The Companies Acts afford very little assistance in terms towards a decision of the question. It is provided [see now s. 302 of the Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452] that in the case of a voluntary winding-up the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall,
D unless it be otherwise provided by the regulations of the company, be distributed among the members according to their rights and interests in the company. But this leaves undetermined what those rights and interests are. The learned counsel for the appellant argue that except in so far as the provisions of the Companies Acts necessarily create a distinction between the rights of its members and those of partners, the principles of the law of partnership are applicable, and ought to
E be applied; and they urge that, in the case of a partnership, unless the terms upon which it is entered into provide otherwise, surplus assets are distributable among the partners in the proportions in which they are entitled to share the profits.

Even assuming that the doctrine laid down with regard to the division of surplus assets in the case of a partnership be correct (upon which I pronounce no
F opinion), I am unable to see how it establishes the appellant's claim that the ordinary shareholders should receive the whole of the assets. The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case. What they are to receive is indeed limited in its amount, but it is none the less a share in the profits. To treat them as partners receiving only interest on their capital
G and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think, therefore, that the first contention of the appellant wholly fails.

H The other point raised by the appeal is, to my mind, one of considerable difficulty. There is no decision bearing directly upon the point, and it must, therefore, be determined upon general principles of equity. Some stress was laid in the court below upon the decision in *Sheppard v. Scinde, Punjab and Delhi Rail. Co. (1)*, but I do not think that case can be relied on as an authority except where the circumstances are precisely similar. All the noble and learned Lords who took
I part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle. The view taken by the court below has presented to my mind from the outset some formidable difficulties. I cannot but feel that it would in some cases be most inequitable to take into consideration in distributing the surplus assets only the amount of capital paid up by the several classes of shareholders, and to make the distribution accordingly.

In the Court of Appeal COTTON and FRY, L.JJ., were guided to their conclusion by the provisions contained in the articles of association of this company. With

all deference, I do not think that they really afford the assistance that was supposed. The 85th article of association prescribes that the net profits of each year shall be divided pro rata upon the whole paid-up capital of the company, and that the directors may declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon. But this article is clearly inapplicable to the preference shareholders, who do not share pro rata in the profits of the year. Their rights are determined by the resolution creating the new capital, which provided that the new shares were to entitle the holders thereof to a dividend of 5 per cent. per annum "upon the amount for the time being called up thereon," and taking precedence over all dividends on the ordinary shares. This clearly by implication excludes in the case of these shares the operation of art. 85. COTTON, L.J., after pointing out, I think correctly, that under the articles both as regards the ordinary shareholders and the preference shareholders respectively inter se, the right to the dividend was to be on the footing of its being in proportion to the sum paid upon the shares, proceeds to say (39 Ch.D. at p. 25):

"That is the footing upon which to decide it. All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end. We must deal with them all as shareholders having equal rights without reference to profits, and in my opinion when that is so, and when there is the indication in the articles of association which form the contract of partnership that profit is to be divided when it is a going concern, and arising from the working of the business in accordance with the sums paid up on each share, then in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with, and in proportion to, the amount paid up by them on their shares."

I have a difficulty in seeing how the provisions of the articles alluded to show that the equitable mode of distribution is that suggested. It is conceded that they cease to be applicable when the company comes to be wound-up, but if they are to be regarded at all, I think that their full effect must be borne in mind. It is not the case that when the company was a going concern the profits earned were to be divided in accordance with the sums paid on each share. The share of the profits to which the preference shareholders were entitled was limited in amount. It did not depend upon the proportion which the profits bore to the total paid-up capital; and the ordinary shareholders were, in fact, receiving a proportion of the profits exceeding that which they would have been entitled to had such profits been divided to each shareholder in proportion to the capital paid up. I do not say that this indicates the mode in which the surplus assets should be distributed; but it does appear to me to show that it does not follow from the method in which profits were divided, that the equitable mode of dividing surplus is to let all the members share alike in proportion to the amount paid up on their shares. In the present case, too, it cannot be doubted that, in estimating the price to be paid by the canal company, the future prospects of the Bridgewater company, the probable development of its property, and the increase in its value, was taken into account. In these future prospects the preference shareholders had no concern, save in so far as they improved the security for the payment of their interest. If that security was already ample, the benefit arising from the increased value of the company's undertaking would, down to the time of its being wound-up, enure entirely to the ordinary shareholders; and yet, in so far as the price represented this increased future value, the result of the decision is to give to the preference shareholders approximately one-half of it.

I do not mean to say that any principle can be laid down which will ensure perfect equality in this respect; but that which has been adopted appears to me to tend to raise the inequality to a maximum. The articles of association do not appear to me to afford the means of deciding this case upon any special grounds

- A peculiar to this company. Their provisions are such as are commonly to be found regulating the distribution of profits in the case of joint-stock companies. I think the determination of the question at issue must be arrived at upon principles wider and of more general application. In my opinion, one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of £3 10s. per share was not the only contribution made by the ordinary shareholders to the assets of the company. They had each come under liability to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable, and tend just as effectually to the prosperity of the company, as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property.
- C In *Sheppard v. Scinde Rail. Co.* (1) BOWEN, L.J., said (56 L.J.Ch. at p. 870):

“Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was not in any way an element in the production of this purchase money.”

- I am not by any means prepared to say the same of this company. On the contrary,
- D I think it most probable, looking to the large sums of money raised on loan at a moderate rate of interest, that the liability of the shareholders did add very materially to the ease with which these loans were obtained, and to the consequent development and prosperity of the undertaking.

In the same case *FRY*, L.J., said (*ibid.* at p. 870):

- E “It seems to me that in this case distribution must be proportionate to contribution. But, it is said, suppose the property to have been produced not by unequal contributions, but by unequal liabilities to pay, the proceeds must be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of the liabilities. I conclude that in this case the assumption of liability by the shareholders has not in any way produced the property, and that it cannot be said that the capital has been in the least increased by the liability.”
- F

In the present case that learned judge appears to have discarded altogether these considerations, apparently because he thought the matter settled by the terms of the articles of association; but, for the reasons I have given, I cannot concur in this view.

- G I am fortified by the observations of the two learned judges I have quoted in the view that a scheme of distribution which overlooks an important part of the contribution can scarcely be regarded as equitable. It would be impossible, to my mind, to enter upon an inquiry in each individual case how much the liability incurred and the money provided had respectively contributed to the prosperity of the company or the value of its property. Some general rule must be laid down.
- H I quite admit that it may be urged with force that if the distribution is to follow, not the paid-up, but the subscribed, capital, the liability would always be treated as of as much value as actual money. But if there must be a general rule, and I have to choose between so regarding it or treating it as valueless, I believe the former would, on the whole, be the more equitable course. I, of course, exclude such a case as that of the Scinde railway, where the constitution of the company determined the amount of purchase money to be given for the undertaking, and by the mode in which it was to be ascertained indicated what was the equitable mode of distributing it.
- I

In making these observations with reference to the unpaid liability upon shares, I do not desire to be understood as indicating that they are decisive of the question how surplus assets are to be divided, but only as explaining why I cannot feel satisfied that the principle which has been adopted in the court below is the correct one. Let me put an illustration which occurred to me while the appeal was under argument. Take the case of a company whose entire paid-up capital was obtained

by the issue of preference shares bearing a limited rate of interest, nothing being paid up on the ordinary shares. The prosperity of such a company might be very largely due to the liability of the ordinary shareholders, which might be just as valuable to the company as if they had paid a large sum on their shares. Yet in such a case, if the undertaking were sold, the whole of the surplus, after discharging the liabilities of the company and returning their capital to the preference shareholders, would, on the principle adopted by the court below, have been the property of such shareholders, and it must have been declared that the ordinary shareholders had no title to it, or to share in its distribution—that, though members, they had no “rights or interests” in the company. I admit that the case I have put is an extreme, though it is not an impossible, one; but I think it may well be put to test the equity of the principle laid down. It may be said that in the case I have put, the profits could not be payable according to the amount paid up on the shares, and that in that case some other principle must be applied and the amount subscribed, or some other test must be taken. But if this be so, the principle on which assets were to be distributed would be altered, it may be in a manner most detrimental to the ordinary shareholders, as soon as any call, however small, was made on the shares.

I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided among the shareholders according to the shares which they hold in the company. The present company has been prosperous, and the result of the winding-up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to inquire how the different classes of shareholders would have been dealt with if the reverse had been the case, and a loss has resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case, where there is no provision to the contrary in the articles of the company, the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In *Re Anglesey Colliery Co.* (2) it was held by LORD HATHERLEY, when vice-chancellor, and his judgment was affirmed on appeal, that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members, so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in *Ex parte Maude* (3), where some of the shareholders had paid £20 and others £25 a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets £5 to each shareholder who had paid £25 before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares, “and the amount paid up thereon respectively,” and this was relied on as showing that the loss ought to be proportioned to the amount paid up. MELLISH, L.J., however, said (6 Ch. App. at p. 56):

“In my opinion we cannot draw any inference from art. 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that, in the case of the company being wound-up, the losses should be divided in proportion to the amount paid up, and not to the amount subscribed.”

And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either, it would seem only natural and equitable that loss should be borne and benefits shared in the same proportion. And, in my opinion, this is the true principle to apply.

In the course of the argument I put the case of a company being wound-up, having a large asset of doubtful value, and not capable of immediate realisation. In such a case it might be necessary or prudent to call up the unpaid capital

A in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up, the surplus would be distributed rateably among all the shareholders, whereas, supposing the judgment under appeal to be correct, if the asset had been first realised, the distribution among the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would
 B thus be made to depend on the urgency of the creditors or the timidity of the liquidators—a result neither satisfactory nor equitable. I observe that the same consideration occurred to MELLISH, L.J., in the case I have just referred to. He said (6 Ch. App. at p. 56):

C “If any other construction were adopted it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately valued, or whether it was necessary to make a call to pay the debts. If the £5 per share had been called up to pay pressing debts, it could not be denied that the assets when got in would be divided *pro rata*; that is to say, the losses would be borne by shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realised, or that
 D the creditors did not press for payment, so that a call was not necessary before the assets were divided; but that accident ought not to alter the way in which the assets are to be divided.”

Surely all this applies with equal force to the profit resulting on the winding-up of the undertaking. The truth is that each member who has subscribed for a £10 share owns the same share in the company, whether it be or be not paid
 E up, and, if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned, both classes of shareholders are on the same footing, equally members, and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle
 F which I recommend your Lordships to adopt will not secure absolutely equal or equitable treatment in all cases, but I think that it will in general attain that end more nearly than any other which has been proposed. I am, therefore, of opinion that the judgment appealed from should be reversed, and that it should be declared that the balance of the proceeds of sale ought to be divided among the holders of all the shares in the Bridgwater Navigation Co., Ltd., in proportion to
 G the shares held by them respectively. I, accordingly, move your Lordships that the judgment appealed from be reversed, and that the declaration I have just read be made.

LORD FITZGERALD.—My noble and learned friend who has just spoken has in his exhaustive opinion not only carefully given all the facts and criticised and
 H disposed of the various contentions, but he also examined the case in all its bearings, and fully and clearly indicated his reasons for not adopting the decision of the Court of Appeal. I concur in the conclusion at which he has arrived, though I do not find it necessary to say that I accept all his reasons. I am to be followed by an elaborate speech from LORD MACNAGHTEN, the notes of which
 I I have read, and, as he arrives at the same result, I need not express my concurrence a second time. Coming between such weighty authorities, I confidently anticipate your Lordships' sanction to my being concise.

HIS LORDSHIP stated the facts, and continued: The question is on what principle is that surplus [i.e., the surplus of £550,000 in the hands of the liquidators after paying off every liability of the company and returning to the shareholders their capital with the interest and share of profits due to them] to be divided? The case came first before NORTH, J., and the Court of Appeal adopted his decision. NORTH, J., says (89 Ch.D. at p. 14):

"I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, and that it is to be divided on equitable principles. There is little direct authority to assist me in the matter."

I quite concur so far with the learned judge. He adds (*ibid.* at p. 15):

"But the question I have to decide is not what is a reasonable mode, but what is the equitable mode of distributing the increment in question. In my opinion, the recent case before the Court of Appeal of *Sheppard v. Scinde, Punjab and Delhi Rail. Co.* (1) is so like the present as not only to assist me, but to furnish an authority I ought to follow."

That case as an authority on the present appeal has been already disposed of by my noble and learned friend. NORTH, J., then quotes a passage from the judgment of COTTON, L.J., in the *Scinde Case* (1) (*ibid.* at p. 16):

"I think the general law is, that after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners."

There is the principle on which NORTH, J., acted as the equitable mode of distributing the surplus. The Court of Appeal adopted it. I have felt myself unable to act on this supposed rule as applicable to such an undertaking as the Bridgewater Canal Co., Ltd., and there is no authority for doing so. It may fit an ordinary common law partnership, but when applied to an association such as is now before us, it works inequality and injustice, and not equity. The error seems to me to be in supposing that there is an exact analogy between an ordinary commercial partnership and a statutable undertaking called into existence under the Joint Stock Companies Acts, and regulated by the statute and its own memorandum of association and articles. There may be likeness in some particulars, but there is no real analogy.

Then what rule is to guide this distribution? There is, in my opinion, no contract to guide us in the circumstances which have arisen, and there is nothing to be found in the memorandum of association, or in the articles, or in the statutes, to give us any real help. The resolutions calling into existence the preference shares are equally a blank on the subject; but I have no doubt that the able men who then directed the affairs of the company, if they had seen the probability of a surplus on winding-up, would have been the last to agree to give up the lion's share to the preference shareholders. Then on what rule or principle are we to proceed? I concur in what my noble and learned friend has adopted as the equitable principle to be acted on. There is a clear stage to act on. The shareholders have been all reduced to one common level. Each shareholder of a share represents a former share in the company, and we have some authority that between the several classes of shareholders each represents £10 in the subscribed capital of the company, and that for the present purpose, and in this particular case, it matters not whether the £10 had been actually paid up in full or subscribed for and partially paid. We have some authority for this in *Oakbank Oil Co. v. Crum* (4), which, though not an authority in point, at least imports that the proper interpretation of "share" is the shareholder's proportion in the subscribed capital of the company which appears in his name on the register of shareholders. I am clearly of opinion that the only equitable principle to be acted on in this case is that of equality. That is an equitable principle, and in giving effect to that rule each and every shareholder should receive in respect of his share an equal proportion of this surplus.

LORD MACNAGHTEN.—The question involved in this appeal appears to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of STIRLING, J., in *Re London and Brighton Stock-Exchange Ltd.* (5). *Sheppard v. Scinde, Punjab and Delhi Rail. Co.* (1), which was treated as an authority in the courts below, has since been reviewed in this House, and in

A affirming the decision of the Court of Appeal, every one of the noble and learned Lords who addressed the House relied simply and solely on the special circumstances of the Case.

The question before your Lordships is this. In the liquidation of a company limited by shares, what is the proper mode of distributing assets not required for payment of debts and liabilities, or for the costs of the winding-up, or for the adjustment of the rights of the contributories among themselves, so far, at any rate, as such rights have hitherto been understood and recognised? As incidental to that question, your Lordships have to consider whether the mode of distribution can be in any way affected by one or more of the following circumstances: (i) That the shares of the company were paid up unequally, some being fully-paid up, others being paid up only in part. (ii) That the fully-paid up shares were issued separately as preference shares, carrying a preferential dividend of 5 per cent. without any further right to participate in the profits of the business. (iii) That by the regulations of the company dividends on the company's shares were payable in proportion to the amounts paid up thereon.

The answer, as it seems to me, must depend on the principle applicable to companies limited by shares, and on the provisions contained in the Companies Act, 1862. It is perhaps rather beside the mark to discuss the general doctrines of partnership, and to examine particular cases of partnership contracts. The scheme of the Act and the directions to be found there are, I think, a safer guide than any analogies can be. Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund; and that is all.

When the company is wound-up new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributories among themselves. In the case of compulsory winding-up, the Act says, in s. 109 [see now Companies Act, 1948, s. 265] that

"the court shall adjust the rights of the contributories among themselves, and distribute any surplus that remains among the parties entitled thereto."

In the case of voluntary winding-up, the language is not quite the same, and the directions are rather more explicit [see s. 302 of Act of 1948]. Not that there can be any difference as to the proper mode of distributing assets in the two cases. No one has suggested that. A sufficient reason for the difference of language is, I think, to be found in the circumstance that, while the privilege of voluntary liquidation is confined to companies under the Act, any partnership or association consisting of more than seven members may be wound-up compulsorily. To meet every case of compulsory liquidation it was necessary to use the most general language. Besides, it is obvious that specific directions, useful and proper for the guidance of voluntary liquidation, are not so requisite when the liquidation is under the court. As LORD CAIRNS points out in *Webb v. Whiffin* (6) (L.R. 5 H.L. at p. 735):

"It was naturally thought important in the case of voluntary windings-up to make specific provisions, and to give specific directions as to matters which were supposed to be so plain, and so necessarily consequential upon the general

scheme of the Act, that in a winding-up under an order of the court it was not thought necessary to give express directions upon these matters of detail." A

I cannot, therefore, agree with COTTON, L.J., that ss. 109 and 133 are to be read together, with the result that the more general language of s. 109 is to neutralise or obscure the *prima facie* meaning of the more specific directions given in the case of a voluntary winding-up.

The consequences that are to ensue upon the voluntary winding-up of the company are to be found in s. 133. It is there provided [see now s. 302 of Act of 1948]: B

"The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed among the members according to their rights and interests in the company." C

Then the section goes into details as to the powers of the liquidators [see s. 303 (2) of Act of 1948], and ends by saying that "the liquidators shall pay the debts of the company, and adjust the rights of the contributories among themselves." In the case of members of a company limited by shares, what are "their rights and interests in the company," in the absence of any special regulation, and what are the rights of the contributories among themselves which have to be adjusted in the winding-up? Among the rights to be adjusted, the most important are those which arise when there is a difference between shareholders in the amount of calls paid in respect of their shares. Before winding-up no such rights exist. Whatever has been paid by the shareholders of one issue in excess of the contributions of their fellow shareholders of a different issue, must have been paid in pursuance of calls duly made, or in accordance with the conditions under which the shares were held. While the company is a going concern no capital can be returned to the shareholders except under the statutory provisions in that behalf. There is, therefore, during that period no ground for complaint; no room for equities arising out of unequal contributions. D E

In the case of winding-up everything is changed. The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalised, what equity founded on inequality of contribution can possibly remain? The rights and interests of the contributories in the company must then be simply in proportion to their shares. This was the view of STIRLING, J., in the case I have referred to. Your Lordships, however, were reminded more than once that "the Act does not say so." You were told that, if that had been the meaning of the legislature, nothing would have been more easy than to have said so in so many words. It is easy, no doubt, to make a slip; but I should have been rather surprised if the framers of this Act, which is a model of careful and accurate drafting, had forgotten that the provisions for voluntary liquidation apply to some companies which have not a capital divided into shares. F G H

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures; but they are not debenture-holders at all. For some reason or other, the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company. I

- A Then the preference shareholders say to the ordinary shareholders: "We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of a company results from its paid-up capital; distribution must be in proportion to contribution. The surplus assets must be divided in proportion to the amounts paid up on the shares." That seems to me to be ignoring altogether the elementary principles applicable to joint-stock companies
- B of this description. I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets," as if they were an accretion or addition to the capital of the company capable of being distinguished from it, and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint-stock or common fund—which at the date of the winding-up represented the capital of the company. It is through
- C their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding-up must have taken that share, and must have held it on the terms of paying up all calls duly made upon him in respect thereof. In paying up his share in full he has done
- D no more than he contracted to do. Why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding-up took his share and held it, on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter
- E rights which were the subject of express contract?

Observe how unreasonable this contention on the part of the preference shareholders is. They do not propose to unravel the accounts of the company or to inquire how long the company had the benefit of the contributions from each of the two classes of shareholders, or what was the position of the company when those contributions were made. It may be that the founders of the company made a

F lucky hit at the outset. Good management may have had something to do with the success of the company. And after all, something may perhaps be put down to the fact that the Ship Canal company was forced to buy a property which lay directly in the track of its undertaking. The preference shareholders discard all these considerations. They take the date of the winding-up as the date which governs the rights of the shareholders in the distribution of what they call surplus

G assets. They say: "Our payments then were in excess of the payments of the ordinary shareholders." But that is a mere accident. There was a time not very long ago when the contributions of the ordinary shareholders were in advance of those of the preference shareholders. If the company had gone on they might soon have been on a level again. The prosperity of the company was not due to the contributions of the preference shareholders. They did not come on the scene till just before the last act. It so happens that the very same directors'

H report which records their final payment calls attention to the ship canal as a practical project. When the preference shareholders were invited to come in the prosperity of the company was assured. The business was flourishing; the shareholders were receiving dividends of 8 per cent., with occasional bonuses, and the directors were in a position to borrow at 4 per cent. Instead of borrowing, the

I company resolved to issue these preference shares, on the condition that they should be fully paid up within a limited time. As the company chose to admit the preference shareholders as shareholders, they must have the rights of shareholders; but I cannot see why they should claim more.

Then it was said on behalf of the preference shareholders that the provision for payment of dividends in proportion to the amount paid up on the shares leads to an inference that the distribution of surplus assets was to be made in the same proportion. I do not think that it leads to any inference of the kind. It is a very common provision nowadays, though it is not what you find in Table A; and it is

a very reasonable provision, because during the continuance of the company, and while it is a going concern, it prevents any sense of dissatisfaction on the part of those who have paid more on their shares than their fellow shareholders of a different issue. But when it has come to an end I cannot see how it can be used to regulate or disturb rights with which it had nothing to do even while it was in force.

I am, therefore, of opinion that the judgment of the Court of Appeal must be varied, and that it should be declared that, subject to the payment of the costs, charges, and expenses of the winding-up, including the costs of all parties in this application here and in the courts below, the assets of the company remaining undistributed, other than the reserve fund, which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares.

Appeal allowed.

Solicitors: *Cunliffes & Davenport*, for *T. E. Sampson*, Liverpool; *Burgess & Cosens*, for *Arthur Buckley*, Manchester; *Cunliffes & Davenport*, for *Lingards*, Manchester.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

Re CASTIONI

[QUEEN'S BENCH DIVISION (Denman, Hawkins and Stephen, JJ.), November 10, 11, 1890]

[Reported [1891] 1 Q.B. 149; 60 L.J.M.C. 22; 64 L.T. 344;
55 J.P. 328; 39 W.R. 202; 7 T.L.R. 50; 17 Cox, C.C. 225]

Extradition—Habeas corpus—"Offence of political character"—Onus of proof—Jurisdiction of High Court—Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 3 (1).

By s. 3 of the Extradition Act, 1870: "The following restrictions shall be observed with respect to the surrender of fugitive criminals: (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. . . ." By s. 26 of, and Sched. I to, the Act, murder is an extradition crime for the purposes of the Act. By an Extradition Treaty of 1880 entered into between Great Britain and Switzerland the crime of murder was made the subject of extradition by one country to the other, and s. 3 (1) of the Act of 1870 was incorporated in the treaty. By s. 8 of the Act a magistrate may issue a warrant for the apprehension of a fugitive criminal. By s. 9 when the criminal is brought before him the magistrate shall deal with the matter as if the prisoner were charged with an indictable offence committed in England, and, if the evidence would justify the committal for trial of such a prisoner, the magistrate shall commit the fugitive criminal to prison. On a motion for a writ of habeas corpus by a fugitive criminal so committed,

Held: (i) an "offence of a political character" within s. 3 (1) meant an offence (per DENMAN, J.) which was done in furtherance of and with the intention of assisting as an overt act a political matter, a political rising, or dispute between two parties as to which is to have the government of a State in its hands (per HAWKINS, J.) which was incidental and formed part of a political disturbance; (ii) the magistrate's decision was not binding, either in point of

A law or in point of fact, on the High Court, the judges of which must consider the case as it was before them on the application for habeas corpus.

Per HAWKINS, J.: Under s. 3 (1) the onus was on the applicant for habeas corpus to show that the offence in respect of which his surrender was demanded was one of a political character and not on the persons requesting extradition to show that it was not such an offence.

B Per DENMAN, J.: It was irrelevant to consider whether or not the act done by the applicant for habeas corpus was a wise act from the point of view of his promoting the cause in which he was engaged. The question was whether on the facts it was clear that the applicant was acting as one of a number of persons engaged in acts of violence of a particular character with a political object and as part of a political movement in which he was taking part.

C **Notes.** Important comment on this case was made by the House of Lords in *Schtraks v. Government of Israel*, [1962] 3 All E.R. 529.

Considered: *R. v. Holloway Prison, Re Siletti* (1902), 71 L.J.K.B. 935; *R. v. Brixton Prison, Ex parte Servini*, [1914] 1 K.B. 77; *R. v. Brixton Prison, Ex parte Perry*, [1924] 1 K.B. 455; *Re Kolczynski*, [1955] 1 All E.R. 31; *Re Shalom Schtraks*, [1962] 2 All E.R. 176; *Schtraks v. Government of Israel*, [1962] 3 All E.R. 529. Referred to: *Ex parte Arton* (1895), 12 T.L.R. 131; *Re Government of India and Mubarak Ali Ahmed*, [1952] 1 All E.R. 1060; *Zacharia v. Republic of Cyprus*, [1962] 2 All E.R. 438.

As to procedure on the extradition of offenders, see 16 HALSBURY'S LAWS (3rd Edn.) 567 et seq.; and for cases see 24 DIGEST (Repl.) 995 et seq. For the Extradition Act, 1870, see 9 HALSBURY'S STATUTES (2nd Edn.) 874.

E Cases referred to in argument:

Ex parte Huguet (1873), 29 L.T. 41; 12 Cox, C.C. 551; 24 Digest (Repl.) 1007, 130.

R. v. Maurer (1883), 10 Q.B.D. 513; sub nom. *Re Maurer*, 52 L.J.M.C. 104; 31 W.R. 609; 24 Digest (Repl.) 1007, 131.

F *Re Counhaye* (1873), L.R. 8 Q.B. 410; 42 L.J.Q.B. 217; 28 L.T. 761; 38 J.P. 39; 21 W.R. 883; 24 Digest (Repl.) 1003, 106.

Re Woodall (1889), 57 L.J.M.C. 72; 59 L.T. 549; 52 J.P. 646; 4 T.L.R. 532; 16 Cox, C.C. 478, D.C.; 24 Digest (Repl.), 988, 2.

Re Guerin (1888), 58 L.J.M.C. 42; 60 L.T. 538; 53 J.P. 468; 37 W.R. 269; 16 Cox, C.C. 596; 24 Digest (Repl.) 998, 60.

G **Rule Nisi** for a writ of habeas corpus calling upon the Solicitor to the Treasury, F. Lushington, Esq. (the committing magistrate), and the Consul-General of Switzerland, as representative of the Swiss Republic, to show cause why the writ should not issue to bring up the body of one Angelo Castioni in order that he might be discharged from custody.

H Castioni was arrested at his house in Chelsea on Oct. 3, 1890, upon a warrant issued under the Extradition Acts, on a charge of murdering Councillor of State Luigi Rossi by shooting him with a revolver at Bellinzona, in the canton of Ticino, in Switzerland, on Sept. 11, 1890. The prisoner was brought before F. Lushington, Esq., one of the metropolitan magistrates at Bow Street police-court, who, after taking evidence both for and against the prisoner, held that the offence was not one of a political character so as to exempt him from extradition under s. 3 of the Extradition Act, 1870, and committed him to Her Majesty's prison at Holloway to await his surrender to the Swiss authorities. The evidence contained in depositions sent from Switzerland, those taken at the Bow Street police-court, and in affidavits used on the motion, showed that the prisoner was a native of Stabio, and a subject of the canton of Ticino, in Switzerland, but for the last seventeen years had resided in London, where he was employed as a marble worker. On Aug. 3, 1890, he left England for Carrara to obtain a block of marble for his employer, and on his way spent some days in Switzerland. Having completed his mission to

Carrara, he arrived in the town of Bellinzona on the evening of the 10th, and was in the said town on Sept. 11 following.

Ticino was one of the Swiss cantons confederated under a Central Federal Council, and had a local government and constitution of its own, one of the provisions of which required the government, on the receipt of a petition for a revision of the constitution signed by not less than 7,000 voters, to take within a month from the receipt of the petition the vote of the whole body of electors on whether there should be a revision of the constitution or not. In Ticino the Ultramontane or Conservative government had been in power for fifteen years, and in the autumn of 1890 complaints of gross corruption and maladministration were made against them by the opposing or Liberal party. On Aug. 9 a petition, signed by 9,983 voters, demanding a revision of the constitution of the canton was presented to the government, but no steps were taken to put the matter to the popular vote, and the government organs in the press declared that the petition would not be complied with. In consequence of this, and of the discontent that prevailed, an insurrection, headed by one Bruni, a leading advocate in the Canton, broke out at Bellinzona on Sept. 11. The people having attacked and disarmed the gendarmerie at the arsenal obtained a fresh supply of arms, and, having seized and bound five persons—members of or connected with the government—marched, with these five persons in the front rank, to the Government House, within the gates of which were Councillors Rossi and Gianella with about eighty gendarmes. Admittance having been demanded by the insurgents and refused by the councillors, the locked gates were broken down, and, as the people rushed into the building, a few shots were fired on both sides, one of which killed Councillor Rossi, a young man, who had only lately joined the government. Immediately afterwards Councillor Gianella came forward, waving a white handkerchief, and said that the government yielded to superior force. A provisional government was then formed by the insurgents, and the result of the affair was that, upon interference by a special commissioner, sent by the Federal Council with troops, the unpopular members of the former government were not reinstated, and in accordance with the petition a plebiscite was taken which affirmed the need for a revision of the constitution. There was evidence tending to show that Castioni was present on the day of the insurrection, taking an active part with the insurgents, and that he fired the shot which killed Councillor Rossi, drawing, aiming, and firing a revolver when the latter was only a few paces from him, and that after firing the shot he turned round as if to go, at the same time using an Italian expression signifying "He is down!" or "Someone is down!" Rossi was the only man killed. There was no evidence to show that the prisoner knew him, or had ever seen him before the attack on the Government House. In cross-examination it was admitted by Bruni, the leader of the revolt, that Rossi's death was a misfortune, and not necessary for the success of the movement. A message or report from the Federal Council to the Federal Assembly of Switzerland concerning the armed Federal intervention in Ticino and the political situation in the canton was accepted by the court as showing that the movement was regarded by the Swiss Federal Council as a serious political rising, but not as evidence of what took place during the revolt.

By the Extradition Treaty between Her Majesty and the Swiss Federal Council, signed at Berne, Nov. 26, 1880, it was provided in arts. 2, 9, and 11 as follows. Article 2 included murder and manslaughter in the list of crimes for which extradition is to be granted. By art. 9:

"In cases where it may be necessary, the Swiss government shall be represented at the English courts by the law officers of the Crown, and the English government in the Swiss courts by the competent Swiss authorities."

By art. 11:

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove

- A that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

This motion for a rule nisi was argued and treated as a motion for rule absolute.

Sir Charles Russell, Q.C. (with him *J. P. Grain* and *Eldridge*), for the prisoner.

- B *The Attorney-General* (*Sir Richard Webster, Q.C.*) (with him *R. S. Wright*) for the committing magistrate.

Sir Edward Clarke (with him *Woodfall*) for the Swiss government.

- DENMAN, J.**—Looking at the extreme importance of this case, I should have been disposed, if I had felt any serious doubt as to the course that I ought to pursue, to have taken time, not so much to consider what our judgment should be, as to put it in the best possible shape we could, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is that here is a man who has been in custody for a considerable time, and that no greater delay than is reasonably necessary ought to be interposed if our decision should be one to the effect that he ought not to be in custody any longer.

- After the very able and exhaustive discussion that this case has had on the part of most learned counsel, I am unable to entertain a doubt that upon the whole of this matter it is a case in which we ought to order that the prisoner should be discharged. There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light, I think, has been thrown upon the possible and probable meaning of the words by the kind of arguments that have been addressed to us, applying not only the language of judges, but language used in textbooks, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed, to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother, whose assistance we have on this occasion in deciding the present case.

- I do not think that it is necessary or desirable that one should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offence of a political character. I do not think that we should do good by attempting to put it into exact and exhaustive language—language which should never be departed from as far as we ourselves were concerned, or another court in sitting upon cases of this kind. I do not think that is desirable. But I think it is necessary to express an opinion as to one matter, at all events, upon which I do entertain a very strong opinion. That is, that if the description of the offence to be brought within the Act, or the treaties, given by Mr. JOHN H STUART MILL were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object of it, and the intention of it, and other circumstances connected with it, then I should say that that was a wrong definition, and one which could not be legally applied to the words used in the Act of Parliament.

- Counsel for the prisoner suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is an alias for "in course of." I cannot quite think that was the intention of the writer, or the natural meaning of the expression, but I entirely concur with the observations that have been made by the Solicitor-General that, in the other sense of the words, if they are not to be construed as merely equivalent expressions, that would be a wrong definition. I think that in order to bring the case within the words of the Act, and to avoid extradition for such an act as an act of murder, which is one of the extradition offences, it must be at least shown that the act which is

done is being done in furtherance of—done with the intention of assisting as a sort of overt act, in the course of acting in—a political matter, a political rising, or a great dispute between two parties in the State as to which is to have the government in its hands—that it must be something of that sort before it can be brought within the meaning of the words used in the Act. A

There is another point upon which I have an opinion. Counsel for the prisoner has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that, if there be an extraditable offence—a murder committed—the onus is upon the person seeking the benefit of those words to avoid extradition to show a case in which extradition can be avoided. I do not think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as “on whom is the onus?” I do not think it is intended that, upon a scrap of a *prima facie* case, the one side or the other should have the right of throwing upon the other side the onus of proving or disproving his position. I look at the words of the Act themselves, and I think they are against any such narrow technical mode of dealing with the case. The words of the section which are in question are: B C

“A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. . . .” D

The section begins: “The following restrictions shall be observed with respect to the surrender of fugitive criminals.” There is nothing said upon whom is the onus *probandi*, or that it shall be made to appear by this side or that side in such a case. It is a restriction upon the surrender of a fugitive criminal; and, if it appears that the act that he did was, in the judgment of the court, an offence which would be an offence according to the laws of this country, but was an offence of a political character, then, wholly irrespective of any doctrine of onus on the one side or the other, that is within the restriction, and he cannot be surrendered. That, I think, is enough to say with reference to the meaning of the words. E

Certain contentions were raised early in the argument, mainly by the Solicitor-General, appearing for the Swiss government, which brought inquiries from the court whether he meant to press his argument as far as he appeared to be doing at the time. They were met fairly by the Solicitor-General, and, I think, in every case he has sooner or later abandoned the contentions which he seemed to be making in the sweeping sense in which he appeared to be making them. For instance, he seemed to be saying that, if the magistrate once made up his mind upon the matter, that is a question of fact with which the court had no jurisdiction to deal. It would appear to me that that could not be maintained on the very face of the Act itself, which requires that the magistrate should inform the prisoner that he may apply for a *habeas corpus*. If he is entitled to apply for a *habeas corpus*, I think it follows that the Queen’s Bench Division of the High Court of Justice must have power to go into the whole matter, and in some cases, if there be fresh and cogent evidence, it could not say that it would feel itself to be crippled by the mere fact that the magistrate, upon much less evidence, or perhaps upon the same evidence, had taken a different view of the matter. That I thought it necessary to state by way of protest against any such view of the jurisdiction on an inquiry whether a *habeas corpus* ought to issue. F G H

With those observations it seems to me it does come plainly to a simple question of mixed law and fact, mainly indeed of fact, whether here the facts are such as to bring the case within the restriction of s. 3 (1), and to show that it was an offence of a political character. I do not think it is now disputed that there was at the material time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of this, that, or the other State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on, amounting at the moment in that small community to a state of war. There was an armed I

A body of men who had seized arms from the arsenal of the State. They were rushing into the council chamber in which the government of the State was assembled. They demanded admission, admission was refused, some firing took place, the outer gate was broken down, and I think it also appears plainly from the evidence that this man Castioni had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of a member of the government. Some time before he arrived with his pistol in his hand at the seat of the government, he had gone with multitudes of men, all armed with arms from the arsenal, to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and proceeding on the attack against the government.

C That being so, it resolves itself, I think, to a very small point indeed—a mere question of evidence, not only of the evidence which was taken before the magistrate, but anything that we can collect from what we have before us, and from the whole circumstances of the case.

I would merely say one thing about the message which the Solicitor-General objected to having read, and which he conceded to have read after a slight discussion, upon the thorough understanding that we were not going to use that document as evidence of any particular fact, but that it would be used only as an important document showing that the government of the country had themselves looked upon this as a serious political rising, and a serious state of violence by a very large body of the people. I mean so to use it, and have never thought of using it in any other way. The matter is reduced to the question whether upon the depositions sent over, and upon the depositions before the magistrate, and upon the fresh facts, if there be any which are brought before us on the affidavits, we think that this was an act done not only in the course of a political rising, but as part of a political rising. Here I must say at once that I assent entirely to the observation of counsel for the prisoner that we cannot decide that question merely by considering whether the act, done at the moment at which it was done, was a wise act in the sense of being an act which the man who did it would have been wise in doing it with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of those words in the statute if we were to attempt so to limit it. I do not think it would be right to limit it by considering whether it was not necessary at that time that the act should be done. The question really is whether upon the facts it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object and as part of the political movement and rising in which he was taking part.

The only shadow of a suggestion of evidence to the contrary amounts to very little, and it comes to a nice disquisition, a very able and powerful disquisition, as to the facts of the case, as to what was taking place at the exact moment at which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing, in my judgment, to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is—not that it is a matter of absolute certainty, we cannot be absolutely certain about anything as to men's motives—but the reasonable presumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi as far as we know, fired that shot, thinking it would advance, and intending it to be in furtherance of the object which the rising had taken place to promote, and to get rid of the government, whom he might have supposed were resisting the entrance of the people to that place.

I That I think is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the act was committed, there is some conflict about it. There is

evidence that there was great confusion. There is evidence of shots fired, after the shot which he, Castioni, fired, and putting all those things together, looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he did do it in furtherance of the unlawful rising, of which at that time he was an active party, a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J.—I am of the same opinion. The prisoner is asked to be given up for the crime of murder, which undoubtedly is an extradition crime under this treaty, and undoubtedly he ought to be so given up provided there is *prima facie* evidence of the crime of murder having been committed, unless, indeed, it is shown that the offence of murder in respect of which his surrender is asked was a political offence.

The question whether there is *prima facie* evidence that Castioni committed an extradition crime—that is, the crime of murder—is one which I may dispose of in a very few words. Nobody can doubt at all that the man Rossi was shot by a revolver fired by Castioni. About that there seems to be no real question. Under what circumstances he shot him, and when, possibly would be matters which would be capable of argument before the tribunal before whom he might be tried. Of course, if it could be established before the court that he had deliberately taken a pistol, and that he had aimed it at Rossi without any justification of any sort or kind and had caused the death of Rossi, there would have been an abundant case on which he ought to have been tried according to our law for the crime of murder, and punished in respect of that crime. But it is said, and said I think rightly, that he ought not to be given up upon this ground; that the offence of which he was guilty, if he was guilty of that offence, was of a political character, i.e., that the murder with which he was charged was in itself of a political character. The matter has been before the magistrate, and the magistrate, acting upon the information and the evidence before him, has come to the conclusion that the two things exist: first of all, that there is an abundance of evidence to justify him in committing the man to be tried for murder had his crime been committed in this country, and, secondly, that the offence was not of a political character, and that, therefore, he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision, but to ask ourselves whether or not, having regard to the whole of the circumstances which are now brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrate, or whether we arrive at an opposite conclusion.

It seems to me, for the reasons which were stated in the course of the arguments, that, if the man has a right to move for a *habeas corpus* in order that the case may be reviewed, or for the purpose of getting his discharge, it would be an absurdity to say that he might not enter into those matters which showed that he had been guilty of no offence at all, and I should have said that by no means was the matter concluded by the magistrate's decision, because the magistrate does not sit, when he is committing for trial, as a magistrate sitting finally to dispose of the case and to give judgment upon it, but he states his opinion that there is a *prima facie* case, and upon that ground he signs his warrant of committal. Again, with reference to the question whether the magistrate has a right to deal with a man's objection to being remitted for trial for an extradition crime, I may be wrong, but I entertain no doubt that the magistrate has no right and no jurisdiction to find finally, as against the prisoner, whether or not he has committed the crime which he is charged with having committed, and whether that crime is of a political character.

The sections of the Extradition Act, 1870, to which I desire to call attention are, first, s. 3 (1), which provides that a fugitive criminal shall not be surrendered if

- A the offence in respect of which his surrender is demanded is one of a political character, such as treason, or if he proves to the satisfaction of the magistrate that the requisition for his surrender has in fact been made with a view to trying the prisoner for an offence of a political character. These latter words undoubtedly tend to show that counsel for the prisoner was wrong in the view that he takes that the onus is upon those who seek the extradition to show that the offence committed is not of a political character, because it must be upon the person who seeks to be discharged on the ground that his surrender is asked for with the view to punishing him for an offence of a political character. The onus of establishing that is upon the alleged criminal himself.

- Sections 9 and 10 seem to me to have some bearing on the question whether or not a magistrate is called upon under this section finally to give a decision upon the question whether or not the offence with which a man is charged is of a political character. Section 9 provides :

“When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.”

- D If he were charged before the magistrate with an indictable offence committed in England, the question whether or not the offence for which he was indicted were of a political character or not would make no difference. But under this section the magistrate is to deal with him as though the charge were for an indictable offence committed in England. The section goes on to say :

- E “The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.”

It seems to me that the language of this part of s. 9 in itself shows that the onus is on the person who seeks to exonerate himself from a liability to be handed over to the government of the territory within which the crime is committed.

- F In furtherance of what I am about to say about the jurisdiction of the magistrate, s. 10, to my mind, is by no means unimportant. It provides :

- G “In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.”

- That does not seem to give the magistrate himself the power of dealing with the matter other than this—he is to consider whether the crime is one which, if committed in England, would have made it imperative upon him in discharging his duties to commit the defendant for trial. If so, he is to commit him to prison, but he is, as I have already shown, by s. 9, obliged to receive any evidence which may be tendered to show that the crime is of a political character, and that is analogous to the provision which makes it the duty of a magistrate, if a prisoner wishes to call evidence in support of a defence which he intends to set up when he comes to be indicted, to take that evidence and hand him over to the tribunal before whom he is ultimately to appear. [See now Magistrates’ Courts Rules (S.I., 1952, No. 2190), r. 5 (6).] In furtherance of this view that I take, I read s. 11 of the Act of 1870 :

“If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus,”

which may very well mean this : “I have power to commit you to prison, because I am satisfied that you have been guilty of a crime to which the extradition law

and treaty applies; you have a right to have any evidence taken on your behalf to show that you are a criminal who ought not to be sent out because your offence, even if committed, was of a political character. I will take the evidence for you. You have fifteen days to make application for your release, if you think fit to move for a habeas corpus." What follows afterwards shows that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad, because the second part of s. 11 provides:

"Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court), to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded. . . ."

These are the provisions of the Act. I think they are quite sufficient to satisfy me that the magistrate's decision is by no means binding either in point of law or in point of fact, and that when these matters come to be considered on habeas corpus, the judges must consider the case as it is before them at the time the rule is discussed, and we are not bound, in considering the matter, by, though we pay respect to, them, what the magistrate's views were. We give weight to them and pay consideration to them, but not at the expense of the prisoner, if upon the whole state of things before us we come to the conclusion, either that there is no *prima facie* evidence of the crime having been committed, or that the criminal ought not to be sent to his own government for the purpose of being dealt with by reason of his offence being, though a crime, a crime of a political character.

I do not mean to travel through the facts, which seem to me to be simple enough. One may concede that there was evidence of a crime and that, if it were not of a political character, the prisoner ought to be sent out under the warrant from the Secretary of State, but that brings me to the question whether, upon the present occasion, even assuming there to be the most cogent evidence of the crime of murder, this prisoner ought to be sent out, having regard to the provision which says that he shall not be so if the offence with which he is charged is one of a political character. I entirely dissent—and I think all reasonable persons would dissent—from the proposition that any act done in the course of a political rising, or in the course of any insurrection, is of a political character. Everybody would agree, I think, that it is not everything done during the period that a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately for a matter of private revenge, or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of an extraditable crime because that offence so committed by him could not be said to have any relation at all to a political crime.

What is the meaning of a crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of a crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, the language of which for the purpose of my present judgment I entirely adopt. That is the expression of STEPHEN, J., in his HISTORY OF THE CRIMINAL LAW OF ENGLAND, vol. 2, p. 71. I adopt his definition absolutely:

- A "A third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Wherever a house was burnt for military purposes arson would be committed. To take cattle, etc., by requisitions would be robbery. According to the common uses of language, however, all such acts would be political offences, because they would be incidents in carrying on civil war. I think, therefore, that the expression in the Extradition Act ought, unless some better interpretation of it can be suggested, to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of the political disturbances. . . . I do not wish to enter into details beforehand of the subject which might enter into judicial consideration."
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D The question has now come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given, as to what is the meaning of the phrase which is made use of in the Extradition Act.

E Were the acts done by Castioni of a political character? That there was a general rising of one party there can be no doubt. They were, as it were, levying war against the government. That they anticipated violence and violent resistance there can be little doubt. The very fact that five men were put in front of those who were making the attack shows the object: "We expect an attack to be made upon us; we expect personal violence, and these five persons are the most likely, if they are put in front, to deter those who would offer violence to us from doing so." Not that they thought it would be absolutely so, because they went prepared, armed themselves, some with guns and others with revolvers, to make this attack on the Government House. I think it is immaterial utterly whether or not one gate was broken open, or whether the gates had been burst open or not. The question really is whether this was an act done by the prisoner in his character of a political insurgent at that time, and I do not think it signifies whether or not he had come into Bellingtona on the day before or on the morning on which this occurrence took place. If he was honestly, as he felt himself to be, a citizen of the place, and was, as such, taking his part in a movement of a political character which he thought was for the benefit, or which he chose to join in because he thought it was for the benefit, of the political side to which he desired to attach himself, I cannot come to the conclusion that he is to be deprived of the privilege of the refuge afforded to him simply because, even after the palace was broken

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H into, having a revolver in his hand he did make use of it in a way which is very much indeed to be deplored. I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or anyone of the community had ever personally done to him. When it is said that he took aim at Rossi there is not a particle of evidence that Rossi was even known to him by name.

I I cannot help myself thinking that everybody knows there are many acts of a political character done without reason, done against all reason, but at the same time one cannot look too hardly and weigh in too golden scales the acts of men hot in their political excitement. We know that in heated blood men often do things which are against and contrary to reason, but, none the less, an act of this description may be done for the purpose of furthering and in furtherance of a political act and a political rising, even though it is an act which may be deplored and lamented as even cruel and against all reason by those who can calmly reflect

upon it after the battle is over. For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged. A

STEPHEN, J.—I am of the same opinion, and after the judgments which have been given I shall give my reasons for it in the fewest possible words. I published, some years ago, a book which has been considerably quoted today, and in the passage in which I state my views upon this subject I gave what appeared to me to be the true interpretation of the expression “political character.” It is very easy to give it too wide an explanation. I think that my late friend MR. MILL made a mistake upon the subject probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had—as I have had on many occasions—to draft Acts of Parliament which, although they may be fit to be understood, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you can, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. Having given you my view upon that subject, I shall say no more with regard to the interpretation of the Act of Parliament. I will say only with respect to the facts which have taken place that it is obvious to my mind that the shooting on this occasion took place in a scene of very great tumult, at a moment when, if a man decided to use deadly violence, he had very little time to consider what was happening and to see what he ought to do, and that, therefore, he was committing an act greatly to be regretted. On the whole, I feel no doubt that the habeas corpus ought to go, and that the prisoner ought to be set at liberty. B
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Rule absolute.

Solicitors: *W. H. Phelan; Solicitor to the Treasury.*

[*Reported by M. L. PEEL, Esq., Barrister-at-Law.*]

A

SHARPE v. WAKEFIELD AND OTHERS

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Bramwell, Lord Herschell, Lord Macnaghten and Lord Hennen), January 30, February 2, 3, March 20, 1891]

B

[Reported [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180;
55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389]

Licensing—Renewal—Discretion of justices—Need of judicial exercise.

C

In considering whether or not to grant an application for the renewal of a licence justices have a complete discretion, but the discretion must be exercised according to the rules of reason and justice and not to private opinion, according to law and not to humour. The exercise of the discretion must not be arbitrary, vague and fanciful, but legal and regular, and it must be within the limit to which an honest man, competent to the discharge of his office, ought to confine himself.

D

Licensing—Licence—Renewal—Refusal—Grounds—Remoteness of premises from police supervision—Character and necessities of locality.

E

Justices may refuse to grant an application for the renewal of a licence on the ground of the remoteness of the licensed premises from police supervision and the character and necessities of the locality and neighbourhood in which the premises are situate. Their inquiry need not be limited to the character and conduct of the applicant and his personal fitness to hold a licence, and the suitability of the premises in respect of which the application is made.

F

Notes. By s. 4 of the Licensing Act, 1953, as amended by the Licensing Act, 1961, Sched. 9, Part II: "... licensing justices may grant a justices' licence to any such person, not disqualified under this or any other Act for holding a justices' licence, as they think fit and proper": see 33 HALSBURY'S STATUTES (2nd Edn.) 149.

G

Applied: *R. v. West Riding of Yorkshire County Council*, [1896] 2 Q.B. 386. Considered: *R. v. Howard*, [1902] 2 K.B. 363. Applied: *R. v. Brighton Corpn., Ex parte Tilling* (1916), 85 L.J.K.B. 1552. Considered: *R. v. Southampton County Confirming Committee, Ex parte Slade*, [1928] All E.R.Rep. 487; *R. v. County Licensing (Stage Plays) Committee of Flint County Council, Ex parte Barrett*, [1957] 1 All E.R. 112. Referred to: *Royal Aquarium v. Parkinson* (1891), 8 T.L.R. 144; *R. v. L.C.C., Ex parte Akkersdyk, Ex parte Fermentia*, [1891-4] All E.R.Rep. 509; *R. v. Miskin Higher Justices, Ex parte Pitman*, [1891-4] All E.R.Rep. 1113; *Sharp v. Hughes* (1893), 57 J.P. 104; *R. v. Leigh* (1896), 75 L.T. 339; *Raven v. Southampton Justices*, [1904] 1 K.B. 430; *R. v. Dodds, Ex parte Roberts*, [1904-7] All E.R.Rep. 658; *R. v. Tolhurst, Ex parte Farrell*, [1904-7] All E.R.Rep. 964; *Dartford Brewery Co. v. London County*

H

Quarter Sessions (1906), 75 L.J.K.B. 597; *R. v. Southampton Justices, Ex parte Fuller, Smith and Turner* (1906), 94 L.T. 442; *R. v. Woodhouse*, [1906] 2 K.B. 501; *Liverpool Corpn. v. Walker*, [1908] 1 K.B. 28; *R. v. L.C.C., Ex parte London and Provincial Electric Theatres*, [1915] 2 K.B. 466; *Cassell v. Inglis*, [1916] 2 Ch. 211; *William Denby & Son, Ltd. v. Minister of Health*, [1935] All E.R.Rep. 304; *R. v. Weymouth Licensing Justices, Ex parte Sleep*, [1942] 1 All E.R. 317; *R. v. Manchester Legal Aid Committee, Ex parte R. A. Brand & Co.*, [1952] 1 All E.R. 480.

I

As to the discretion of justices to renew licences, see 22 HALSBURY'S LAWS (3rd Edn.) 525, 526; and for cases see 30 DIGEST (Repl.) 27 et seq.

Cases referred to:

- (1) *Rooke's Case* (1598), 5 Co. Rep. 99 b.; 77 E.R. 209; 41 Digest 61, 446.
- (2) *Wilson v. Rastall* (1792), 4 Term. Rep. 753; 100 E.R. 1283; 42 Digest 756, 1812.

- (3) *R. v. Boteler* (1864), 4 B. & S. 959; 3 New Rep. 505; 33 L.J.M.C. 101; A 28 J.P. 453; 10 Jur.N.S. 798; 12 W.R. 466; 122 E.R. 718; 33 Digest (Repl.) 336, 1613.
- (4) *R. v. Withyham Overseers*, 2 C.L.R. 1657.
- (5) *R. v. Sylvester* (1862), 2 B. & S. 322; 31 L.J.M.C. 93; 5 L.T. 794; 26 J.P. 151; 8 Jur.N.S. 484; 121 E.R. 1093; 30 Digest (Repl.) 30, 197.
- (6) *Macbeth v. Ashley* (1874), L.R. 2 Sc. & Div. 352; 30 Digest (Repl.) 77, B *262.
- (7) *R. v. Smith* (1878), 48 L.J.M.C. 38; 42 J.P. 295; sub nom. *Smith v. Hereford Justices*, 39 L.T. 604, D.C.; 30 Digest (Repl.) 29, 195.
- (8) *R. v. Lancashire Justices, Re Tyson's Appeal* (1870), L.R. 6 Q.B. 97; 40 L.J.M.C. 17; 23 L.T. 461; 35 J.P. 170; 19 W.R. 204; 30 Digest (Repl.) 30, 201.

Also referred to in argument:

R. v. Market Bosworth Licensing Justices (1887), 56 L.J.M.C. 96; 57 L.T. 56; 51 J.P. 438; 35 W.R. 734; 3 T.L.R. 620, D.C.; 30 Digest (Repl.) 38, 295.

R. v. Liverpool Justices (1883), 11 Q.B.D. 638; 52 L.J.M.C. 114; sub nom. *R. v. Lancashire Justices*, 49 L.T. 244; 32 W.R. 20; sub nom. *R. v. Lawrence*, 47 J.P. 596, C.A.; 30 Digest (Repl.) 44, 336.

Day v. Luhke (1868), L.R. 5 Eq. 336; 37 L.J.Ch. 330; 32 J.P. 499; 16 W.R. 717; 12 Digest (Repl.) 351, 2721.

Claydon v. Green, Green v. Claydon (1868), L.R. 3 C.P. 511; 37 L.J.C.P. 226; 18 L.T. 607; 16 W.R. 1126; 40 Digest (Repl.) 257, 2159.

Ex parte Martin (1876), 40 J.P.Jo. 133; 30 Digest (Repl.) 76, 582.

R. v. Young and Pitts (1758), 1 Burr. 556; 97 E.R. 447; 30 Digest (Repl.) 28, E 181.

Boodle v. Birmingham Justices (1881), 45 J.P. 635, D.C.; 30 Digest (Repl.) 35, 259.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., FRY and LOPES, L.JJ.), reported 22 Q.B.D. 239, affirming a decision of the Divisional Court (FIELD and WILLS, JJ.), reported 21 Q.B.D. 66, upon a Case stated by Westmoreland Quarter Sessions.

On Sept. 10, 1887, William Redding applied to the licensing justices for the Kendal division of Westmoreland for the renewal of a licence for the sale of intoxicating liquors at the Low Bridge Inn, at Kentmere, in that county. The application was refused. Susannah Sharpe, the owner of the inn, appealed to the quarter sessions for Westmoreland on Oct. 21, 1887, contending that on an application for the renewal of an existing licence the justices were not entitled to inquire into the character and wants of the neighbourhood, or to refuse a renewal upon the ground that there was no longer a necessity for a licensed house in the neighbourhood. Quarter sessions refused to renew the licence on the ground of the remoteness of the premises from police supervision, and of the character and necessities of the locality and neighbourhood in which the inn was situated. A Special Case having been stated for the opinion of the Queen's Bench Division, the court came to the conclusion that the justices at the annual general licensing sessions had the same absolute discretion to grant or refuse renewals as they had to grant a new licence, and this decision was affirmed by the Court of Appeal. From that decision Susannah Sharpe appealed to the House.

Henn Collins, Q.C., Candy, Q.C., and L. Sanderson for the appellant.

Addison, Q.C., Poland, Q.C., and Paterson for the justices.

Their Lordships took time for consideration.

Mar. 20, 1891. The following opinions were read.

LORD HALSBURY, L.C.—I do not think that at any period of the argument any of your Lordships doubted but that this judgment must be affirmed. By the express language of the Alehouse Act, 1828, which is the governing statute, the

- A grant of a licence is expressly within the discretion of the magistrates [see now Licensing Act, 1953, s. 4 (supra)]. For reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but, if one were to argue a priori, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power, and is even the duty, of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by proper authorities, and so forth. If this is the original jurisdiction, what sense or reason could there be in making these topics irrelevant in any future grant?

- It surely must have been in the contemplation of the legislature that the circumstances of a neighbourhood might change; a population might diminish or increase. Would it be argued that, if the population had very much increased at some point where by reason of its previous want of population no such public accommodation had been hitherto granted, no licence should be granted because this additional grant might to some extent interfere with the practical monopoly enjoyed by the persons already licensed? This, of course, could not be argued, since it is the well-understood practice to do this very thing. But can anything be more unreasonable than the suggestion that the legislature had given the discretion in one direction and withheld it in the other? In real truth a great deal of the argument addressed to us on the part of the appellant has been less addressed to us upon the true construction of the Alehouse Act, 1828, or the statutes which have followed it than to some supposed injustice, which the argument assumed would be so great, if the matter were left to the discretion of the justices that the legislature never could have intended to have entrusted them with discretion so wide.

- I do not think, if the injustice were so great as it is suggested by the argument, that that consideration could prevail over the plain language of the legislature. But I am not able to assent to the notion that the injustice is so great. An extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not to private opinion: *Rooke's Case* (1), 5 Co. Rep. at p. 100a; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself: *Wilson v. Rastall* (2). So in *R. v. Boteler* (3), where justices thought proper not to enforce the law because they considered that the act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or to leave undone. So, again, where overseers were required by the Beerhouse Act, 1840, to certify whether applicants for beer licences were real residents and ratepayers of the parish, it was held that they were not entitled to refuse the certificate on the ground that in their opinion there were already too many public-houses, or that the beershop was not required: *R. v. Withyham Overseers* (4). So a discretion which empowered justices to grant licences to innkeepers, as in the exercise of their discretion they deemed proper, would not be exercised by coming to a general resolution to refuse a licence to anybody who would not consent to take out an excise licence for the sale of spirits: *R. v. Sylvester* (5).

Again, justices were authorised to alter the hours for the sale of intoxicating liquors in any particular district, but it was held that, though this was a general discretion given to them, they had no right by virtue of a general resolution to alter the time in every case. They were required judicially to determine, although according to their discretion, what places in the honest exercise of their judgment required other hours for opening and closing than those specified. The question

arose in *Macbeth v. Ashley* (6) on the proviso to s. 2 of the Licensing (Scotland) Act, 1853, which was in these words: A

"Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public houses than those specified in the forms of certificates in the said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours not being earlier than 6 o'clock or later than 8 o'clock in the morning for opening, or earlier than 9 o'clock or later than 11 o'clock in the evening for closing the same, as they shall think fit." B

Eleven o'clock at night was, accordingly, the hour appointed for closing public houses in Scotland, and the magistrates at Rothesay issued an order closing them at 10 o'clock instead of 11. LORD SELBORNE, in giving judgment in the House of Lords in that case, makes these observations (L.R. 2 Sc. & Div. at p. 360): C

"Without meaning to deny that it is confided to the discretion of the magistrates to determine what particular localities require other hours for opening and closing than those specified, it is obvious that such discretion as they have is not an arbitrary discretion to define any localities they please, but they must be such localities as they consider in the honest and bona fide exercise of their own judgment to require a difference to be made. The participle 'requiring' is connected with the substantive 'locality,' and, therefore, it must be a requirement arising out of the particular circumstances of the place. The magistrates must, in the exercise of an honest and bona fide judgment, be of opinion that the 'particular locality' which they except from the ordinary rule is one which from its own special circumstances requires that difference to be made." D E

I do not feel, therefore, though the language of the statute and the power given by that language is so great and so unqualified, that the mischief or danger apprehended by the appellants is at all likely to arise. The legislature has given credit to the magistrates for exercising a judicial discretion, that they will fairly decide the questions submitted to them, and not by evasion attempt to repeal the law which permits public-houses to exist, or evade it by avoiding a plain exposition of the reasons on which they act. I am very far indeed from saying that, assuming the complete discretion that I have indicated to exist, it would be likely that the persons exercising it would consider an original application in the same way as one which was applied for by the person who has already been licensed for one year. Of course, the justices would remember that a year before a licence had been granted, and presumably, unless some change during the year was proved, they start with the fact that the topics to which I have referred have already been considered, and one would not expect that those topics would be likely to be reopened, unless, as I say, some change has been proved. This would be likely to limit the inquiry to the conduct of the house and the character of the licensee, and perhaps the condition of the house, but as matter of fact, and not as matter of law at all. F G H

As to the question of law arising upon the language of all the statutes, it may, in my judgment, be very shortly disposed of. The first statute to which one need go back it is admitted gives discretion. Does any Act passed since purport to withdraw it? Certainly not. On the contrary, the Acts referred to expressly retain it, subject to certain provisions which it cannot be pretended affect to exclude the topics, which it is argued are topics irrelevant to a renewal. I do not mean to say that a repeal or qualification may not sometimes be implied by subsequent statutes enacting something inconsistent with a previous Act; but in a matter so constantly before the legislature as the licensing laws I cannot but think that if it was intended to alter the law in this respect it would have been done in plain and unambiguous language. The Licensing Acts, 1872 and I

- A 1874, which are the Acts upon which reliance is placed, do not profess to limit the discretion, but enact certain new procedure, all of which procedure is perfectly consistent with the preservation intact of the discretion given to the magistrates. I do not think that it is necessary to go into details as to the alteration of procedure—it is merely procedure. It leaves the earlier Act absolutely untouched upon the subject now in debate, and I entirely approve of and adopt the decision
- B of COCKBURN, C.J., and MELLOR, J., arrived at thirteen years ago in *R. v. Smith* (7). I, therefore, think that this appeal ought to be dismissed with costs.

LORD BRAMWELL.—I think this is a very plain case, and that the judgment should be affirmed. Houses of public entertainment and for the sale of drink have been in this country and in many others the subject of regulation for police

C purposes: not for what one may call economic purposes, like the fixing of the price of bread, or the wages of labour, but for the maintenance of order. Naturally the buildings themselves, their character, their number, and their neighbourhood, have been considered as well as the persons who should be permitted to carry on the trade or business. That certainly has been the case in England; and it is undoubtedly so now with respect to licences granted to sell drink on premises

D for the first time. This is so clear that the learned counsel for the appellant have not contended to the contrary. If an application is made for a licence to sell drink on premises not before licensed it is certain that the magistrates may refuse it, and may refuse for the reason and no other than that they think the neighbourhood does not need it—that none is needed, or none in addition to the houses already licensed.

- E But it is said that this power or right in the magistrates does not exist where a licence has been granted, and the question is whether it should be renewed. I am not sure that this contention might not be met by this. The magistrates have a discretion to refuse, they are not bound to state their reasons, and, therefore, their decision cannot be questioned. But I think it better to say that, in my judgment, if they had to state their reasons it would be a good one in point
- F of law that they refused to renew on the ground of "the remoteness from police supervision and the character and necessities of the locality and neighbourhood in which the inn is situate." Of course the finding of the facts by the sessions is conclusive.

Two objections are raised by the appellant. One is, that though by the Ale-house Act, 1828 [repealed], the above might be a good ground for a refusal of a

G licence applied for for the first time, it is not for a refusal of its renewal. Why I know not. I quite agree that different considerations should operate on the minds of the justices, and I doubt not do. The hardship of stopping the trade of a man who is getting an honest living in a lawful trade and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration, but it must be done so in conjunction with considerations the

H other way, and must be left to the discretion of the justices. The licence is a renewal. That word has been criticised. It may be misleading, but is, I think, correct. It is a "renewal"—i.e., a new licence, as we talk of a new lease being a renewal, though parties and terms may be wholly different. And one cannot help seeing that, if the discretion was to be limited, as contended in the case of a renewal, the legislature might have said so in terms, and has not. Whenever

I that is the case it seems to me that courts ought not to put a limit on general words without almost a necessity for doing so. The other objection is that subsequent legislation has shown that Parliament intended that there should be a difference between the treatment of original applications for a licence and applications for renewals, and has shown that it intended that the licence should be renewed except for objection to the licensee, at all events, that its renewal should not be refused for such a reason as is given in this case, and so the power to refuse on that ground has been taken away by the legislature. I cannot find this. I do find, indeed, that the legislature, in its subsequent Acts, contemplated

that, as a rule, as a practice, licences would be renewed. But there is nothing A
 to show that the discretion to refuse is taken away. The word "personal," so
 much relied on, means "individual," as distinguished from the class to which he
 belongs. And I must repeat my remark that it could have been so enacted,
 and there is nothing to justify implying such a repeal. Indeed, I think this
 argument presents a consideration unfavourable to the appellants. The legislature
 has most clearly shown that it supposed, and contemplated, that licences would B
 usually be renewed—that the taking away of a man's livelihood would not be
 practised cruelly or wantonly. True, and because it showed that plainly it may
 have felt it safe to leave an absolute discretion with the justices, a discretion
 that would be discreetly exercised. And it has been. I do not say in this case.
 I know nothing about it, I mean by justices generally. That is shown by what
 was mentioned by counsel for the justices, namely, that at the sessions when C
 there is an appeal against a refusal of a first licence the appellant begins; the
 burden of proof is on him; he has to make out that he ought to have a licence.
 Where, on the other hand, the repeal is against a refusal to renew a licence the
 respondents begin; the burden of proof is on them; they have to make out that
 the applicant ought not to have a licence; practically, that his licence should be
 taken from him. This, counsel says, is the practice throughout England. One D
 may well suppose this to be known to the legislature, and to be one cause why
 the justices are trusted with such extensive power. For these reasons I think
 the appeal should be dismissed, thinking, indeed, that the legislature contemplated
 that ordinarily licences would be renewed, and have most strongly shown that,
 but thinking also that that does not help the appellant's counsel to show, and that
 they have not shown, that a renewal may not be refused for the reason given in E
 this case.

LORD HERSCHELL.—The sole question for decision in this case is whether,
 where a licence is applied for by way of renewal, by one who already holds a
 licence for the sale of intoxicating liquors, the licensing authorities are entitled
 to take into consideration the wants of the neighbourhood and the remoteness of F
 the premises from police supervision, or whether their inquiry must be limited to
 the character and conduct of the applicant, and they can only refuse the applicant
 on the ground of his personal unfitness. It was admitted by the learned counsel
 for the appellant that there was authority for the proposition that a complete
 discretion had been vested in the justices to grant or withhold any application for
 a new licence, though they somewhat faintly contended that, upon the true con- G
 struction of s. 1 of the Alehouse Act, 1828, this discretion was confined to the
 question whether the applicant was a fit and proper person to hold the licence,
 and whether the premises in respect of which he made the application were
 suitable for the purpose.

It is, to my mind, abundantly clear that this is not a correct view of the statute.
 Giving to the language used its natural interpretation, I think it impossible to H
 do otherwise than hold that the discretion of the justices is not in any way fettered.
 When once this conclusion is arrived at, it seems to me to follow that the justices
 had under the Act of 1828 the same discretion when the holder of a licence
 applied for another licence for the ensuing year. It is by virtue of the very
 same enactment that the justices are empowered to grant such a licence. The
 statute makes no distinction between this case and the original application. The I
 word "renewal" is never mentioned, and it is expressly provided that every licence
 granted under the authority of the Act shall last for one year "and no longer."

But it was argued that the law had been modified by subsequent legislation,
 and this was the point mainly insisted upon on behalf of the appellant. The
 Licensing Act, 1872, has, it is true, by s. 42 [repealed], altered in some respects
 the procedure provided in relation to applications for licences by the Act of 1828,
 but the alterations have reference to matters of procedure only. Under the earlier
 Act the applicant for a licence was required to attend in person unless hindered

- A by sickness, infirmity, or other reasonable cause. The Act of 1872 provided that in case of an application for the renewal of a licence the applicant need not attend in person at the annual licensing meeting, unless required by the justices so to attend. It also contained enactments securing to the applicant for a renewal of his licence notice that objection was taken to such renewal, and prescribed that no evidence with respect thereto should be received by the justices that was not given on oath. These provisions would obviously have left the discretion of the justices just what it had been before, even if the statute had not gone on, as it does, to provide that subject thereto licences should be renewed, and the powers and discretion of justices relative to such renewal should be exercised as theretofore.

- C It was, however, said that the amendment of s. 42 of the Licensing Act, 1872, enacted in s. 26 of the Licensing Act, 1874 [repealed], had the effect of limiting the power of the justices and prohibiting them from refusing to grant a renewal of a licence save for some cause personal to the applicant. The enactment in question certainly does not in terms contain any such provision, and I do not think it is possible to infer from the language used that the legislature intended thus to alter the law. The section, after reciting that it was enacted by s. 42 of the Act of 1872 that an applicant for the renewal of his licence need not attend in person at the annual licensing meeting, unless required by the licensing justices so to attend, enacts

“that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent.”

- E I think the object of this provision is obvious. Under the earlier Act the justices at any sessions might (or at the very least it was open to contention that they might) have required all applicants for a renewal to attend as before. The later Act prescribes that no such requisition is to be made except for some special cause personal to the recipient of the requisition. The cause, it will be observed, is to be a cause for requiring the individual to be present, and the fact that objection was taken to the renewal of his licence would be such a cause. The language of the statute has no reference to the causes which, when the applicant attends in pursuance to the requisition, may operate in the minds of the justices to determine whether his application shall be acceded to or not.

- F For these reasons I think that the judgment of the court below was correct and ought to be affirmed. There is one observation made by the LORD CHANCELLOR to which I am not prepared to give my assent without qualification. I do not think that the fact that a licence had been granted for the previous year would be a sufficient ground for the justices presuming that the licensed house was then needed and considering only whether the circumstances had changed in the interval. It might well be that the attention of the licensing justices had not on a former occasion been called to the condition and wants of the neighbourhood.

- H **LORD MACNAGHTEN.**—For the reasons stated by my noble and learned friends, which it is unnecessary for me to repeat, I also am of opinion that it is clear beyond the possibility of doubt or question that the Alehouse Act, 1828, conferred upon the licensing justices the same discretion in the case of an application for what is now termed a renewal as in the case of a person applying for a licence for the first time, and that, although there has been an alteration in the procedure in favour of applicants for renewed licences, there is nothing in the subsequent legislation to do away with or impair or fetter that discretion.

I **LORD HANNEN.**—I do not consider it necessary to occupy your Lordships' time with observations on the Alehouse Act, 1828. It was long ago decided, I think rightly decided, that the justices were, under that Act, entitled and bound to consider the needs of the neighbourhood on an application for a licence to a person seeking to keep a house for the sale of excisable liquors: *R. v. Lancashire*

Justices, Re Tyson's Appeal (8); and that their discretion is equally wide in the case of a person already keeping such a house as in one where the application is by a person not before licensed: *R. v. Smith* (7). A

But it was contended that the general discretion given by the Act of 1828 was restricted by the Licensing Acts of 1872 and 1874. By the first of these Acts the renewal of licences is dealt with, and by s. 42 certain changes are made in the procedure where a renewal is asked for: (i) the applicant need not attend in person unless required by the justices to do so; (ii) no objection to the renewal is to be entertained unless written notice of the intention to oppose, stating the general grounds of the opposition, has been served seven days before the meeting; and (iii) evidence with respect to the renewal shall be given on oath. But the section concludes, B

"Subject, as aforesaid, licences shall be renewed, and the power and discretion of justices relative to such renewal shall be exercised as heretofore." C

This, therefore, clearly leaves the discretion of the justices unfettered where the provisions of s. 42 have been complied with. The argument for the appellant was chiefly based on the qualification of s. 42 of the Act of 1872, aided by the first clause of s. 26 of the Act of 1874. The clause is as follows: D

"Whereas by s. 42 of the principal Act, it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent." E

Rightly to understand this enactment it is necessary to revert to the earlier legislation on the subject of the personal attendance of applicants for licences. By s. 12 of the Alehouse Act, 1828, only those applicants were excused from personal attendance who could prove by sworn testimony that they were hindered by sickness or infirmity or by any other reasonable cause, in which case an authorised person might attend for them. Section 42 of the Act of 1872 excused the applicant for a renewal of his licence from attendance unless required by the justices. This left it in the power of the justices to require the attendance of all applicants for renewed licences. This power might be exercised so as to cause inconvenience to applicants required to attend on grounds not having reference to their particular case. Instances have been brought before the superior courts where justices have expressed and acted upon a general intention with regard to all licences, whereas it is their duty to consider each individual case on its own special merits. The object of s. 26 of the Act of 1874 appears to be to enforce this duty, and to require the justices to particularise the special ground on which they considered the personal attendance of the applicant necessary. The word "personal" is fully satisfied by construing it as meaning "for a cause in which the applicant is personally interested, and not merely interested as one of the general body of licensed persons." F

For these reasons it appears to me that the judgment appealed from is correct and should be affirmed. G

Appeal dismissed. H

Solicitors: *Peckham, Maitland & Peckham*, for *F. W. Watson*, Kendal; *Nicol, Son & Jones*, for *J. Bolton*, Kendal. I

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re HULKES. POWELL AND OTHERS v. HULKES

[CHANCERY DIVISION (Chitty, J.), May 24, June 1, 1886]

[Reported 33 Ch.D. 552; 55 L.J.Ch. 846; 55 L.T. 209;
34 W.R. 733; 35 W.R. 194]

Executor—Liability—Payments made bona fide, but on erroneous construction of will—Accounts furnished to residuary legatee—Liability of executor to refund with interest.

By her will, made in 1871, the testatrix appointed the plaintiffs her executors and trustees and directed them to convert her personalty into money, and, after payment of expenses, to pay specific legacies within six months of her death. Shortly after the testatrix's death the plaintiffs sold her plate, household goods, furniture, and other effects, and, acting bona fide but in accordance with a mistaken construction of the will, applied the proceeds of sale in part payment of legacies which should not have been paid out of that fund, paying the balance to the defendant, the tenant for life of the residuary real and personal estate and the residuary legatee of a portion of the personal estate. Correspondence took place between the plaintiffs and the defendant about the estate. The defendant was sent accounts from time to time, and the plaintiffs drew his attention to the fact that they were accounting to him for the balance of the purchase money. In an administration action brought by the plaintiffs against the defendant the defendant counterclaimed for a declaration that the proceeds of sale which had been wrongly applied in part payment of the legacies should have been invested and the income paid to him as part of the income of property to which he was entitled as tenant for life, and that the plaintiffs should be charged interest on it.

Held: while, as a general rule, a payment to a wrong person is no discharge of an obligation, the defendant had been fully aware of the circumstances and had acquiesced in the erroneous payments, and, therefore the plaintiffs were not liable to be charged interest on the sums wrongly paid.

Saltmarsh v. Barrett (No. 2) (1862), 31 Beav. 349, not followed.

Notes. Referred to: *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154.

As to liability of executor to account, see 16 HALSBURY'S LAWS (3rd Edn.) 477 et seq.; and for cases see 24 DIGEST (Repl.) 745 et seq.

Cases referred to:

- (1) *Saltmarsh v. Barrett* (No. 2) (1862), 31 Beav. 349; 31 L.J.Ch. 783; 7 L.T. 87; 8 Jur.N.S. 737; 10 W.R. 640; 54 E.R. 1173; 24 Digest (Repl.) 746, 7314.
- (2) *A.-G. v. Alford* (1855), 4 De G.M. & G. 843; 3 Eq. Rep. 952; 24 L.T.O.S. 265; 1 Jur.N.S. 361; 3 W.R. 200; 43 E.R. 737, L.C.; 24 Digest (Repl.) 744, 7302.
- (3) *Vyse v. Foster* (1872), 8 Ch. App. 309; 42 L.J.Ch. 245; 27 L.T. 774; 21 W.R. 207, L.J.J.; affirmed (1874), L.R. 7 H.L. 318; 44 L.J.Ch. 37; 31 L.T. 177; 23 W.R. 355, H.L.; 24 Digest (Repl.) 739, 7258.
- (4) *A.-G. v. Köhler* (1861), 9 H.L.Cas. 654; 5 L.T. 5; 8 Jur.N.S. 467; 9 W.R. 933; 11 E.R. 885, H.L.; 24 Digest (Repl.) 745, 7313.
- (5) *Middleton v. Chichester* (1871), 6 Ch. App. 152; 40 L.J.Ch. 237; 24 L.T. 173; 19 W.R. 369, L.C. & L.J.J.; 5 Digest (Repl.) 1098, 8859.

Also referred to in argument:

Tebbs v. Carpenter (1816), 1 Madd. 290; 56 E.R. 107; 24 Digest (Repl.) 747, 7338.

Further Consideration of an administration action brought by the plaintiffs, the executors and trustees of the will, against the defendant, the residuary legatee, in which the defendant counterclaimed for a declaration that the proceeds of sale

of property belonging to the testatrix should not have been applied in part payment of legacies, but should have been invested and the income paid to him as part of the income of property to which he was entitled as tenant for life under the trusts of the will, and that the executors should be charged with interest on the proceeds.

By her will made in 1871 the testatrix, Anne Maria Hulkes, who died in 1879, appointed the plaintiffs her executors and trustees, directed them, out of the shares of personal estate thereafter first directed to be sold and converted into money, to pay all her just debts, funeral and testamentary expenses, and at the expiration of six calendar months after her death to pay certain specific pecuniary and charitable legacies. To this end she directed the plaintiffs to sell and convert into money certain stocks and shares named in the will, and also all other shares and personal estate and money in the bank not therein specifically mentioned or bequeathed. The defendant, H. S. Hulkes, was tenant for life of the residuary real and personal estate and residuary legatee of a portion of the personal estate. The will was a complicated one. Shortly after the death of the testatrix the plaintiffs sold the plate, household goods, furniture and other effects of the testatrix and, acting bona fide in accordance with what the court subsequently decided to be a mistaken construction of the will, applied the proceeds of sale in part payment of legacies which should not have been paid out of that fund.

They paid the balance over to the defendant Hulkes who was living in Australia at the time of the death of the testatrix, and a good deal of correspondence took place between him and the plaintiffs relative to the estate of the testatrix. It appeared that the plaintiffs sent the defendant accounts from time to time and explanations, and though they did not in definite terms call his attention to any question of construction or interpretation of will, they drew his attention to the fact that they were accounting to him for the balance of the purchase money. The court was of opinion that on the facts the defendant must be taken to have adopted the same construction of the will as that which the trustees had adopted.

Ince, Q.C., and *Charles Browne* for the plaintiffs.

Romer, Q.C., and *J. Bradford* for the representatives of the defendant Hulkes.

Ingle Joyce and *E. W. Byrne* for other parties.

CHITTY, J.—A general question has been argued with regard to the liability of trustees to pay interest, and I will state my view of the law founded on what I consider to be authorities binding on me.

LORD CRANWORTH, in *A.-G. v. Alford* (2), had the question before him and the other members of the Court of Appeal, and he examined the principle upon which the liability of a trustee to pay interest was founded at some considerable length. In stating his own opinion he said (4 De G.M. & G. at p. 851):

“What the court ought to do, I think, is to charge him only with the interest which he has received, or which he is justly entitled to say he ought to have received, or which it is fairly to be presumed that he did receive and that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made than one of those I have mentioned.”

LORD CRANWORTH is there dealing, I need scarcely say, with the case of the executor or trustee who has received the trust fund in respect of which the demand for interest is made, and not with the case of wilful default. **JAMES, L.J.**, in *Vyse v. Foster* (3), referred to **LORD CRANWORTH**'s judgment in *A.-G. v. Alford* (2). He agreed with the principle enunciated by **LORD CRANWORTH**, and the only passage I need cite is this, where he was dealing with the doctrine of punishment (8 Ch. App. at p. 333):

“In fact, it is not by way of punishment that the court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon.”

A The only other authority that I will mention is *A.-G. v. Köhler* (4), where the question was whether an administrator who had wrongly paid over the estate under the intestacy was liable when he had to account to the next-of-kin for the principal of the estate, to pay interest. Those are the only facts necessary to state in order to ascertain the grounds upon which the House of Lords proceeded. The circumstance that the administrator in that case was the nominee of the Crown was altogether immaterial on this point. LORD CRANWORTH, in advising the House of Lords, after in substance showing that the administrator had paid away the money in error, and under a mistake of fact, stated his opinion that the administrator was liable to pay it as a matter of course. He said (9 H.L.Cas. at p. 680):

C "I can discover no ground for relieving him from the payment of interest more than from payment of principal. His liability would have arisen from his having improperly paid over to the Crown money belonging to the next-of-kin."

He does not mean that there was any sinister intent, but that the payment had been made in a mistaken view of the law, or more probably in a mistaken view of the facts.

D "Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principal is clear."

E The other members of the House of Lords who advised the House in their speeches came to the same conclusion, and the decision of the House of Lords went not simply for the principal, but for the interest. The circumstances that LORD CAMPBELL, who had died before the judgment was given, had formed an adverse opinion is a circumstance, of course, that can have no weight with me. What I have stated is the decision of the House of Lords, and it is put simply on the ground by LORD CRANWORTH that the administrator who has improperly paid money away is deemed by a court of equity still to have the money in his own hands.

F The judgment of LORD HATHERLEY, L.C., in *Middleton v. Chichester* (5), strongly illustrates what I have been saying. The case was one under the Debtors Act, 1869. The trustee, who had been ordered to pay by a court of equity any sums in his possession or under his control, was liable to be attached for default of payment, and the question was as to the meaning of the words "any sums in his possession or under his control." In expounding the statute LORD HATHERLEY stated a general proposition of equity upon which he founded himself in order to arrive at the true meaning of the words "in his possession or under his control" as used in the statutes, and he said (6 Ch. App. at p. 157):

H "But there is a sensible and intelligible construction to be put upon the clause, if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a court of equity as having them in his possession until he has properly discharged himself."

I A payment to a wrong person obviously is no discharge. I think that there LORD HATHERLEY was correctly stating the view which the court of equity, at least in modern times, has always taken. In order to avoid misapprehension, I would say that in this case there is no question of wilful default. A trustee is liable to be charged with interest on balances in his hands, and I am sorry to say it often happens that trustees are so charged on the further consideration of administration actions. The court never inquires whether the trustee has spent them or what he has done with them, but finds in taking the account that there was a balance remaining in his hands. Where he has received the fund and retained it he is held liable for interest at 4 per cent., being at the same time at liberty to excuse or justify himself where he shows the exigencies of the trust required that he should retain the money in question in his hands for the purpose of the administration of the estate.

What I have stated I consider to be the general law on the subject, and the only exception, as far as decision goes, that I know in modern times, is the decision of SIR JOHN ROMILLY in *Saltmarsh v. Barrett* (No. 2) (1), where he held that an executor who paid money under a mistake was not liable, though liable to refund the principal, to pay interest on it. If that had been the true view of the law I should have been very glad to follow it, because I am satisfied that cases may occur in which trustees are somewhat severely treated in a court of equity, and have been so. But, in comparing his decision with the higher authorities that I have mentioned, it appears to me the decision cannot be maintained. At least it is one on which I cannot venture to act. If a trustee were excused payment of interest where he acted bona fide, according to the decision of SIR JOHN ROMILLY I should have a difficulty in dealing with that not uncommon case which occurs where the trustee, in perfect innocence and good faith, makes an investment which turns out not to be authorised. He is ordered then to replace the fund, and to replace the fund with interest from the time the investment was made. I need not go into the details of such a case as that. Of course, if the interest made by the fund is equivalent to 4 per cent., no question arises; but a question only arises where, as sometimes happens, the investment turns out wholly unprofitable and produces no income whatever. For these reasons, in stating the general principle of the law, I think I am not at liberty to adopt SIR JOHN ROMILLY's decision.

I now come to the peculiar facts of the case, which, to my mind, are very special. The will is obscure, and it took considerable argument to ascertain the true construction of it. I decided that, on the true construction of the will, the furniture did not form part of the special fund devoted to the payment of the testatrix's debts and the immediate legacies, and that the furniture over which the testatrix had a power of sale constituted a portion of the estate of which the defendant Hulkes was tenant for life. The result, therefore, is, that he was entitled to the interest on the money which arose from the sale after paying the proper expenses of the sale. Mr. Hulkes was in Australia at the time when the testatrix died. The executors, as appears from their acts, adopted what I hold to be an erroneous construction of the will, and selling the furniture, which they did properly—for they had power in my view of the will to sell it—they applied a considerable portion of the moneys derived from the sale in paying legacies which, according to the true construction of the will, ought not to have been paid out of that fund (for there was a balance of some few hundred pounds); and they paid over to Mr. Hulkes, who was a tenant for life, upon the true construction of the will, the balance of this money. They adopted the construction that the furniture formed part of the special fund, and, if they had been right in that, they would have been right also in handing over to Mr. Hulkes the balance, because, under the terms of the will, the balance of that fund, of whatever particulars it really consisted, was his money. They sent Mr. Hulkes accounts from time to time; they sent him a copy of the will, and many letters passed between the executors in England and Mr. Hulkes in Australia.

I will state merely the result. They did not in terms definitely call his attention to any question of construction or interpretation of the will, and they did what I have described without consulting him; that is to say, having sold the furniture they paid the legatees who were not entitled to be paid out of the fund, and they handed the balance to Mr. Hulkes, but they never sent him the balance as the balance. They sent him accounts from time to time with letters of explanation, and, on the reading of the account in connection with the letters, I am satisfied that they did call his attention to this, that they were accounting to him for the balance of the furniture money. That I am satisfied of. The result, therefore, is, that he being a man of business, as is shown from his letters, was aware of what the trustees had done after they had done it, and being, as of course I assume in his favour, an honest man, he took the balance of the furniture fund on the only footing on which he could take it, namely, after reading or referring to the copy of the will before him, and adopting the same construction of the will as the trustees themselves had adopted and acted upon.

- A The question is, whether the trustees are liable to account to him as tenant for life for interest at 4 per cent. on so much of the furniture money as they paid away to the charities. I will treat the question, first, as if there was no demand made against Mr. Hulkes. How would it then stand that the trustees and the cestui que trust both adopted the same construction of the will? I throw in, though I do not consider it a governing circumstance, that they adopt the same construction of a
- B will which is obscure, and the trustees having no doubt at first by their acts put forward that construction, Mr. Hulkes, the cestui que trust, adopts it by his acts also. Then, at the end of a certain number of years, other persons interested complain and say: "This is not the right course of administration, you made a blunder, both of you." Thereupon, says Mr. Hulkes to the trustees: "That is true; but now that the matter is going to be set right, you must pay interest upon the sum
- C at 4 per cent. which you improperly paid away." I have a case, therefore, not of the cestui que trust instigating the trustees to commit what turns out to be a breach of trust; but I have a case of the cestui que trust acquiescing for a number of years in the breach of trust, and, if that were the whole of the case, it appears to me the cestui que trust could now turn round on innocent and honest trustees and say: "You must account to me for the interest." It would be a common mistake,
- D and there would be, in the more exact language of the court of equity, acquiescence by the cestui que trust who had not in the first instance concurred in the act.

- It is necessary to bear in mind that that is not the whole of the case, and I have broken this part of the transaction into two in order that I may deal fairly with the facts. The other persons who were interested in the estate say that Mr. Hulkes must refund that portion of the furniture money which is capital, and which Mr.
- E Hulkes has paid pending the suit, and which is now applicable to paying their legacies, their legacies being deferred legacies. Mr. Hulkes must refund that money. He knew the will. He knew that he was receiving part of the trust fund which belonged to other persons, and he must refund. He must refund at the instance of the executors, who are now instructed by the court that the construction upon which they and Mr. Hulkes acted was erroneous. Mr. Hulkes
- F must repay the balance he received. There is no question of Mr. Hulkes paying interest, because he was tenant for life of that portion of the fund.

- Having regard to this second set of facts which I have mentioned, are the trustees to be placed in a worse position? To put the argument as strongly as I can for Mr. Hulkes, he says, "What I have done was to acquiesce in your view of the will as a whole, and when anyone comes and shows that is an error, then I insist that
- G everything shall be set right, and on the setting of that right it appears that it was incompetent for you, the trustees, to pay me interest as tenant for life on that part of the property." I think that view is not correct. I think the trustees are entitled to say to him (it is only a question between him and them), "Common error there was, we acted on it and you never complained, and therefore we are still entitled, as between us, to the benefit of your long acquiescence." On that view the trustees
- H are not liable to repay interest to Mr. Hulkes. Costs of the summons to vary to be costs in the action.

Solicitors: *Paterson, Snow, Bloxam & Kinder*, for *S. C. F. & C. A. Powell*, *Knaresborough*; *Wild, Browne & Wild*; *Hopgood, Foster & Dowson*; *Patey & Warren*.

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

DREW v. DREW

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), April 12, May 8, 1888]

[Reported 13 P.D. 97; 57 L.J.P. 64; 58 L.T. 923;
36 W.R. 927]

Divorce—Desertion—Evidence—Intention to desert—Husband leaving wife for other woman—Arrest on criminal charge before end of statutory period of desertion—Inability to return to wife.

A husband, on the pretext of going to Ireland for a week's shooting, left his wife with whom he had been cohabiting, and never returned. Unknown to his wife he had been committing adultery with another woman, and on leaving his wife he arranged with this woman that he would go with her to Constantinople. In fact he did not go to Constantinople as planned, but went to Australia in order to evade arrest on charges of fraud. He was arrested in Australia before the completion of the period requisite to constitute desertion, brought back to England in custody, and sentenced to ten years' imprisonment.

Held: there was evidence that when he left her the husband intended to desert his wife, and, therefore, the fact that he was taken into custody by the police, and so prevented from returning to her, before the expiration of the statutory period for desertion did not prevent that period from continuing to run.

Notes. Applied: *Wynne v. Wynne*, [1895-9] All E.R.Rep. 1001. Distinguished: *Wilson v. Wilson* (1908), 72 J.P. 112; *Williams v. Williams*, [1939] 3 All E.R. 825. Considered: *Beekes v. Beekes*, [1948] P. 302; *Crowther v. Crowther*, [1951] 1 All E.R. 1131. Referred to: *Brown v. Brown* (otherwise *Grayson*), [1947] 2 All E.R. 160.

As to continuance of desertion and a physical inability on the part of the deserting spouse to end desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 254; and for cases see 27 DIGEST (Repl.) 358 et seq.

Case referred to in argument:

Townsend v. Townsend (1873), L.R. 3 P. & D. 129; 42 L.J.P. & M. 71; 29 L.T. 254; 21 W.R. 934; 27 Digest (Repl.) 343, 2852.

Undefended Petition by a wife for divorce on the grounds of her husband's adultery and desertion. The charge of adultery was found proved, and the case is only reported on the issue of desertion.

The parties were married in 1870, and thereafter they lived and cohabited at various addresses in or near London until Jan. 6, 1886, when the husband left the matrimonial home telling the petitioner that he was going to Ireland for a week's shooting. The husband never returned to the matrimonial home, and the parties never again cohabited. About the same time the husband suggested to the woman with whom, unbeknown to the wife, he had been committing adultery, that she accompany him on a trip to Constantinople, and he had bought the tickets for this trip, provided her with an outfit, and had caused her luggage to be marked in the initials of the names by which she knew him. In fact the husband did not go to Constantinople, but fled by himself to Australia to evade arrest on charges of fraud. He was arrested in Australia and brought back to England in custody, and in November, 1886, he was sentenced to ten years' penal servitude on the charges of fraud. The police officer who arrested him in Australia stated that he had every reason to believe that at that time he was living with another woman.

Inderwick, Q.C. (Searle with him), for the petitioner.

SIR JAMES HANNEN, P.—I have to determine the rights of the parties upon a consideration of what were the circumstances at the time this man left his wife.

A If these lead me to the conclusion that he intended to desert her, the fact that he was afterwards brought back to this country in the custody of the police, and thus rendered unable to return to her, would make no difference. A desertion begun would continue notwithstanding the fact that his imprisonment would have prevented his return to her.

B I have to consider whether, when he parted from his wife on Jan. 6, 1886, he deserted her. In coming to a conclusion on that point, I must take into consideration the whole of his action. Not infrequently one comes to the conclusion that when a man has left his wife and cohabited with some other woman, treating her as his wife, the fact that he has not returned to his wife and given her an opportunity of living with him, explains his conduct, and attaches to it the character of desertion. It is proved that the husband in the present case told **C** his wife a false story, that he was going to Ireland for a week's shooting. He did not tell her that those whom he had defrauded would be in pursuit of him, and that he might be put on his trial. The next fact of importance is that he contemplated taking another woman away with him. This woman says that they continued to meet until January, 1886; that he had proposed to her to take her away with him, travelling in the name by which he was known to her; and that she had her **D** linen marked with the initials of that name. Though he was obliged to fly from his creditors, that does not exclude the idea that he also intended to desert his wife.

E I think the fact that he had made these arrangements with another woman to go away with him, and live with him as his wife, shows that, besides the motive for avoiding those who would be in pursuit of him on a criminal charge, he had the intention at the same time of deserting his wife. That is rather strengthened by the inference that, when he got over to Australia he seems to have broken his promise to this woman; and there is this further evidence of his intention to abandon his wife, that the detective officer who arrested him found him consorting with some other woman, who came down to the ship, and took leave of him with many demonstrations of affection. I think, therefore, that the evidence leads to the conclusion that, at the same time he endeavoured to avoid being arrested, he **F** also availed himself of that opportunity to desert his wife. There will, therefore, be a decree nisi with the custody of the children to the petitioner.

Solicitors : *Morice, Toller & Blakesley.*

[*Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

BAIRD v. WELLS AND ANOTHER

[CHANCERY DIVISION (Stirling, J.), February 28, March 1, 7, April 23, 1890]

[Reported 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312;
39 W.R. 61; 6 T.L.R. 229]*Club—Expulsion of member—Proprietary club—Wrongful expulsion—Right to injunction to restrain interference of his use of the club—Right to damages.*

Where a member of a proprietary club has been wrongfully expelled therefrom his only remedy is to sue for damages. He is not entitled to an injunction restraining the committee or the proprietor of the club from interfering with his use and enjoyment of the club.

A committee of a club was elected irregularly and not in accordance with the club rules. By a resolution of the committee the plaintiff was subsequently expelled from the club for an alleged infringement of one of the club rules. The plaintiff was not given an opportunity to appear before the committee and to answer the charge on the occasion when the resolution was passed. The club was a proprietary club owned by one of the defendants who received the subscriptions and owned the club premises and furniture. None of the club members had any interest in any of the funds or property of the club. The plaintiff sought an injunction to restrain the committee and the proprietor of the club from interfering with his use and enjoyment of the club.

Held: although by reason of the irregularities the committee's resolution was not binding on the plaintiff, it being a proprietary club the plaintiff was not entitled to an injunction and his only remedy was damages.

Notes. Considered: *Young v. Ladies' Imperial Club*, [1920] All E.R.Rep. 223. Referred to: *Finch v. Oake* (1896), 60 J.P. 309; *Gray v. Allison* (1909), 25 T.L.R. 531; *Kelly v. National Society of Operative Printers' Assistants*, [1914-15] All E.R.Rep. 576; *A.-G. v. Swan*, [1922] 1 K.B. 682; *Bombay Official Assignee v. Shroff* (1932), 48 T.L.R. 443; *Abbott v. Sullivan*, [1952] 1 All E.R. 226; *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175.

As to the expulsion of a club member in general, see 5 HALSBURY'S LAWS (3rd Edn.) 261 et seq.; and for cases see 8 DIGEST (Repl.) 654 et seq.

Cases referred to:

- (1) *Labouchere v. Earl of Wharnccliffe* (1879), 13 Ch.D. 346; 41 L.T. 638; 28 W.R. 367; 8 Digest (Repl.) 655, 30.
- (2) *Fisher v. Keane* (1878), 11 Ch.D. 353; 49 L.J.Ch. 11; 41 L.T. 335; 8 Digest (Repl.) 657, 36.
- (3) *Dawkins v. Antrobus* (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 653, 21.
- (4) *Forbes v. Eden* (1867), L.R. 1 Sc. & Div. 568, H.L.; 8 Digest (Repl.) 651, 9.
- (5) *Rigby v. Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 8 Digest (Repl.) 658, 45.
- (6) *Wright v. Stavert* (1860), 2 E. & E. 721; 29 L.J.Q.B. 161; 2 L.T. 175; 24 J.P. 405; 6 Jur.N.S. 867; 8 W.R. 413; 121 E.R. 270; 30 Digest (Repl.) 544, 1785.

Also referred to in argument:

- Hopkinson v. Marquis of Exeter* (1867), L.R. 5 Eq. 63; 37 L.J.Ch. 173; 17 L.T. 368; 32 J.P. 195; 16 W.R. 266; 8 Digest (Repl.) 659, 49.
- Lyttleton v. Blackburne* (1875), 45 L.J.Ch. 219; 33 L.T. 641; 8 Digest (Repl.) 659, 51.
- Millican v. Sullivan* (1888), 4 T.L.R. 203, C.A.; 8 Digest (Repl.) 651, 14.
- Wood v. Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 543, 1771.
- Taylor v. Waters* (1817), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 42 Digest 906, 29.

- A *Maddison v. Alderson* (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 34 Digest (Repl.) 119, 814.
Re St. James' Club (1852), 2 De G.M. & G. 388; 19 L.T.O.S. 307; 16 Jur. 1075; 42 E.R. 920, L.C.; 8 Digest (Repl.) 650, 1.

B **Motion** by George Alexander Baird for an interlocutory injunction to restrain the defendants Wells and Raleigh who were the proprietor and the secretary respectively of the Pelican Club from interfering with the plaintiff's use and enjoyment of the club as a member.

C The Pelican was a proprietary club established in 1887. The rules of the club provided for the election of a committee at a general meeting to be held in October or November in each year, fourteen days' clear notice being given to the members; the committee to consist of not more than twenty-one members; the proprietor to be an ex officio member, but not qualified to vote. It was also provided that special meetings might be called, that the committee should elect the members and fix the subscription, and that the rules should be printed and binding upon the members.

Rule 7 provided that:

D "Resolutions to be proposed at special or ordinary meetings shall be given notice of within a clear week previous to the meeting."

Rule 17 provided that:

E "Any member whose conduct in or out of the club shall be unbecoming a gentleman in the opinion of the committee, or with respect to whom any matter may have transpired which might be calculated to render his continued membership of the club injurious to its character or interests, shall, if the committee on inquiry find the same to be substantiated, be requested to resign; and in the case of his non-compliance he shall be subject to expulsion."

F The first general meeting of the club was held on Oct. 29, 1887. There was no general meeting in the year 1888, and it appeared from the evidence that at the beginning of December, 1888, the committee consisted of only twelve members, and that on December 6 nine persons, one of whom was the defendant Raleigh, were appointed to act on the committee for the purpose of filling up the vacancies. On Mar. 13, 1889, the secretary, pursuant to a direction by the committee, issued a notice convening a general meeting. The meeting was convened for the purpose of considering certain proposed new rules, but no notice was given pursuant to r. 7 of the resolutions intended to be submitted. At the meeting, which took place on April 2, 1889, it was resolved that

G "the election of the then present committee be confirmed; that the elections and work of the committee be confirmed;"

H the rules were at the same time amended and confirmed. The rules as amended provided for an increase in the numbers of the committee, an alteration in the mode of election, and r. 7 was altogether omitted.

I On Dec. 23, 1889, a prize fight took place at Bruges, at which the defendant was present. Disturbances occurred in which it was alleged that a certain official of the club was implicated. In the course of an investigation by the committee into the conduct of that official, charges were made against the plaintiff inter alia that he had hired "roughs," who were present at the fight, and had used violent language. On Dec. 30, 1889, a letter was sent to the plaintiff summoning him to attend before the committee on Jan. 7, 1890. The plaintiff, in reply, addressed to the chairman and members of the committee a letter, in which he requested that before a decision should be arrived at he might be supplied with an accurate statement of the complaint made against him, in order that he might examine into the same with the view of ascertaining the true facts and placing them before the committee. He also stated that he had not either directly or indirectly done anything that necessitated an inquiry into his conduct. The plaintiff attended, and was examined before the committee on Jan. 7. In the result the committee

acquitted him on the charge of having hired "roughs," and resolved that his language, although unbecoming a gentleman and a member of the club, and consequently to be regretted, was not such as in their judgment to call for the application of rule 17. A general meeting of the club took place the next day, at which it appeared that the decision of the committee did not meet the approval of all the members. The Marquis of Queensberry moved,

"That the examination into Mr. Baird's conduct should be re-opened and continued by the committee from the point it left off."

To that motion an amendment was proposed,

"That the conduct of Mr. Baird be referred back to the committee for further consideration, and that they be instructed to report to a general meeting to be convened one month from this date."

The amendment was carried after a considerable discussion. The chairman stated that the committee had resolved to resign, and that a general meeting would be called in a fortnight to elect a "better lot." The report of the proceedings did not state that the meeting was adjourned, but a notice of an adjourned meeting was posted at the club and sent to every member. The further or adjourned meeting was held on Jan. 22, 1890, and it was then proposed and carried unanimously that the old committee should be invited to return to office in a body. That committee then proceeded to deal further with the plaintiff's case, and at a meeting held on Jan. 29 it was resolved

"That in view of the report made by the committee to the general meeting, and of the vote of the members thereon, Mr. G. Baird be requested to resign his membership of the club in conformity with rule 17."

On Feb. 10 a further meeting of the committee was held, at which it was resolved to expel the plaintiff from the club.

Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., and De Witt for the plaintiff. Hastings, Q.C., and Levett for the defendants.

STIRLING, J.—This is a motion to restrain the defendants from excluding the plaintiff from the use and enjoyment of the Pelican Club, of which the plaintiff was threatened to be deprived in consequence of a decision of the committee of the club. In cases similar to the present the court, as has been repeatedly held, does not undertake to act as a Court of Appeal from the decisions of committees of clubs: *Fisher v. Keane* (2); *Labouchere v. Earl of Wharnccliffe* (1); *Dawkins v. Antrobus* (3). The only questions which this court can entertain are: First, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and thirdly, whether the decision complained of has been come to bona fide. I propose to inquire into these matters in the first place, reserving for consideration hereafter a further question, viz., whether the decisions to which I have referred apply to a club constituted as the present is. [After considering the facts His LORDSHIP observed that all the cases laid down that the rules of a club must be observed, and that it had been held in *Labouchere v. Earl of Wharnccliffe* (1) that the decision of a club meeting of which proper notice had not been given according to the rules was not binding on a member although he had appeared before it without protest. Accordingly His LORDSHIP found that (i) the committee's decision was not binding on the plaintiff since the committee had not been elected according to the rules of the club, and (ii) it was open to serious question whether the committee's resolution calling on the plaintiff to resign could be regarded as representing the unbiased judgment of the committee after fairly hearing the plaintiff. His LORDSHIP continued:]

The question then arises whether this case falls within the class of cases in which the court grants relief by way of injunction. In all the cases of this nature in which up to the present time an injunction has been granted, the club has

A been one of the ordinary kind; it has been possessed of property (such as a freehold or a leasehold house, furniture, books, pictures, and money at a bank) which was vested in trustees upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it. But the interest of the members is not confined to that purely personal right. The members might, if they all agreed, put an end to the club, and in that case they B would be entitled, after the debts and liabilities of the club were satisfied, to have the assets divided among them. In the present case the club, as such, has no property. The club-house and furniture belong to the defendant Wells, and by him the subscriptions are taken. He is not a trustee, but the owner of the property. If the club was dissolved at any moment there would be nothing whatever to divide among the members.

C The inference of the court in the cases which have hitherto occurred has been based on the rights of property, of which the member has been improperly deprived. The general principle was laid down by LORD CRANWORTH in *Forbes v. Eden* (4) (L.R. 1 Sc. & Div. at p. 581), where he said :

D "Save for the due disposal and administration of property, there is no authority in the courts of either England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs."

And the same principle was stated at great length by SIR GEORGE JESSEL in *Rigby v. Connol* (5). In that case the plaintiff sought to restrain the defendant from excluding him from the benefits of a trades union, of which he was a member. SIR GEORGE JESSEL said (14 Ch.D. at p. 487) :

E "The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom. I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed in this F country, at least in any of the Queen's courts, to decide upon the rights of persons to associate together when the association possesses no property. . . . I cannot imagine that any court of justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the courts, as such, have never dreamt of enforcing agreements strictly personal in their nature. . . . In such cases no court of justice can G interfere so long as there is no property the right to which is taken away from the persons complaining. If that is the foundation of the jurisdiction the plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the courts as regards clubs I think is quite clear."

H Then his Lordship referred to certain cases, and came to the conclusion that the plaintiff was not entitled to any relief.

I Here, as I have pointed out, there are no funds vested in trustees or settled to be disposed of by the members of the Pelican Club in accordance with the rules of that association, and the question is, whether the plaintiff, as a member of that club, has any right of property for the protection of which the court will interfere by way of injunction, and in my judgment he has not. The position appears to me to be this : each member is entitled by contract with the defendant Wells to have the personal use and enjoyment of the club, in common with the other members, so long as he pays his subscription and is not excluded from the club under rule 17. That right is, as it seems to me, of a personal nature, such as, if infringed, may give rise to a claim for damages, but not such as the court will enforce by way of specific performance or injunction. The contract in its legal nature closely resembles contracts for providing board and lodging in a particular

house, as when the head of a household admits a boarder into his family for a fixed period, or the proprietor of a private boarding-house agrees to provide for a term board and lodging for one boarder in common with others, as to which *Wright v. Stavert* (6) may be referred to. The contracts in these cases fall, in my opinion, under the head of agreements strictly personal in their nature, and consequently in neither of them would the court interfere by way of injunction at the instance of the boarder. So also, in my judgment, is it in the present case.

It was contended that damages might be an insufficient remedy by reason of a decision being given which affects the character and position in society of the plaintiff, and does not satisfy the requirements of the law. In no case, so far as I am aware, has the existence of such circumstances been treated as affording ground for the granting of an injunction to restrain the proceedings of a voluntary society; and, indeed, upon the principle laid down in *Forbes v. Eden* (4), it might well happen that decisions which gravely affect some members of a voluntary society, and do not satisfy the requirements of the law, might be arrived at by the committee or other like body without being open to be questioned in any civil court or giving rise to any right of action whatever. Under these circumstances, I make no order on the motion.

Solicitors: *Lumley & Lumley; Lewis & Lewis.*

[Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.]

WEATHERLEY v. CALDER & CO.

[QUEEN'S BENCH DIVISION (Huddleston, B., and Mathew, J.), October 29, 1889]

[Reported 61 L.T. 508]

County Court—Summons—Service—Service at branch office of firm within jurisdiction—Firm's principal place of business outside jurisdiction—County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 74.

The plaintiff began an action in the county court against the defendants, a firm whose principal place of business was in Scotland, but who had a branch office in England. The summons was served on the defendants at their branch office.

Held: the defendants carried on business within the meaning of the County Courts Act, 1889, s. 74, at their branch office and, therefore, the service of the summons was good.

Notes. The County Court Act, 1888, s. 74, has been repealed. See now the County Court Rules, 1936, Ord. 2, r. 1. For the County Court Rules, 1889, Ord. 7, r. 12 and 13, see now the County Court Rules, 1936, Ord. 8, r. 14.

Considered: *Davis v. British Geon, Ltd.*, [1956] 2 All E.R. 404.

As to venue of an action in a county court, see 9 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 13 DIGEST (Repl.) 415 et seq.

Cases referred to in argument:

Re Brown and London and North Western Rail. Co. (1863), 4 B. & S. 326; 2 New Rep. 447; 32 L.J.Q.B. 318; 8 L.T. 695; 27 J.P. 711; 10 Jur.N.S. 234; 11 W.R. 884; 122 E.R. 481; 13 Digest (Repl.) 417, 435.

Russell v. Cambefort (1889), 23 Q.B.D. 526; 58 L.J.Q.B. 498; 61 L.T. 751; 37 W.R. 701, C.A.; 36 Digest (Repl.) 519, 827.

Wood v. Anderson Foundry Co. (1888), 36 W.R. 918; 4 T.L.R. 708; Digest (Practice) 318, 428.

A *Jackson v. Beaumont* (1855), 11 Exch. 300; 24 L.J.Ex. 301; 25 L.T.O.S. 185; 19 J.P. 532; 3 W.R. 521; 156 E.R. 844; 13 Digest (Repl.) 420, 468.

Appeal by the plaintiff from the judge of the Middlesbrough County Court.

The plaintiff commenced an action on a charterparty made at Glasgow for the carriage of a cargo from Riga to Grimsby, in the Middlesbrough County Court, and the summons (in which the defendants were described 'as of Glasgow') was served on their branch office at Middlesbrough, though their head office was at Glasgow. The defendants appeared in the action, and made certain applications for postponement. On the case coming on for trial, the judge held that, the defendants being a firm whose principal place of business was situate out of the jurisdiction, he could not try the case, and that jurisdiction had not been conferred on him by the conduct of the defendants in appearing and making the application.

C By s. 74 of the County Courts Act, 1888:

"Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave in the court in the district of which the cause of action or claim wholly or in part arose."

T. Willes Chitty for the plaintiff.

Cyril Dodd for the defendants.

E **HUDDLESTON, B.**—The question here is whether the county court judge was right or not in refusing to entertain jurisdiction in a case which came before him. The facts are admitted on both sides. A Glasgow firm had a branch office at Middlesbrough. An action is brought against them in the Middlesbrough County Court, and the summons is served on the office at Middlesbrough. The defendants appear to the action; they apply for an adjournment, and they make admissions in the action. The learned county court judge thought that he had no jurisdiction to try the case, on the ground that to do so would be to assume to the county court a wider jurisdiction than the High Court itself possesses. The answer to his objection is, that that jurisdiction is conferred by the County Courts Act, 1888.

G It has been argued that the words "carry on business" which are used in s. 74 of that Act, only apply to the principal place of business, and cases have been quoted, the substance of which goes to show that those words mean "head office." Those cases are mainly cases of large corporations, carrying on business over large areas. But in this case the defendants did carry on business at Middlesbrough, and it seems impossible to contend that, if a London firm has a branch office at Newcastle, an action could not be brought against them at that place. Therefore, s. 74 applies, and the county court judge was wrong.

H Then it is argued that we must adopt the construction applied in the decisions on the High Court Rules, because it is said that there are no provisions in the County Court Rules for service in such a case as this, and that s. 164 of the County Courts Act, 1888 [now s. 103 of the County Courts Act, 1959], provides that the High Court Rules are to apply to cases not provided for by the County Court Rules. But, in my opinion, this case is expressly provided for by Ord. 7, r. 12 and r. 13 of these rules, and their provisions have been complied with in this case. But, even if the service were bad, which I do not think it was, I am of opinion that the defendants by their subsequent conduct have waived that objection. The appeal must, therefore, be allowed.

MATHEW, J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Botterell & Roche; Bell, Brodrick & Gray.*

[Reported by R. M. MINTON-SENHOUSE, ESQ., Barrister-at-Law.]

BANK OF NEW SOUTH WALES v. O'CONNOR

[PRIVY COUNCIL (Lord Watson, Lord FitzGerald, Lord Hobhouse, Lord Macnaghten and Sir William Grove), January 29, 30, March 9, 1889]

[Reported 14 App. Cas. 273; 58 L.J.P.C. 82; 60 L.T. 467;
38 W.R. 465; 5 T.L.R. 342]

Mortgage—Equitable mortgage—Tender—Refusal—Right of mortgagor to maintain action for detinue of deposited deeds.

Where there is an equitable mortgage by deposit of deeds there is no authority for saying that a refusal by the mortgagee to accept a proper tender is a breach of contract for which an action of detinue will lie.

Mortgage—Tender—Rejection by mortgagee—Action for redemption—Liability of mortgagee to pay costs—Interest—Effect of tender on liability of mortgagor.

If a mortgagee rejects a proper tender he does so at his own risk, and in an action for redemption he may be refused his costs or may even be ordered to pay the costs of the action. The tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee.

Notes. Followed: *Graham v. Seal* (1918), 88 L.J.Ch. 31. Applied: *Barratt v. Gough-Thomas*, [1951] 2 All E.R. 48. Referred to: *Edmondson v. Copland*, [1911-13] All E.R.Rep. 592.

As to tender of amount due in mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 242-243; and for cases see 35 DIGEST 610.

Cases referred to:

- (1) *Cotterell v. Stratton* (1872), 8 Ch. App. 295; 42 L.J.Ch. 417; 28 L.T. 218; 37 J.P. 4; 21 W.R. 234, L.C. & L.J.J.; 35 Digest 696, 4393.
- (2) *Postlethwaite v. Blythe* (1818), 2 Swan. 256; 36 E.R. 613, L.C.; 35 Digest 609, 3460.
- (3) *Gyles v. Hall* (1726), 2 P.Wms. 378; 24 E.R. 774, L.C.; 35 Digest 666, 4023.
- (4) *Chilton v. Carrington* (1854), 15 C.B. 95; 3 C.L.R. 138; 24 L.J.C.P. 10; 24 L.T.O.S. 94; 1 Jur.N.S. 89; 3 W.R. 17; 139 E.R. 355; subsequent proceedings (1855), 15 C.B. 730; 3 C.L.R. 392; 24 L.J.C.P. 78; 24 L.T.O.S. 258; 1 Jur.N.S. 477; 3 W.R. 248; 139 E.R. 735; subsequent proceedings, 16 C.B. 206; 3 C.L.R. 606; 24 L.J.C.P. 153; 1 Jur.N.S. 477; 3 W.R. 376; 139 E.R. 735; 43 Digest 513, 514.

Also referred to in argument:

- The Notting Hill* (1884), 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp.M.L.C. 241, C.A.; 17 Digest (Repl.) 114, 272.
- British Columbia, etc., Saw Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 8 Digest (Repl.) 150, 951.
- Bodley v. Reynolds* (1846), 8 Q.B. 779; 15 L.J.Q.B. 219; 7 L.T.O.S. 61; 10 Jur. 310; 115 E.R. 1066; 17 Digest (Repl.) 78, 19.
- Davis v. Oswell* (1837), 7 C. & P. 804; 173 E.R. 351, N.P.; 43 Digest 521, 590.
- Breuer v. Dew* (1843), 11 M. & W. 625; 1 Dow. & L. 383; 12 L.J.Ex. 448; 1 L.T.O.S. 290; 7 Jur. 953; 152 E.R. 955; 5 Digest (Repl.) 1043, 8429.
- Waters v. Towers* (1853), 8 Exch. 401; 22 L.J.Ex. 186; 155 E.R. 1404; 7 Digest (Repl.) 403, 255.
- Phillips v. Hayward* (1835), 3 Dowl. 362; 1 Har. & W. 108; 43 Digest 527, 640.
- Williams v. Archer* (1847), 5 C.B. 318; 5 Ry. & Can. Cas. 289; 17 L.J.C.P. 82; 136 E.R. 899, Ex. Ch.; 43 Digest 524, 615.
- Grébert-Bornis v. Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 17 Digest (Repl.) 132, 390.
- Moore v. Shelley* (1883), 8 Ch. App. 285; 52 L.J.P.C. 35; 48 L.T. 918, P.C.; 35 Digest 325, 699.

A **Appeal** from an order of the Supreme Court of the Colony of Victoria (HIGINBOTHAM, C.J., WILLIAMS and HOLROYD, JJ.), dismissing with costs a motion made by the appellants for a new trial in an action of detinue brought against them by the respondent arising from the appellants' refusal to deliver up to the respondent certain title deeds deposited with them by way of equitable mortgage upon payment of the sum which the respondent alleged to be due to the appellants in respect thereof.

Finlay, Q.C., and Lofthouse for the appellants.

Channell, Q.C., and Gould for the respondent.

LORD MACNAGHTEN.—The question involved in this appeal is one of some importance to persons who may be concerned in lending or borrowing money on mortgage in Victoria. There are no facts in dispute. O'Connor, the plaintiff in the action, was a coach-builder in Beechworth, a comparatively small town in daily communication by rail with Melbourne, and distant apparently some few hours' journey from that city. He was in a fair way of business. His profits, he says, averaged from £400 to £500 a year, and his business seems to have been increasing down to the end of 1886. O'Connor kept an account with the Beechworth branch of the Bank of New South Wales from October, 1884. In the course of the next two years he somewhat crippled his resources by contesting a seat in the Legislative Assembly, and by incurring some expense in furnishing a house on the occasion of his marriage. He borrowed from his mother, Mrs. Pye, who lived in Melbourne, two sums of £150 and £200 without security, both of which he paid back with interest. He also incurred a debt of £100 to the bank. To secure that sum he deposited the title deeds of a small plot of ground where he carried on his business. The land is said to have been worth £200, and the buildings on it, which were of wood and about eight years old, some £400 more. He acquired the property from his uncle by a voluntary conveyance in January, 1886. He mortgaged it to the bank by a deed dated Feb. 22, 1886, which was duly registered. The mortgage was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt with interest, and the surplus was to be paid to the debtor as personal estate. The deed has a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the bank was entitled to in respect of the deposit of the title deeds relating to the property.

On Jan. 24, 1887, O'Connor's working account with the bank was in credit to the amount of £1 4s. 9d. On the following day it was overdrawn, and it was never again in credit. On Feb. 4, Hannaford, the manager of the bank at Beechworth, wrote to O'Connor, stating that his account was £61 overdrawn, and requiring him to pay in £125 to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage of February, 1886, O'Connor had a discount account with the bank. It comprised two classes of bills discounted for him by the bank: (i) bills of which he was endorsee; and (ii) acceptances of his, discounted at his request for the convenience of other persons. In reply to Hannaford's letter O'Connor called at the bank, and said that he could not pay in £125 straight off at such short notice. He seems to have satisfied Hannaford that the bills referred to in his letter were or would be provided for. On Monday, Feb. 14, Hannaford wrote again to O'Connor, stating that his working account was £67 overdrawn, that it was the balance day of the week, and that O'Connor must get the account largely reduced before three o'clock. He added that he hoped O'Connor did not give out any wages cheques on Saturday. O'Connor went immediately to the bank, and assumed a somewhat indignant tone, apparently on the ground that he had been in the habit of having an overdrawn account. It was a strange way of doing banking business, he said, to send him a letter on Monday, knowing his wages cheques were all paid on Saturday. However, he got Hannaford to promise to honour some small cheques of his which were outstanding, and then he said: "One thing, you won't trouble me much

longer with letters of this kind. I'll go to Melbourne some time this week, and get enough money to carry on independent of the bank." On Friday, Feb. 18, O'Connor called at the bank, and said he was going to Melbourne to get the money to carry on his business. Thereupon, at his request, Hannaford consented to pay a bill for £12 15s. which would fall due on the next day. O'Connor promised to be back about Wednesday the 23rd. A

O'Connor went to Melbourne and saw his mother. She promised to lend him £600. She said at the trial he might have had £1,000. She advanced him £300 in cash, on the terms that the money was to be used for lifting his deeds at the bank, and for no other purpose. He was to take his sister with him to the bank and hand over the deeds to her. The deeds were to be brought back or the money restored at once. O'Connor returned to Beechworth on Saturday night. The wages of his men, which were due at 1 p.m. on that day, were unpaid. When he returned home, he had only £6 or £8 of his own, and he owed about £20 for wages. The men re-assembled for work on Monday the 21st. He told them he would pay them at dinner time, but he failed to do so, and some of the men struck work then and there. On the same day, Monday the 21st—but whether before or after this occurrence is not stated—O'Connor went to the bank with his sister, taking with him his mother's money in a bag. Hannaford had made out O'Connor's account up to Feb. 23, showing a balance of £371 3s. 4d. in respect of indebtedness and liability. The items shortly were as follows:—Secured account, £103 12s. 0d.; working account, £81 14s. 5d.; discount account—as endorsee, £106 7s. 6d.; as acceptor, £79 9s. 5d.; total £371 3s. 4d. O'Connor objected to the last item of £79 9s. 5d., saying it was "monstrous," as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them over unless the whole amount of debt and liability were cleared off, saying he had to obey instructions. O'Connor observed that he had to return the money or take back the deeds at once. Hannaford then said that he would send the deeds and bills to the head office in Melbourne. C D E

O'Connor, after consideration, said that he would take the money to Melbourne, and he asked for and obtained a copy of the document on which the bank relied. It does not appear that O'Connor told Hannaford at that interview how he was situated with his workmen, or that he asked for any further indulgence from the bank. Instead of taking the money to Melbourne at once, O'Connor wrote a letter to his mother which she seems to have mislaid. On Tuesday, the 22nd, she sent a reply in the handwriting of her son, a boy of about eight or nine years old, which said, "Ma went to the bank and found that the money did not come down. Ma is annoyed about it, as she expected the money to be there today. Ma says she does not want no humbugging with you." On the receipt of this letter, O'Connor went to Hannaford and said his mother had written to him an angry letter, and that he should now be unable to get money from her. On Thursday O'Connor took the money back to his mother. On Saturday, Feb. 26, Hannaford wrote to O'Connor saying that he had had a communication from the head office, and that the bank would not insist on payment of the £79 9s. 5d., less rebate, though they were entitled to do so. On Feb. 28, the writ in this action was issued. On Mar. 8, the bank waived their claim to a general lien. F G H

Under these circumstances, if O'Connor had brought an action for redemption on the day on which the writ was issued, he might possibly have been entitled to costs up to Mar. 8. On the other hand, if he had persisted in the action after the bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the court, have had to pay the costs of the action. A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted I

A vexatiously or unreasonably. In *Cotterell v. Stratton* (1), LORD SELBORNE observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation of, or culpable neglect of his duty under, the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions; and he goes on to point out
B that such a departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions.

In the present case it is not easy to understand how the bank or their manager can be charged with vexatious or unreasonable conduct. It is admitted that
C Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the bank were careful to take a formal security for £100, it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so bold and defiant a tone in his communications with Hannaford, if it had not been taken for granted on both sides that the bank
D had some security in their hands. Hannaford was merely a subordinate, acting under instructions, as O'Connor knew. O'Connor had given no notice that he intended to draw a line at a certain point in the account. There was no opportunity of consulting the head office. Hannaford, therefore, seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the
E affair was not completed in Melbourne was not the fault of the bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition: "My
F mother would not lend me the money again. She was angry with me."

The action, however, which O'Connor brought against the bank was not an action for redemption. It was an action of detinue. The writ was issued in haste. But the statement of claim was not delivered until April 14. It is certainly a singular document. It does not refer to the mortgage of February, 1886, or notice the fact that the deeds were deposited as a security. It simply
G states that the bank on Feb. 21, 1887, detained, and had always since such time detained, from the plaintiff his title deeds. It specifies the deeds, and states that by reason of such detention the plaintiff had suffered damage as follows:

"He was rendered unable to procure a loan of £600 from Annie Pye. . . . and unable to pay his workmen in his business of coach-builder, and was compelled to discharge some of his said workmen, and was rendered unable to meet his
H liabilities in his said business, and was sued in respect thereof, and his credit was injured and his trade diminished, and his said business was otherwise injured."

Then it claims a return of the deeds, or £1,000 for their value, and £2,000 for their detention. The defence was delivered on April 29. It is equally remarkable. For some unexplained reason, the bank also abstained from referring to
I the mortgage of February, 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the plaintiff deposited the said deeds with them to secure the repayment of £100, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability, they brought into court £50 and one shilling, and they delivered a counterclaim for money due to them. In reply the plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still

remained due. He then stated the tender on Feb. 21, and its refusal. Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the bank allowed the action to be set down for trial. A

It came on to be tried on July 20, 1887, before HOLROYD, J., and a jury. In addition to proof of the facts already stated, evidence of a somewhat loose and unsatisfactory description was offered, with the view of proving the special damages alleged in the statement of claim. This evidence was objected to, on the ground that the damages claimed were too remote. The learned judge admitted the evidence, but reserved the question of its admissibility for the consideration of the full court. No evidence was given on the part of the defence. The jury estimated the value of the property at £700. They gave £1,500 damages for detention, and they found that there was due to the bank under the counterclaim the sum of £284 2s. 7d., which was afterwards reduced by consent to £202 1s. The question reserved came on to be argued before the full court on Aug. 10, 1887, when it was held that the evidence objected to was admissible. On Aug. 26, 1887, on motion for judgment, the court adjudged—(i) That the plaintiff recover against the defendant £1,500 on his claim; (ii) That the defendant recover against the plaintiff the sum of £202 1s. on the counterclaim. Provision was made for set-off and payment of the balance, and the bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the plaintiff. The bank was ordered to pay the costs of the action and the costs of the argument before the full court, after deducting the costs of the counterclaim. On Nov. 2, 1887, the bank moved the full court for an order to set aside the verdict for the plaintiff, on the grounds that it was against the weight of the evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The court ordered that the verdict should be affirmed, and that the motion for a new trial should be dismissed, with costs. The bank has appealed to Her Majesty in Council from the two orders of the full court and the judgment of Aug. 26, 1887. The whole matter is, therefore, open, with this exception, that the bank cannot now be permitted to rely upon the legal mortgage of Feb. 22, 1886, although it was put in evidence at the trial by the plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit and the appeal must be decided on that footing. B C D E F

The learned counsel for the appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which mortgagees would be exposed if such a verdict were upheld. They contended, too, that no damages, or at any rate no substantial damages, were due either in fact or in law. These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But, in their Lordships' opinion, there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the court below was apparently not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles because in the conduct of the action both parties have chosen to ignore them. The question that suggests itself is, can such an action as this be maintained? It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants during a great part of their argument, as an action for damages occasioned by a wrongful act arising out of breach of contract. G H I

What is the wrongful act? And what is the breach of contract? Their Lordships have not had the advantage of seeing a note of the summing-up. But in the full court the learned judge who tried the case states his view as follows:

"In my opinion there was a contract here to deliver up the deeds on payment of a certain sum of money. That was broken when the money was tendered

A and ought to have been accepted. Then the bank was in the same position as if it had actually taken the money and then refused to deliver up the deeds. That was a wrongful detention of another man's property, and, therefore, a tort."

B The bank was, no doubt, bound to deliver up the deeds on payment of the sum secured, with interest and costs if any, but in their Lordships' opinion, there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrongdoer.

C The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law; nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem must do equity and pay principal, interest, and costs before he can recover the property which at law is not his.

D So it is in the case of an equitable mortgage. It is a well-established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a court of equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same court if there be any conflict the rules of equity must prevail. In *Postlethwaite v. Blythe* (2), where property had been conveyed to secure a debt of a comparatively small amount, LORD ELDON, L.C., refused to direct a release upon payment into court of the largest sum to which the debt would in probability amount. He said (2 Swan. at p. 258):

E "I take it to be contrary to the whole course of proceeding in this court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorise me to take the estate from the plaintiff before payment."

G To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into court, but not till then, the mortgagee is required by the order to deliver up the title deeds.

H It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper tender he can always obtain his deeds on a summary application on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. A form of order adapted to such a case is to be found in *SETON ON DECREES* (3rd Edn.), p. 1040. No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A court of equity can take all the circumstances of the case into consideration and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects a tender he rejects it at his own risk, and in an action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further, a proper tender will stop the running of interest if the mortgagor keeps the money

ready to pay over to the mortgagee: *Gyles v. Hall* (3). But there is no authority for saying that refusal to accept a proper tender is a breach of contract for which an action at law will lie.

The learned counsel for the respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In *Chilton v. Carrington* (4) the experiment was tried once and again. But the result of two actions in that case, so far as they are reported, affords but little encouragement for a repetition of the experiment. In *Chilton v. Carrington* (4) the assignee of a bankrupt publican sought to recover the title deeds of a public-house which had been deposited with the defendants to secure a sum of £150. The action was brought after tender. The plaintiff sued for detention of the deeds, which were described in the declaration as "goods and chattels," and for damages. The defendants did not put in an equitable plea, but their case was that the deposit was intended to secure an account for beer as well as the £150. That question was tried on demurrer. It was held that the deposit was only a security for the £150. The parties then went to trial, and there being no equitable defence, they agreed that the jury should find damages for the detention, and that they should not be required to assess the value of the so-called goods and chattels. Upon this arrangement the jury found a verdict for £60 damages. The plaintiff then applied to the judge in chambers for delivery up of the deeds. The defendants urged that they ought not to be required to deliver up the deeds before payment. The learned judge, however, made the order. The defendants then applied to the full court to set aside the order, and argued that, according to the settled principles of equity, they could not be required to part with their security until they were paid. The learned judges were puzzled by the course which the parties had taken. In the course of the argument, addressing the counsel for the defendants, VAUGHAN WILLIAMS, J., observed with perfect accuracy, "If you are right the plaintiff ought not to have succeeded in the action." Ultimately the court got over the difficulty, by setting aside the order in chambers, on the ground that by arrangement between the parties the jury had been discharged from finding the value of the goods detained. As the result of that action the plaintiff was no nearer getting back his deeds. However, he still contended that, having made a proper tender and that tender having been refused, he was entitled to have his deeds without payment of the money. So he brought another action of detinue. On this occasion the defendants were better advised, and they put in a plea by way of equitable defence that the deeds were deposited to secure £150 and that that sum remained unpaid. On argument the court allowed the plea to be put in, and nothing further seems to have been heard of the action. That case, so far from being an authority in favour of the respondent, is really an authority against him.

Their Lordships are, therefore, of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances, their Lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their Lordships, cannot arise. The proper order will be to dismiss the action, to allow the verdict on the counterclaim as reduced by consent to stand, and to direct payment to the appellants of the reduced amount, together with interest and the costs of the counterclaim. As to the costs of the action, having regard to the way in which the bank has acted in the conduct of the litigation, their Lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors: Wadeson & Malleeson; Geare, Son & Pease.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

A

Re BARRINGTON. GAMLEN v. LYON

[CHANCERY DIVISION (Kay, J.) June 24, 29, July 3, 1886]

[Reported 33 Ch.D. 523; 56 L.J.Ch. 175; 55 L.T. 87;
35 W.R. 164; 2 T.L.R. 774]

B

Settled Land—Waste—Minerals—Wrongful working by trespasser—Land required for railway—Payment of compensation—Rights of tenants for life and remaindermen.

C

In 1876 the coal mines under certain lands were devised upon trust for A. for life, without impeachment of waste, and after her death upon trust for B. for life, without impeachment of waste, with limitations over. A. died in 1883. During her lifetime and after her death the owners of neighbouring collieries inadvertently worked coal under the devised lands by instroke, and they afterwards paid compensation in respect of the coal so worked. A railway passed over a portion of the lands. In June, 1884, the lessees of the coal mines gave notice to the railway company that they intended to work the coal lying under and adjoining a portion of the railway. The railway company gave a counter-notice to the effect that the coal was required for the support of the railway, and subsequently paid compensation, out of which £136 0s. 2d. was apportioned as paid in respect of the lessors' interest. On the question to whom the compensation moneys belonged.

D

E

Held: (i) since A. and B. were unimpeachable for waste, the compensation paid by the neighbouring coal owners, in respect of the coal worked during their lifetimes, belonged to A.'s estate and B. respectively; and (ii) as to the £136 0s. 2d., the court was bound to consider all the circumstances in determining the rights of the tenant for life and the remaindermen under the Lands Clauses Consolidation Act, 1845, s. 74, but, as the coal in respect of which the compensation was paid was not of such an extent that it would be impossible to get it during B.'s lifetime, B. was entitled to this sum.

F

Notes. The Lands Clauses Consolidation Act, 1845, s. 74, was amended by the Statute Law Revision Act, 1892.

Considered and Distinguished: *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129. Considered: *Re Fullerton's Will*, [1906] 2 Ch. 138; *Re Williams' Settlement*, *Williams Wynn v. Williams*, [1922] 2 Ch. 750; *Re Leeds' (Duke) Will Trusts*, *Leeds (Duke) v. Davenport*, [1947] 2 All E.R. 200.

G

As to waste, see 34 HALSBURY'S LAWS (3rd Edn.) 649 et seq.; as to the application of money in respect of leases or reversions, see 10 HALSBURY'S LAWS (3rd Edn.) 200–202; and for cases see 11 DIGEST (Repl.) 262; 33 DIGEST (Repl.) 751. For the Land Clauses Consolidation Act, 1845, s. 74, see 3 HALSBURY'S STATUTES (2nd Edn.) 924.

H

Cases referred to:

- (1) *Uvedall v. Uvedall*, 2 Roll. Abr. 119.
- (2) *Whitfield v. Bewitt* (1724), 2 P.Wms. 240; 2 Eq. Cas. Abr. 589; 24 E.R. 714, L.C., 33 Digest (Repl.) 751, 257.
- (3) *Bewick v. Whitfield* (1734), 3 P.Wms. 267; 24 E.R. 1058; 2 Digest (Repl.) 112, 810.
- (4) *Pigot v. Bullock* (1792), 1 Ves. 479; 3 Bro.C.C. 539; 30 E.R. 447; 2 Digest (Repl.) 105, 722.
- (5) *Anon.* (1729), Mos. 237; 25 E.R. 369; 2 Digest (Repl.) 107, 753.
- (6) *Pyne v. Dor* (1785), 1 Term Rep. 55; 99 E.R. 968; 2 Digest (Repl.) 141, 1097.
- (7) *Bagot v. Bagot*, *Legge v. Legge* (1863), 32 Beav. 509; 2 New Rep. 297; 33 L.J.Ch. 116; 9 L.T. 217; 9 Jur.N.S. 1022; 12 W.R. 35; 55 E.R. 200; 2 Digest (Repl.) 110, 794.

I

Also referred to in argument:

Askew v. Woodhead (1880), 14 Ch.D. 27; 49 L.J.Ch. 320; 42 L.T. 567; 44 J.P. 570; 28 W.R. 874, C.A.; 11 Digest (Repl.) 261, 1396.

Lowndes v. Norton (1877), 6 Ch.D. 139; 46 L.J.Ch. 613; 25 W.R. 826; 2 Digest (Repl.) 111, 797.

Baker v. Sebright (1879), 13 Ch.D. 179; 49 L.J.Ch. 65; 41 L.T. 614; 28 W.R. 177; 2 Digest (Repl.) 138, 1065.

Honywood v. Honywood (1874), L.R. 18 Eq. 306; 43 L.J.Ch. 652; 30 L.T. 671; 22 W.R. 749; 2 Digest (Repl.) 112, 815.

Waldo v. Waldo (1841), 12 Sim. 107; 10 L.J.Ch. 312; 59 E.R. 1072; 2 Digest (Repl.) 133, 994.

Gent v. Harrison (1859), John. 517; 29 L.J.Ch. 68; 1 L.T. 128; 5 Jur.N.S. 1285; 8 W.R. 57; 70 E.R. 526; 2 Digest (Repl.) 111, 802.

Phillips v. Barlow (1844), 14 Sim. 263; 14 L.J.Ch. 35; 4 L.T.O.S. 130a; 60 E.R. 359; 2 Digest (Repl.) 132, 982.

Jodrell v. Jodrell (1869), L.R. 7 Eq. 461; 38 L.J.Ch. 507; 20 L.T. 349; 17 W.R. 602; 20 Digest (Repl.) 299, 414.

Smith v. Great Western Rail. Co. (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; 26 W.R. 130, H.L.; 11 Digest (Repl.) 169, 397.

Originating Summons taken out by the plaintiffs, Robert H. Gamlen and Josiah Burdett, two of the trustees of the will of Francis Lyon Barrington, deceased, against the defendants, Francis Bowes Lyon and Viscount Barrington, to have the following questions determined by the court: (i) What were the respective rights of the plaintiffs, and of the defendant, Francis Bowes Lyon, the equitable tenant for life in possession of the estates settled by the testator's will, and of the defendant Viscount Barrington, as executor of the Dowager Viscountess Barrington, deceased, the late tenant for life of such estates under the same will, in a sum of £839 7s. 2d., being the compensation for certain coal under the settled estates, gotten by instroke by Messrs. Samuelson and Co. (ii) What were the respective rights of the plaintiffs, and of the defendant, Francis Bowes Lyon, as such tenant for life as aforesaid, in a sum of £136 0s. 2d., being the compensation paid by the North-Eastern Rail. Co. on account of the persons interested in the reversion of the settled estates for stopping the working by the lessees of certain minerals under such estates.

The following statement of facts related to the first question in the summons upon which the opinion of the court was desired: By his will, dated Dec. 1, 1876, the late Francis Lyon Barrington, who and whose predecessors in title had for upwards of a century been the owners in fee simple of certain mines (but not of the surface over such mines) under certain lands at Binchester, in the county of Durham, devised, among other hereditaments, his collieries at Binchester aforesaid unto, and to the use of his trustees, the plaintiffs, in fee simple upon trust (subject to provisions for payment of debts and legacies long since satisfied) to stand seised thereof, subject to a mortgage then and still subsisting, in trust, out of the rents and profits of such hereditaments, to pay an annuity therein mentioned and still subsisting, and subject to such annuity, in trust for the then Dowager Viscountess Barrington during her life without impeachment of waste. And after her decease in trust for the defendant, Francis Bowes Lyon, and his assigns during his life without impeachment of waste, with limitations over.

The testator died Jan. 15, 1877, and his will, with a codicil thereto (by which an additional trustee of his will, namely, the defendant, Viscount Barrington, was appointed), was subsequently duly proved by the defendant, Viscount Barrington, and the plaintiffs, the executors, and trustees. The Dowager Viscountess Barrington died on Mar. 23, 1883, whereupon the defendant, Francis Bowes Lyon, became equitable tenant for life of the devised estates.

The Binchester collieries were, on part of their north-west side, bounded by and abutted on a colliery known as Hedley Hope Colliery, not forming part of the Bar-

- A rington settled estates. Both collieries were formerly leased by their respective owners to J. W. Pease & Co., or to their predecessors in title; but the outlying portions of the Binchester coal being less accessible from the Binchester workings, J. W. Pease & Co. worked that portion of the Binchester coal which adjoined the Hedley Hope Colliery by instroke from the Hedley Hope Workings, and brought it to bank up their pit at Hedley Hope as they were entitled to do. In 1867 J. W. Pease & Co.'s tenancy of Hedley Hope Colliery ceased, and at that date the barrier separating the two mines in the main coal seam consisted of certain pillars of coal forming part of and indicating the boundary of the Binchester mine.

- In 1873 J. W. Pease & Co. surrendered their lease of the Binchester colliery to the testator, who granted them a fresh lease for a term of thirty-one years from May 1, 1872, reserving royalties, of which the royalty for main coal after May 1, 1872, for the residue of the term was 35s. per ton. The lease contained a clause prohibiting the lessees from assigning or underletting the demised coal mines without the lessor's licence in writing first obtained. In 1873 Samuelson & Co. became lessees of Hedley Hope Colliery, and in October, 1882, they began working the pillars of Binchester coal above mentioned from the main coal seam, and at intervals continued to work them until December, 1884, when the error was discovered and the workings ceased. The coal then worked by Samuelson & Co. amounted to 490,884 tons. J. W. Pease & Co., without consulting their lessors, arranged terms of compensation with Samuelson & Co., and offered to pay J. W. Pease and Cos.'s lessors a royalty of 35s. per ton on the coal taken, being the royalty which would have been payable if the coal had been got by J. W. Pease & Co. under their lease. The royalty upon that quantity of coal at 35s. per ton would amount to the sum of £859 0s. 11d., and the property tax to be allowed thereon was calculated at £19 13s. 9d., having the net sum of £839 7s. 2d. which Samuelson & Co. offered to pay. The rents reserved by the lease were full rack rents. The coal in question was worked by Samuelson & Co. inadvertently and through mistake of the boundary, and not with any wrongful intent.

- The following statement of facts related to the second question in the summons:
- F The North-Eastern Rail. Co. were the proprietors of a line extending along the surface over the above-mentioned Binchester Colliery. In June, 1884, the lessees of the Binchester Colliery gave the North-Eastern Rail. Co. notice that they were desirous of working and taking away the whole of the coal lying under and adjoining a portion of such railway. To this the company replied, on July 28, 1884, by a counter notice, in which they alleged that the lessees were not in a position to work any of such coal except in the Brockwell seam, and that the notice given by the lessees was premature except as aforesaid; and further that the company, in pursuance and by virtue of every power enabling them in that behalf, required that all the coal then left or being in the Brockwell seam should be left unworked; and further gave notice that they were willing and thereby offered to pay to the parties entitled all such compensation as might be payable according to law in respect of the coal so to be left unworked. In the result the mining engineers for the different parties (including the tenant for life, but not the trustees, who were not represented) agreed the compensation to be paid by the company at £514 17s. 11d., of which the lessors' proportion was to be £136 0s. 2d. It was stated by the mining engineer for the tenant for life that the £136 0s. 2d. was equivalent to the rent the lessors would have received from J. W. Pease & Co. for the coal if it had been worked under the lease.

The summons was adjourned into court.

By the Lands Clauses Consolidation Act, 1845, s. 74:

"Where any purchase money or compensation paid into the Bank under the provisions of this or the special Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in *England*

or the Court of Exchequer in Ireland, on the Petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be."

(The words in italics were replaced by the Statute Law Revision Act, 1892.)

Theobald for the plaintiffs, the trustees of the will, and for the parties interested in remainder.

Decimus Sturges for the defendant Francis Bowes Lyon.

Phipson Beale for the defendant.

Cur. adv. vult.

July 3, 1886. **KAY, J.**, read the following judgment.—The testator, F. L. Barrington, was owner in fee of certain coal mines in the county of Durham, but not of the surface above such mines. By his will in 1876 he devised the mines to trustees upon trust for the Dowager Viscountess Barrington for life without impeachment of waste, and after her death for the defendant, Francis Bowes Lyon, for life without impeachment of waste, with limitations over. He died on Jan. 15, 1877, and Lady Barrington died on Mar. 23, 1883. During her lifetime and after her death certain of the coal was got by the owners of neighbouring collieries by instroke from those collieries, such neighbouring owners having inadvertently thus trespassed beyond their boundary.

The question is to whom the moneys recovered in respect of such trespass belong. The point seems to be completely determined by authority.

No doubt, if a tenant for life, who is impeachable of waste, improperly commits waste by cutting trees or digging minerals, such trees or minerals when severed become at once the property of the owner of the first estate of inheritance in esse: *Uvedall v. Uvedall* (1); *Whitfield v. Bewitt* (2); *Bewick v. Whitfield* (3); and in such case an intermediate tenant for life without impeachment of waste cannot recover the proceeds in trover: *Pigot v. Bullock* (4) (1 Ves. at p. 484). The reason for this seems to be that he had no right to the timber cut before his estate came into possession. The same law applies if the timber he severed by the act of God as by tempest or by a trespasser: see *Bewick v. Whitfield* (3).

On the other hand, if the severance be in the lifetime of a tenant for life who is unimpeachable of waste the severed portion of the inheritance belongs to such tenant for life. In *Anon.* (5) **SIR JOSEPH JEKYLL, M.R.**, stated (Mos. at p. 238):

"It is now settled at law that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life who is dispunishable of waste and not to the remainderman in tail or in fee."

This was followed by **MANSFIELD, C.J.**, in *Pyne v. Dor* (6), who said, "that a tenant for life without impeachment of waste has a right to the trees the moment they are cut down." And in *Bagot v. Bagot* (7) the law as to timber and minerals is treated as being precisely identical. I am, therefore, of opinion that the proceeds of the minerals worked during the respective lifetimes of Lady Barrington and the defendant belong to her estate and to the defendant respectively.

Another question arises thus: A railway belonging to the North-Eastern Rail. Co. passes over a portion of the mine. In June, 1884, the lessees gave to the railway company notice that they were desirous of working the coal lying under and adjoining a portion of the railway. A counter notice was given, and eventually a compensation, to be paid by the railway company, was assessed at £514 17s. 11d., of which the lessors' proportion was to be £186 0s. 2d.

I have to determine under s. 74 of the Lands Clauses Act who is entitled to the latter sum. I quite agree that under that section it is the duty of the court to consider all the circumstances, and if the coal for which compensation was thus recovered was of such an extent that by no possibility it could be gotten during

A the lifetime of the existing tenant for life, it seems to me that might be a circumstance which the court might have to regard in determining the relative rights of the tenant for life and the remainderman. But nothing of that kind occurs here, and I am of opinion that in this case the tenant for life is entitled to the £136 0s. 2d. being that part of the compensation which is allotted to the lessors.

B Solicitors: Gamlen, Burdett & Woodhouse; Western & Sons; Carlisle, Unna & Rider.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Re COLLINS. COLLINS v. COLLINS

D [CHANCERY DIVISION (Pearson, J.), March 16, 17, 18, 1886]

[Reported 32 Ch.D. 229; 55 L.J.Ch. 672; 55 L.T. 21; 50 J.P. 821;
34 W.R. 650; 2 T.L.R. 423]

Trust—Infant—Maintenance—Jurisdiction of court to authorise—Testator's intention to benefit particular family.

E A testator gave the residue of his real and personal estate to trustees upon trust to receive the rents and profits, and he desired them to invest in their names the surplus income not otherwise bequeathed by a former part of his will, "such investments to be brought within the period limited for such investments." When such period had been reached, he devised and bequeathed such real and personal estate to his sister for life, and after her decease to his nephew W. for life, and after his decease to his children in tail male, and then he devised the same to his nephew J. for life, and then to A. in tail male respectively. W., J., and A. were infant children of the testator's sister. The testator died possessed of considerable real and personal property. An application was made on behalf of W. J., and A., that £2,000 a year might be paid to their mother out of the income of the testator's residuary estate for their maintenance and education.

G **Held:** the principle to be applied was that the children intended to get the benefit of the testator's bounty should be fully qualified for the proper use of that bounty; and, as the testator had shown an intention to benefit a particular family, the court would, notwithstanding the direction to accumulate, order the payment of £2,000 a year to the mother for the benefit of her infant children.

H *Havelock v. Havelock, Re Allan* (1) (1881), 17 Ch.D. 807, applied.

Notes. In addition to its inherent jurisdiction, the court also has power, in appropriate cases, to order maintenance of an infant out of income under the Trustee Act, 1925, s. 57, and under the Variation of Trusts Act, 1958.

I Considered: *Re Stapleton, Stapleton v. Stapleton*, [1946] 1 All E.R. 323. Referred to: *Re Walker, Walker v. Duncombe*, [1901] 1 Ch. 879; *Chapman v. Chapman*, [1954] 1 All E.R. 798.

As to deviation from the terms of a trust, see 38 HALSBURY'S LAWS (3rd Edn.) 1025 et seq.; as to the powers of court respecting maintenance of infants out of income, see 21 HALSBURY'S LAWS (3rd Edn.) 173-174; and for cases see 28 DIGEST (Repl.) 570-572. For the Trustee Act, 1925, s. 57, see 26 HALSBURY'S STATUTES (2nd Edn.) 138; and for the Variation of Trusts Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 1180 et seq.

Cases referred to:

- (1) *Havelock v. Havelock, Re Allan* (1881), 17 Ch.D. 807; 50 L.J.Ch. 778; 44 L.T. 168; 29 W.R. 859; 28 Digest (Repl.) 571, 858.
- (2) *Revel v. Watkinson* (1748), 1 Ves. Sen. 93; 27 E.R. 912, L.C.; 40 Digest (Repl.) 755, 2421.

Also referred to in argument:

Burges v. Mawbey (1823), Turn. & R. 167; 40 Digest (Repl.) 753, 2390.

Originating Summons taken out by William Collins, James Collins and Archibald Collins, suing by their mother Jane Collins as next friend, asking for an order that an allowance of £2,000 a year be paid to their mother out of the income of the residuary estate of Thomas Collins deceased for the purpose of maintaining and educating her three sons.

Thomas Collins, late of Knaresborough, M.P., by his will dated July 30, 1884, appointed his cousin Francis Collins and his sisters Katherine Collins and Jane Collins, co-trustees and co-executors of his will, and he devised to Francis Collins his dwelling-house, at Knaresborough, and all the rents and profits of the cottages adjoining for his life, and he allowed the said Francis Collins to charge the rest of his estate during that period with the payment of the sum of £1,000 a year to be paid to him by the testator's executors quarterly, and after his decease he devised the dwelling-house and cottages and £1,000 a year to his sister Jane Collins, and at her decease he devised the same estate to his nephew William Collins, and at his death without male issue he devised the same to his nephew James Collins, and at his death without male issue then he devised the same to his nephew Archibald Collins, and the testator directed his executors to invest the spare capital arising from the interest of spare money in securities in land within five miles of Knaresborough, or in stocks of the same quality as those in which such moneys were then invested, giving a preference to land securities, and the testator gave and devised all the residue of his real and personal estate whatsoever to his trustees upon trust to receive the rents and profits, and manage the same, and he desired his trustees to invest in their own names the surplus income arising from his real and personal estates not otherwise bequeathed, "such investments to be brought within the period limited for such investments," and when such period had been reached, then the testator devised and bequeathed all such last-mentioned real and personal estate to his sister Jane Collins for her life, and after her decease then he gave and devised the same to his nephew William Collins for life, and after his decease to his children in tail male, and then he devised the same to his nephew James for life, and then to Archibald, in tail male respectively.

The testator's sister Jane Collins had eight children, five of whom were daughters, and three sons, namely, William, James, and Archibald Collins. William Collins was in his twenty-first year, and was being educated at Oxford. James Collins was in his nineteenth year, and Archibald Collins in his seventeenth year. The income of the testator's residuary estate including the annuity of £1,000, amounted to about £6,000. Francis Collins had conveyed the testator's house at Knaresborough, which was of large size, to Jane Collins, her brother and sisters, and the brother and sisters allowed her to use it. It was of large size and out of repair. Jane Collins had an income of about £1,000 a year, derived from property which would pass to her children after her death.

Everitt, Q.C., and *Vaughan Hawkins* in support of the summons.

Charles Broune for the trustees.

PEARSON, J.—The question that arises on this will is a question which has been the subject of discussion in a great many cases both from early times, and also more particularly within the last twenty years. The case which is now the leading case on this subject is *Havelock v. Havelock, Re Allan* (1), which was decided by MALINS, V.-C. The ground of the decision I take to be this, where a testator has made provision for a family, using that word in the ordinary sense

- A (that is to say the children of a particular stirps in succession or otherwise), but has postponed their enjoyment by a trust for accumulation either for particular purposes or generally for the increase of the estate, he nevertheless does not intend that those children shall be left unprovided for, or that they shall be left in such a state of moderate means that they shall not be educated properly for the purposes of the fortune which he desires them to have. The court has accordingly
- B found in very old times that where an heir-at-law is left unprovided for, his maintenance ought to be provided. LORD HARDWICKE (*Revel v. Watkinson* (2)) extended that to the case of a nephew, and the decision of LORD HARDWICKE has been quoted with approbation, and followed by most distinguished judges, among others LORD HARCOURT, SIR THOMAS PLUMER, and MALINS, V.-C., and I do not think since that decision of *Havelock v. Havelock*, *Re Allan* (1), that in any court that decision has been found fault with.

- C It was thought, I remember at the time when the decision was given, that it was a very strong decision. The will in that case was a very peculiar will, and I always thought, although I have no right to express an opinion on it because I was counsel in the case, that there was more to be said for that decision simply on the words of the will than could be said for many decisions of a similar kind on other wills. Nevertheless, the principle is a sound one, and even if it be a new principle laid down for the first time in that case, so far as the facts of *Havelock v. Havelock*, *Re Allan* (1) are concerned, I think it is a principle which may well be followed.

- To my mind, and using all the experience I have, these trusts for accumulation are mischievous, and in this will it is plain that the gentleman who drew it, if he meant it for a will, knew very little what he was about when he drew it, because his phraseology is lamentably infelicitous. What has been said is evidently the case, that this will was intended simply as instructions for a will, and if so, it ought to be construed more benevolently than most wills are. But I think I am not doing wrong as to the principle which it is suggested lies at the bottom of all these cases—that the court should only do that which it always attempts to do in
- F construing wills, namely, give effect to the intention of the testator who must have desired if he was a reasonable man that the children whom he intended to get the benefit of his bounty should be fully qualified for the proper use of that bounty. Under these circumstances I shall make the order which is asked for here.

- It is suggested very properly on the part of the trustees, that possibly the £2,000
- G a year is a large sum to be allowed. But having regard to all the circumstances of this case, both to the number of the members of the family, which the court always considers in making the allowance, having regard to the amount of the income of the property, having regard to the present income of the lady, the mother of these children, and who will herself enjoy for life the income of this property if she survives twenty-one years, I do not think £2,000 a year is an improper sum
- H to allow her, because the income which either of these children will be entitled to at the end of this period will, as I am told, be from £8,000 to £10,000 a year. Even if it was only one half £10,000 a year, if it were £5,000 a year, it is plain that whoever is to possess that income ought to receive an education to fit him for the purposes for which he ought to apply that income, and ought to be put in such a state of society that he can really benefit by the income which is to come to him. It is
- I plain that to deprive a child of the income for twenty-one years would be making the provision for the child an injury rather than a benefit afterwards. I propose, therefore, to allow £2,000 a year. Looking to all the limitations of the will on which it would not be proper for me to give any decision at the present time, and seeing that the youngest child, assuming his brothers die without male issue, will be absolutely entitled to the personal estate at all events, I propose to give the £2,000 a year, to direct the trustees to pay that out of the income of the personal estate, and I propose to direct them to pay to Mrs. Collins for the maintenance and education of the three sons. That is to say, she may spend the money as she

likes, provided she has the maintenance and education of the three sons provided for, and I give liberty to apply in chambers for any purpose necessary.

It having been suggested that the limitation with regard to the accumulations was void altogether, I think it right to express my opinion on that point. Clumsy as the will is, I think the meaning was to take out of the residue the dwelling-house and cottages and the £1,000 a year, and then to give all the residue of the real and personal estate to the trustees upon trust to accumulate for so long a period as the law allows, and I do not know that there is anything at all improper or illegal in that. I am very sorry I am obliged to say so, because I should be very glad to see the law altered, and these trusts for accumulations disposed of.

Solicitors: *Farrer & Co.*; *Paterson, Snow, Bloxam & Kinder.*

[Reported by A. J. SPENCER, Esq., Barrister-at-Law.]

Re NORTH BRAZILIAN SUGAR FACTORIES, LTD.

[COURT OF APPEAL (Cotton and Lopes, L.JJ.), November 11, 1887]

[Reported 37 Ch.D. 83; 57 L.J.Ch. 110; 58 L.T. 4; 4 T.L.R. 61]

Company—Winding-up—Inspection of books—Purposes for which order may be made—Obtaining evidence in support of action by shareholders against directors—Need for books to be in possession of the company—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 156.

The powers given to the court by the Companies Act, 1862, s. 156 [now s. 266 of the Companies Act, 1948] to order inspection, after a winding-up order, of the books and papers of a company **held** to be *prima facie* to be exercised only for the purposes of the winding-up, and for the benefit of those interested under it. Obtaining evidence in support of actions by individual shareholders for their own benefit against the directors was not an object within the section. Such an order could only be made as to books and papers in the company's possession, and not as to those in the possession of third parties who claimed a right to possess them.

Notes. The Companies Act, 1862, ss. 115, 155 and 156 have been repealed, and the corresponding provisions are contained in the Companies Act, 1948, ss. 268, 341 and 266 respectively.

Referred to: *Re London & Lancashire Paper Mills Co.* (1888), 57 L.J.Ch. 766.

As to orders for inspection of the books and papers of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 723-724; and for cases see 10 DIGEST (Repl.) 1040-1041. For the Companies Act, 1948, ss. 266, 268 and 341, see 3 HALSBURY'S STATUTES (2nd Edn.) 668, 669 and 720.

Case referred to:

- (1) *Re Imperial Continental Water Corpn.* (1886), 33 Ch.D. 314; 56 L.J.Ch. 189; 55 L.T. 47; 2 T.L.R. 850, C.A.; 10 Digest (Repl.) 941, 6457.

Also referred to in argument:

Re Joint-Stock Discount Co., Ex parte Buchan (1866), 36 L.J.Ch. 150; 15 L.T. 261; 15 W.R. 99; 10 Digest (Repl.) 1041, 7203.

Re Park Gate Waggon Works Co. (1881), 17 Ch.D. 234; 44 L.T. 901; 30 W.R. 20, C.A.; 10 Digest (Repl.) 968, 6681.

Re National Financial Co. (1867), 15 W.R. 499; 10 Digest (Repl.) 1041, 7205.

- A** **Appeal** by six shareholders of the North Brazilian Sugar Factories, Ltd., from a decision of CHARLES, J., refusing to grant them an order against the liquidator of the company that they, by their solicitors, might be at liberty to inspect all the books, papers, and documents then in the custody, possession, or control of the company or the liquidator, and to take copies of and abstracts from such books, papers, and documents, at their own expense, as they might be advised.
- B** The North Brazilian Sugar Factories, Ltd., was registered under the Companies Acts on May 27, 1882, with a nominal capital of £450,000 in £20 shares, and in November, 1882, the capital was increased by special resolution to £700,000, a power of borrowing up to £505,000, being at the same time given to the directors instead of the power to borrow up to £20,000 previously existing under the articles. The directors borrowed large sums on debentures. Losses having been sustained, and default having been made in payment of interest on the debentures, the debenture-holders brought an action in which, in 1887, a receiver was appointed; and an extraordinary resolution was passed on June 7, 1887, to wind-up the company, and to sanction a scheme which was laid before the shareholders at the same time. This scheme provided in effect that a new company should be incorporated to acquire all the assets of the old company; that the liquidator should sell to the
- D** new company all the concessions, lands, tramways, factories, buildings, machinery, plant, chattels, money, and things in action of the old company, and the undertaking and business of the old company, with the full benefit of all contracts and agreements, and of all securities to which the old company was entitled, and all other the real and personal property of the old company; and that the purchase money should be paid in fully paid-up shares of the new company. On June 25,
- E** 1887, an order was made continuing the winding-up under the supervision of the court. The new company having been formed, an agreement for the sale to it of all the assets of the old company, on the terms mentioned in the scheme, was entered into on July 29, 1887, subject to the approbation of the judge, and to such approval as was required by the Joint Stock Companies Act, 1870. This approval was obtained at a meeting held on July 25, 1887, and an order sanctioning the
- F** scheme and the agreement for sale was, notwithstanding the opposition of several debenture-holders, made on Aug. 11, 1887. A number of shareholders who were dissatisfied with the way in which the affairs of the company had been managed, appointed six of their number as a committee of investigation. The liquidator, who had been the secretary of the company from the first, was unwilling to allow
- G** inspection of the books and papers of the old company, and the members of the committee on Aug. 17, 1887, took out a summons, returnable on Aug. 30, asking that they, by their solicitors, might be at liberty to inspect all the books, papers, and documents then in the custody, possession, or control of the company or the liquidator, and to take copies of and abstracts from such books, papers, and documents, at their own expense, as they might be advised. The liquidator
- H** deposed, in opposition to this application, that no books, papers, or documents of the company were in the custody, possession, or power of the company, or of himself as the liquidator, and that all such books, papers, and documents had been handed by him to the new company.

On Sept. 23 CHARLES, J., refused the application and the committee appealed. They filed an affidavit stating that there were misleading statements in the prospectus; that illusory balance-sheets had been issued; and that the company's property

I had been wasted by proceedings of the directors, which were alleged to be irregular, illegal, and ultra vires.

By the Companies Act, 1862 :

Section 155. "Where any company has been wound up under this Act and is about to be dissolved, the books, accounts and documents of the company and of the liquidators may be disposed of in the following way; that is to say, where the company has been wound up by or subject to the supervision of the court, in such way as the court directs, and where the company has been

wound up voluntarily, in such way as the company by an extraordinary resolution directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein."

Section 156. "Where an Order has been made for winding up a company by the court, or subject to the supervision of the court, the court may make such Order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the Order of the court, but not further or otherwise."

Romer, Q.C., and *D. L. Alexander* for the applicant shareholders.

Millar, Q.C., and *G. T. Millar* for the liquidator.

COTTON, L.J.—This is an appeal from an order refusing an application, under s. 156 of the Companies Act, 1862, for inspection of the books and papers of a company.

The winding-up of the company having been ordered to be continued under the supervision of the court, a scheme for the formation of a new company was sanctioned by the court, and under this scheme all the assets of the old company were made over to the new company. The winding-up is, therefore, at an end so far as regards increasing the assets of the old company, for whatever could be obtained from the directors or otherwise must go to the new company. None of the books of the company are in the possession, custody, or power of the liquidator, as he has handed all of them over to the new company. I am not satisfied that he was wrong in doing so, for all the assets of the old company had been sold to the new company with the sanction of the court, and I do not think that s. 155 of the Act applies to such a case. It is urged that there are some books to which the new company is not entitled; but I do not think that this is made out. But, even if that were proved to be the case, I do not think that s. 156 enables the court to decide any question of right as against persons, other than the liquidator, who has got the books; it only applies to books in the possession of the liquidator. In this case, before inspection could be ordered, proceedings would have to be taken to get the books back. An order for inspection in an action could not be made as to books in the possession of third parties who claimed a right to possess them.

If, however, books were in the possession of the liquidator, it would not be right to make an order for their inspection. I repeat as to this section what I said in *Re Imperial Continental Water Corpn.* (1) as to s. 115, that the powers given by it are prima facie to be exercised for the purposes of the winding-up, and for the benefit of those who are interested in it. I do not say that in no case can inspection be ordered where it is not for the general benefit of the contributories, but, prima facie, inspection is only to be ordered with a view to their general benefit. It is said that in this case inspection would be for the benefit of the shareholders in the old company, as it might lead to getting in assets which would increase the stock of the new company, and so increase the value of the shares in the new company which the old shareholders receive in lieu of their old shares; but I think that is too remote. The object of this application is clearly to obtain evidence in support of actions by individual shareholders for their own benefit against the directors, and that is not an object which is within the section. In my opinion, the appeal fails.

LOPES, L.J.—A conclusive objection to this application is found in the position of the books and papers of which inspection is sought. The section only extends in terms to "books and papers in the possession of the company." I understand that to refer to books and papers which are in the manual possession of the company, or in their power, or under their control. These books and papers clearly are not so.

- A** It is right, however, that I should express my opinion on the other point. The words of s. 156 are wide. But it must be borne in mind that this section is found in Part 4 of the Act, relating to the winding-up of companies, and that tends to the conclusion that the powers were intended to be used for the purposes of the winding-up. And the remark in *Re Imperial Continental Water Corpn.* (1) on s. 115 applies equally to this section, that its powers were given with a view to the more beneficial winding-up of the company. What is the object with which inspection is now sought? Not the more beneficial winding-up of the company, but a collateral object, the obtaining discovery to enable individual shareholders to bring actions against the directors or promoters. The appeal must be dismissed.

Appeal dismissed.

- C** Solicitors: *Emanuel & Simmonds; Ashurst, Morris, Crisp & Co.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

D

Re MOUNT MORGAN (WEST) GOLD MINE, LTD. Ex Parte WEST

[CHANCERY DIVISION (Kay, J.), April 4, 5, 1887]

[Reported 56 L.T. 622; 3 T.L.R. 556]

- E** *Company—Prospectus—Misrepresentation—Sale by shareholder of some shares—Rescission of allotment of other shares—Shareholder's right to rescind.*

F The plaintiff was induced to subscribe for shares in a company by a fraudulent misrepresentation in a prospectus, which falsely stated the effect of certain reports. These reports were available for inspection, but the plaintiff did not inspect them. Before he discovered the fraud, he sold some of the shares, and, on discovering it, he claimed to rescind the allotment in respect of the remainder of the shares.

G **Held:** the shareholder was entitled to rescind the allotment in respect of the shares which he still retained, since (i) the contract was severable, and by selling some of his shares before he discovered the fraud, he did not lose his right to rescind the allotment of the other shares, and (ii) it was no defence for the company that the shareholder had the means of discovering the fraud, since he was entitled to rely on the prospectus.

Maturin v. Tredinnick (1) (1864), 12 W.R. 740, applied.

H **Notes.** The Companies Act, 1862, s. 25, has been repealed and replaced by the Companies Act, 1948, s. 110.

As to misrepresentations in a prospectus, see 6 HALSBURY'S LAWS (3rd Edn.) 184-197; and for cases see 9 DIGEST (Repl.) 134-135. For the Companies Act, 1948, s. 110, see 3 HALSBURY'S STATUTES (2nd Edn.) 545.

Cases referred to:

- I** (1) *Maturin v. Tredinnick* (1864), 2 New Rep. 514; 4 New Rep. 15; 9 L.T. 82; 10 L.T. 331; 28 J.P. 744; 12 W.R. 740; 10 Digest (Repl.) 1190, 8311.
(2) *Kennedy v. Green* (1834), 3 My. & K. 699; 40 E.R. 266, L.C.; 20 Digest (Repl.) 331, 646.
(3) *Jones v. Smith* (1843), 1 Ph. 244, L.C.; 20 Digest (Repl.) 342, 706.
(4) *Whitbread v. Jordan* (1835), 1 Y. & C.Ex. 303; 4 L.J.Ex. Eq. 38; 160 E.R. 123; 20 Digest (Repl.) 339, 690.
(5) *Rawlins v. Wickham* (1858), 3 De G. & J. 304; 28 L.J.Ch. 188; 5 Jur.N.S. 278; 44 E.R. 1285; 32 L.T.O.S. 231; 7 W.R. 145, C.A.; 20 Digest (Repl.) 560, 2634.

Also referred to in argument :

Central Rail. Co. of Venezuela v. Kisch (1867), L.R. 2 H.L. 99; 36 L.J.Ch. 849; 16 L.T. 500; 15 W.R. 821, H.L.; 9 Digest (Repl.) 95, 427.

Redgrave v. Hurd (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, 417.

Edgington v. Fitzmaurice (1885), 29 Ch.D. 459; 65 L.J.Ch. 650; 53 L.T. 369; 50 J.P. 52; 33 W.R. 911; 1 T.L.R. 326, C.A.; 9 Digest (Repl.) 126, 678.

Carling v. London and Leeds Bank (1887), 56 L.J.Ch. 321; 56 L.T. 115; 35 W.R. 344; 3 T.L.R. 349; 9 Digest (Repl.) 121, 642.

Smith v. Chadwick (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 9 Digest (Repl.) 127, 695.

Gilbert v. Endean (1878), 9 Ch.D. 259; 39 L.T. 404; 27 W.R. 252, C.A.; 35 Digest 23, 143.

Peek v. Gurney (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, 119.

Scholey v. Central Rail. Co. of Venezuela (1868), L.R. 9 Eq. 266, n., L.C.; 9 Digest (Repl.) 134, 753.

Re Hop and Malt Exchange and Warehouse Co., Ex parte Briggs (1866), L.R. 1 Eq. 483; 35 Beav. 273; 35 L.J.Ch. 320; 14 L.T. 139; 12 Jur.N.S. 322; 55 E.R. 900; 9 Digest (Repl.) 95, 423.

Denton v. MacNeil (1866), L.R. 2 Eq. 352; 35 Beav. 652; 14 L.T. 721; 30 J.P. 692; 14 W.R. 813; 55 E.R. 1050; 9 Digest (Repl.) 40, 72.

Hallows v. Fernie (1868), 3 Ch. App. 467; 18 L.T. 340; 16 W.R. 873, L.C.; 9 Digest (Repl.) 121, 630.

Application under s. 35 of the Companies Act, 1862, to have the name of Stephen Henry West removed from the register of shareholders of the Mount Morgan (West) Gold Mine, Ltd., which was a company registered under the Companies Acts, 1862 to 1883, on the ground of alleged misrepresentations contained in its prospectus.

The company was formed in October, 1886, with a nominal capital of £200,000 in 200,000 shares of £1 each. The prospectus stated that the company was "formed to purchase and work fourteen acres of gold-bearing rock deposit, being a portion of the now famous Mount Morgan, Queensland." Mount Morgan was described in the prospectus as yielding 3½ to 10 ounces of gold per ton, and "as official publications say, 'may be truly called a mountain of gold.'" The prospectus also referred to a sample of gold-bearing rock displayed at an exhibition, and to a report of Mr. Robert L. Jack, a geological surveyor to the Queensland government, and to a report of a Mr. Longden. The prospectus claimed that it was founded mainly on published reports and plans made by Queensland government officials, and it stated that the reports or documents on which it was based were open for inspection at the company's office. In fact, the prospectus was an audacious fraud. The company's property contained no gold, and the reports of Mr. Jack and Mr. Longden referred to a different part of Mount Morgan, and the sample of rock was not taken from the company's property.

The applicant read the prospectus, but did not inspect the reports. He applied for 1,000 shares, and was allotted 400. In November, 1886, he sold 100 of these. On Mar. 3, 1887, he received information that certain of the statements in the prospectus were untrue. On that day, he instructed his solicitors to take the necessary steps to have his name removed from the register of members; the solicitors informed him, however, that they had served a notice of motion on behalf of one John Moylan James, another shareholder in the company, against the company, claiming similar relief. On Mar. 15, 1887, the applicant was informed that James' claim had been settled, and the following day the applicant served notice of motion on the company.

Renshaw, Q.C., and Frederic Thompson in support of the motion.

Marten, Q.C., Ince, Q.C., and Grosvenor Woods for the company.

A **KAY, J.**—In this case an application is made to remove the applicant's name from the register of shareholders on the ground that he has been defrauded by misrepresentations contained in the prospectus.

The facts, stating them quite briefly, are these: The prospectus professes to be a true representation of Mr. Jack's report. It is almost as false a representation of that report as it is possible to be. [His LORDSHIP then contrasted the terms of

B Mr. Jack's report with the terms of the prospectus, and continued:] I repeat, a more false statement of Mr. Jack's report, on which this prospectus professes to be founded, could hardly have been made by anyone who set himself by design to represent that report. This has been done of course to catch unwary shareholders. Everybody knows that people who buy shares trust generally to the prospectus which is sent to them, and have not very often the opportunity, even
C if they have the desire, to go and investigate the report which they are told they may see. If any man had read, as I have now read, that report of Mr. Jack's with this prospectus, and after that had taken shares in the company, he must have been a man whose common sense had deserted him entirely. I regret extremely to see what frauds are perpetrated in the launching of these joint-stock companies; and I must say that this is one of the most audacious frauds that I ever saw,
D because it is one which might easily have been discovered by people who were careful enough to go and investigate Mr. Jack's report. The company, or the directors, must have been aware that before long someone or other would find out what gross misrepresentation and falsehood were contained in this prospectus, and would take such a step as is taken by this shareholder to relieve himself of the shares which he had by this prospectus been induced to take.

E There are certain other considerations which have been urged. It is said that, in this case, the application being for rescission of the contract, it cannot possibly now be had because the applicant sold some of his shares. He stated that he did sell them, and sold them at par. But he says, and this is not denied, and there is no attempt, and wisely I think, to meet this evidence by any evidence at all on the part of the directors or the company—that he sold them before he had

F knowledge of this fraud which had been committed upon him. He having sold some of the shares before he knew of the fraud, is it the law that he cannot rescind the contract as to those which remain in his hands? Let us try that on principle: A man applies to the company for shares as in this case. He asks for 1,000 shares, but he only gets 400. The application generally is: "Send me a specified number of shares, or as many of that number as you can let me have at so much per share." The contract is always at so much per share. It is not

G a lump sum. Why should not a man who has parted with his shares before he discovered that he has been defrauded, say to the company, as to the shares that remain in his hands, "Now that I have found out the fraud I seek to have my contract rescinded?" I can see no reason to the contrary. The contract seems to me plainly a divisible contract, a severable contract, and, if you like to put it so,
H a separate contract as to each share which he took. As to those which he still has I can see no reason, because he has parted with some, that he should not have relief against those who defrauded him.

But the authority, and the only authority I believe on the subject, is distinctly in favour of that proposition. I refer to *Maturin v. Tredinnick* (1), which came twice before Wood, V.-C. That was a case, be it observed, between vendor and
I purchaser, where the purchaser had obtained his shares, not directly from the company, but had got them from another person. But alleging that he had been defrauded by that other person, he was seeking to relieve himself from that fraud by rescission of that contract as to the shares which he had not parted with. Wood, V.-C., said (12 W.R. at p. 741):

"The difficulty was the plaintiff had lost possession of some of the shares. Since the plaintiff had purchased 100 shares in our mine, and, before the discovery of the fraud, had sold twenty, he could have no remedy as to the

twenty, but must bear his loss, yet relief could be given as to the remaining eighty, for the whole of the shares would, in such case, rise or fall in value together."

On the further argument of the case he had said that (*ibid.*):

"When relief was asked against a purchaser of several shares of different descriptions, the person seeking it must be able to give up in toto what he had received. The shares might alter in value, some becoming profitable and others not, and a person could not be allowed to keep what was good, and undo the sale of what was worthless. Where, however, a number of shares in one mine had been bought, and a portion had been sold, and those remaining fluctuated in value together, so that the contract became perfectly severable, it might be still rescinded as regarded the portion still remaining unsold."

I asked for any authority contradicting that, but none has been produced.

I turn to LINDLEY, L.J.'s *LAW OF PARTNERSHIP* (4th Edn.), pp. 717, 925, 942. *Maturin v. Tredinnick* (1) is there referred to, without any comment of disapproval or anything of that kind, as being a clear authority that a contract of this nature, as to shares in the same company, is a severable contract. I entirely agree with that view. There seems to me no reason why it should not be so. Therefore, I think that the fact that the applicant had sold some of his shares before he discovered this fraud, and consequently before he took measures to relieve himself of the rest, is not a ground for refusing him that relief.

The other ground is this: It is said that there has been too much delay. As to that, the evidence is quite uncontradicted, not indeed answered in any way. The applicant's affidavit states that:

"On the 3rd day of March, 1887, I received information from which I inferred that certain of the statements in the prospectus were untrue, and that the samples of gold referred to in the 2nd, 9th, and 10th paragraphs of the second page of the prospectus, and the statements in the report of the said J. N. Longden were not taken from, and did not relate to the said company's property, and thereupon on the same day I consulted my solicitors [whose names he mentions] and gave them instructions to take the necessary steps to have my name taken off the register of the shareholders of the said company. I was informed by my said solicitors that they had served a notice of motion on behalf of one John Moylan Jones, a shareholder in the said company, asking to have his name removed from the register of the said company, and for repayment of the sums paid by him on his said shares on the ground of misrepresentations contained in the prospectus, and before taking formal proceedings against the said company to have my name removed, I, acting on the advice of my said solicitors, waited until the application of the said John Moylan Jones had been disposed of, in the hope that, if that application was successful, the company would relieve me from my shares without making formal application for that purpose. On Mar. 13th, 1887, however, I was informed that the claim of the said John Moylan Jones had been settled by an arrangement made by certain persons, by which the shares of the said John Moylan Jones were paid up in full and a transfer taken from him of such shares . . . Thereupon, under the advice of my said solicitors, I caused the notice of motion in this matter to be served on the company."

Well, the actual date of service was Mar. 16, so that the only delay was from Mar. 3 to Mar. 16, and that delay was because there was pending a motion in which the point would be tried. The applicant thought it was wise not to harass the company with additional litigation, but to wait the result of that motion. The waiting for that occupied thirteen days. Can I say that he lost his rights? I have no authority for such a proposition. It seems to me he has proceeded with

A all reasonable diligence in the matter, and has not lost by that delay any right which he might have.

The other point raised was, that the applicant might, if he liked, have inspected the report, and, therefore, had been guilty of such negligence in not doing so that he was not entitled to relief. I am surprised to hear that argument advanced at this time after the well-known decisions of *Kennedy v. Green* (2), *Jones v. Smith* (3) before LORD LYNTHURST, *Whitbread v. Jordan* (4), *Rawlins v. Wickham* (5), and many other cases. They all turned distinctly on this, that if a man makes a false statement—and the same thing applies, of course, in the case of a company—to another person to induce him to enter into a contract, it does not lie in his mouth to say that there was a document the effect of which he misrepresented to that person, and that such person should have looked at that document.

B He is not bound to do that. He has a right to rely on the statement so given. In the present case it was proved that the document had not been examined, and that the applicant did rely on the prospectus. Therefore, I consider it to be settled by authority that it does not lie in the mouth of people who have committed a fraud of this kind to say, "There were means of knowledge open to you and you have been guilty of negligence in not resorting to them."

C I, therefore, without any hesitation, remove this applicant's name from the register of shareholders, and make the usual order, which is that all payments be returned to him. Of course, he will have no relief in respect to the shares sold. It will be an order for repayment of £150 with interest at 5 per cent. I allow interest at 5 per cent. In the case of fraud it is right to allow the interest at the high rate.

D Solicitors: *Robins, Cameron & Kemm; Want & Harston.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

F

Re BOWES. EARL OF STRATHMORE v. VANE

G [CHANCERY DIVISION (North, J.), October 27, 28, 1887]

[Reported 37 Ch.D. 128; 57 L.J.Ch. 455; 58 L.T. 309;
36 W.R. 393; 4 T.L.R. 20]

Executor—Liability—Leasehold—Entry into possession of testator's leasehold—Liability for rent after death of testator—Full letting value.

H After the death of the testator his executor entered into possession of leasehold land which the testator had held from year to year and continued in possession until the expiration of the lease. On a claim by the landlord against the executor personally for rent which had accrued since the testator's death, it being uncertain whether the estate was solvent,

I **Held:** the executor as assign of the lease was personally liable for the rent subsequent to the testator's death up to the full letting value, whether in fact that value had been received by him or not.

Notes. Followed: *Whitehead v. Palmer*, [1908] 1 K.B. 151. Referred to: *Ren-dell v. Andreae* (1892), 61 L.J.Q.B. 630.

As to limitation of personal liability of personal representative for rent, see 16 HALSBURY'S LAWS (3rd Edn.) 469, and for cases see 24 DIGEST (Repl.) 395 et seq.

Cases referred to:

(1) *Hornidge v. Wilson* (1840), 11 Ad. & El. 645; 3 Per. & Daw. 641; 9 L.J.Q.B. 72; 113 E.R. 559; 24 Digest (Repl.) 695, 6797.

- (2) *Hopwood v. Whaley* (1848), 6 C.B. 744; 6 Dow. & L. 342; 18 L.J.C.P. 43; 12 Jur. 1088; 136 E.R. 1440; 24 Digest (Repl.) 697, 6813. A
- (3) *Rubery v. Stevens* (1832), 4 B. & Ad. 241; 1 Nev. & M.K.B. 183; 2 L.J.K.B. 46; 110 E.R. 446; 24 Digest (Repl.) 695, 6796.

Also referred to in argument:

Hargrave's Case (1599), 5 Co. Rep. 31b.

Buckley v. Pirk (1710), 1 Salk. 87, 316; 10 Mod. Rep. 12; 91 E.R. 75, 729; 24 Digest (Repl.) 696, 6811. B

Summons in an administration action, by the applicant, the lessor, for an account of the rent due from the death of the testator to the expiration of the lease and an order that the defendant, the executor of the estate who had entered into possession, should pay the amount found due on the account.

By a deed dated April 19, 1872, Rosamund Norcliffe leased to John Bowes, the testator, leasehold land, part of Langton Wold, Yorkshire, for one year from April 6, 1872, and thenceforth from year to year until the lease should be determined as therein provided. Rosamund Norcliffe died in 1881, and the Rev. Charles Best Norcliffe became entitled as tenant for life in possession to the rents and profits of the land leased by the deed of April 19, 1872. The testator used the land as a training ground for horses, and received payments from other persons for agisting and being allowed to train horses on it. He died on Oct. 9, 1885, and his executors took possession of the training ground, and received various payments for pasturage and from horse trainers who were allowed to use it. On April 6, 1887, the tenancy was determined by notice given by the executors. An action was brought to administer the testator's estate, and the present summons was taken out by the Rev. Charles Best Norcliffe. It was not certain whether the testator's estate was solvent or not. C

Higgins, Q.C., and *W. C. Druce* for the applicant.

Cozens-Hardy, Q.C., and *Deane* for the defendant. D

NORTH, J., stated the facts, and continued: The right of the lessor as against the lessee of the estate is perfectly clear. He has a right to come in and prove for the whole of the rent; but proving for the rent he can only be entitled to receive if the estate is insolvent, as is possible in this case, the same dividend that other creditors would be entitled to receive in respect of it. Then what is his position as against the executor, who has in the way I have mentioned entered into possession? Of course, if sued as executor, he puts in a proper plea—he is only liable to the extent of the assets; but it is also open to the lessor to take proceedings against him as assign of the lease, and if he does that, he is entitled to recover the rent from the executor as assign of the lease. E

But a hardship may be inflicted upon the executor if he finds himself in possession of property for which he has to pay the full rent and the property itself is not worth as much as the rent. Therefore, the law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for the rent accrued during the time in which he was in possession, he is entitled to set up, by way of defence, that he is only assign as executor, and that the profits or yearly value (I will consider the meaning of those words presently) of the property amount to a sum less than the rent. Then he must pay into court the amount that he admits to be the value, and if his plea is proved, and that is the full value, he will be under no further liability in respect of the matter. F

In some cases that have been referred to the court has spoken of the liability of the executor in respect of "profits;" and it has been said at the Bar that profits mean merely what he actually has received minus the expenses, and therefore the profits cannot include anything which has not been received, and which, therefore, cannot be profit. But in the cases in which the word "profit" was used, the court generally assumed the profits to be more than the rent, in which case it did not matter whether they were called "profits" or anything else, and even in the few G

A cases where the profits were referred to as being less than the rent no suggestion was made that less than the full profits whatever they were had actually been received. It seems to me that the word "profits" does not accurately describe that for which the executor as assign is liable. What he is liable for is to account for what the actual value of the premises to him has been during the time in which the rent for which he is sought to be made liable has accrued, or the time in which he has been in possession. In the case of an executor who has proved the will it would be from the time of the testator's death, and that is independently of any question whether that value has actually been received by the executor or not. That seems to me to be quite clear.

In the first place I refer to the form of plea as given in *WOODFALL'S LANDLORD AND TENANT* (18th Edn.), p. 290, and there it says that an executor

C "sued as an assignee of the term, and who has not assigned over, may plead—except as to £—(being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into court, or the claim for it be otherwise answered)—that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time, since the death of the lessee, received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever except to the amount excepted."

D The plea goes on to deal with the surplus with respect to which his liability depended upon whether he had assets or not. That is the form of plea given. In *Hornidge v. Wilson* (1), LORD DENMAN says (11 Ad. & El. at p. 655):

E "With respect to the value, it is clear that an administrator who has fully administered, and is chargeable with no default or laches, may discharge himself from liability to a greater extent than the real value; but we think that the real value as against one who takes to the premises and accepts rent for them after the death of his intestate, must be taken to be that which the premises would have been worth but for his own act."

F That is to say, the question what he has received is not the test, but the real value of the premises. In that case an executor as assign was held liable for what might have been received if he had kept a covenant to repair, which he had not done, and also he was held liable for rent which a tenant was bound to pay, but being insolvent had failed to pay.

G Therefore, as to both these sums, the executor was held liable in respect of money which he had not received, and as to one of which he could not actually have received through the insolvency of the tenant. That states the principle very clearly; but there is another later case, the facts of which come very near the present, and that is *Hopwood v. Whaley* (2). The marginal note is this:

H "Executor of lessee for years is, in the absence of other assets, liable, *de bonis propriis*, for the rent reserved to the extent to which he might by the exercise of reasonable diligence have derived profit from the premises."

I In that case, the property was held for three years under a lease after the death of the testator. The rent payable to the lessor was £90 a year, and £270 the amount of rent claimed. For one quarter the executor himself was in actual occupation, and his liability therefore to pay one-fourth of the rent, or £22 10s., was clear. During the remaining two and three-quarter years the property had remained unlet.

The questions left to the jury are stated thus (6 C.B. at p. 747):

"The learned judge was of opinion that, as there was no plea of payment to cover the quarter during which the plaintiff occupied the premises, the plaintiff must, at all events, have a verdict for that; and he left it to the jury to say—first, whether the defendant had, in fact, derived any profit or advantage from the premises, and, if so, to what amount; secondly [and this is the important

point] whether he might by the exercise of reasonable diligence have derived profit or advantage therefrom, and, if so, to what amount." A

The finding of the jury was that he had received the £22 10s.; and also that, although the property could not be let for £90 a year, it might have been let for £60 a year, and the result was that the executor was held liable at the rate of £60 a year for the two years and three-quarters in which he had not himself occupied, and for the full rent for the remaining quarter. After considering the form of plea, and commenting on *Hornidge v. Wilson* (1) and *Rubery v. Stevens* (3), COLTMAN, J., says (6 C.B. at p. 755):

"The question, then in substance is, whether the defendant might have received profit and advantage from the premises to the amount of the rent due, or of any part thereof." C

MAULE, J., puts the matter very clearly. He says (*ibid.* at p. 756):

"The cases on the subject of a lease devolving on an executor, where the rent reserved exceeds the value of the premises, are involved in some difficulty. I think, however, upon the authorities, as well as on principle, that, where the rent reserved exceeds the value of the premises, an executor in the character of assignee is liable to the extent of such value; and where the value exceeds the rent reserved, to the extent of such rent." D

Those authorities clearly show what the liability of the executor would be in the present case. He is liable for the actual value of the premises during the time in which he held the premises as assignee—that is to say, for a year and a half after the testator's death. Then the question of how the value is to be arrived at arises, and it is clear from those authorities that the value is to be arrived at—first, by considering what he has received, and, in addition to that, by considering what he might have got if reasonable diligence had been used. Therefore, there are those two items to be considered which make up the total amount for the aggregate of which he is liable, provided always they do not together exceed the full amount of the rent. E

In the present case, the application is made in an informal way—in a way which caused me a difficulty that I do not see my way to get over, excepting by concession of the parties, although the respondent to the application has not raised any technical objection to the form of the application. The application is by summons in the action to administer the estate of the testator, and it asks, to put it shortly, that an account may be taken of what is due for rent since the death of the testator to the expiration of the lease; that an account may be taken of the rent and profits received, or which but for the wilful neglect or default of the executor might have been received in respect of the land during the same period; and then that the executor may be ordered to pay the amount found due to the applicant on the account first mentioned out of the money with which he is chargeable on the account secondly mentioned, and to pay the costs of the application. F

As regards the estate of the testator, that form of claim is entirely misconceived. The right of the landlord against the testator's estate is merely to prove for the whole rent, and be paid like any other creditor is paid. As against the executor he would have a right to bring his action, and to recover such an amount as was found to be due, substantially upon the footing of such accounts as are asked by the summons. But that is not the measure of the liability of the testator's estate. As I understand, the summons has been presented in this form upon the footing that the executor has been acting properly in the administration of the estate, and that whatever he is liable for the estate would be liable to recoup to him, and, therefore, the irregular step has been taken with the acquiescence of all parties, of making the claim directly against the estate instead of against the executor personally. But, as I pointed out, the measure of liability of the estate is the whole rent and nothing else; and assuming that the executor pays the full amount that is asked for by the claim, he would not have a right to stand as against

A the estate as creditor for that amount, because, even assuming that he was entitled to recover from the estate, still he clearly could not be entitled to receive from the estate what he had to pay by reason of his omission to recover what he might have done, because that is a loss that he would have to account for to the estate, and the estate would not be answerable for. If, therefore, I were simply to direct the inquiry in the form asked by the summons, it would not give me any measure by
B which to ascertain the liability of the testator's estate.

Further than that there is this difficulty: at the present time the only parties who are here are, the applicant, on the one hand, and the executor on the other as representing the estate, and no question between the estate and him can be decided where he is the only person representing his own interest, and also representing the estate which really has an adverse interest to him. It seems to me, therefore, that
C upon this summons as it stands I cannot give any relief; and, therefore, as against the estate, but for what I am going to say, I should have to dismiss the summons, and should dismiss the summons without costs, upon the ground that the application fails as regards the estate, but has been made in this form with the concurrence of the executor with a view of saving trouble and expense to all parties if it could be done. Strictly speaking, all that I can do is to dismiss the summons.
D But I have pointed out what, in my opinion, is the liability of the parties. The liability of the executor can strictly only be enforced by an action brought against him to recover the sums for which he is liable, and upon the present summons in the matter of the estate I cannot make any order against him. Unless he consents to an amendment of the summons it must simply be dismissed. But inasmuch as the matter has been argued fully, and I have expressed my opinion, it seems to me to
E be worth his while to consider whether it would not be better to amend the summons.

I leave the words to counsel, but something to this effect, in addition to what is asked by it, adding an application that in the alternative if the court should be of opinion that the applicant is not entitled to any of the relief asked against the estate then the executor might be ordered personally to pay what should be ascertained to be due on taking the account. That can only be done by consent. If
F that were done and the executor submitted, and it appeared on the face of the order that he submitted, to be bound by the decision of the summons in the same way as if a writ against him had been issued, the parties would be in the position of having got a judgment upon the point in question in the cheapest possible way in which a judgment could be got, and of course it would be open to him, if he were
G not satisfied with the view I have taken, to appeal from it.

Unless the parties assent to that view being taken, all that I can do is to dismiss the summons, and leave the applicant to take such remedy as he may be advised against the executor. If the course I have suggested is assented to, I should give no costs either way, because although in that case the applicant would have succeeded yet he would only have succeeded by arrangement between the parties that a claim which was not right in form might be put right so as to be made formal. It
H is for the parties, therefore, to say whether they will adopt the one course or the other. In the one case the summons will be dismissed without costs; in the other case what I should propose to do would be to make a declaration to the effect that the executor is liable in the way I have suggested, and to direct an account of rent due during the time that he has been in possession; and also, on the other hand,
I an account in the form used in the direction to the jury in *Hopwood v. Whaley* (2) whether he had in fact derived any profit or advantage from the premises, and if so what amount; and secondly, whether he might by the exercise of reasonable diligence have derived profit or advantage therefrom, and if so, to what amount.

Order accordingly.

Solicitors: *Crossman & Prichard*, for *Brown & Elmhirst*, York; *Western & Sons*.

[*Reported by A. J. SPENCER, ESQ., Barrister-at-Law.*]

HANBURY v. CUNDY

[CHANCERY DIVISION (Stirling, J.), December 17, 20, 1887]

[Reported 58 L.T. 155]

Landlord and Tenant—Covenant—Licensing—Tied house—Covenant to take beer from landlord—Proviso for reduction of rent on performance of covenant—Right of tenant to purchase of beer from rival brewer.

A public-house lease contained a covenant that the tenant and his assigns would at all times during the term purchase all beer required for the business from the landlord, a proviso for re-entry for non-payment of rent or non-performance of the covenants, and a provision for reduction of rent so long as the tenant should purchase beer from the landlord.

Held: the covenant to purchase beer from the landlord was an absolute one and the tenant had not the choice of dealing with a rival brewer and paying the unreduced rent.

Notes. As to tied house covenants, see 23 HALSBURY'S LAWS (3rd Edn.) 638; and for cases see 31 DIGEST (Repl.) 112 et seq.

Cases referred to in argument:

Catt v. Tourle (1869), 4 Ch. App. 654; 38 L.J.Ch. 665; 21 L.T. 188; 17 W.R. 939; 31 Digest (Repl.) 113, 2542.

Luker v. Dennis (1877), 7 Ch.D. 227; 47 L.J.Ch. 174; 37 L.T. 827; 26 W.R. 167; 31 Digest (Repl.) 115, 2558.

Weston v. Metropolitan Asylum District Managers (1882), 9 Q.B.D. 404; 51 L.J.Q.B. 399; 46 L.T. 580; 30 W.R. 623, C.A.; 31 Digest (Repl.) 250, 3840.

Woodward v. Gyles (1690), 2 Vern. 119; 23 E.R. 686; 2 Digest (Repl.) 59, 329.

Legh v. Lillie (1860), 6 H. & N. 165; 30 L.J.Ex. 25; 25 J.P. 118; 9 W.R. 55; 158 E.R. 69; 2 Digest (Repl.) 65, 368.

Rolfe v. Peterson (1772), 2 Bro. Parl. Cas. 436; 1 E.R. 1048; 2 Digest (Repl.) 59, 331.

Motion by the plaintiffs, the landlords, for an injunction to restrain the defendant, the assignee of the lease of a public-house, from purchasing beer other than from the plaintiffs in accordance with the covenant contained in the lease. The motion was subsequently treated as the trial of the action.

The plaintiffs, brewers, granted to Pearson a lease of a public-house for a term of forty years from Midsummer, 1878, at a rent of £300 per annum. This lease, which was ultimately assigned to the defendant, contained a covenant for the payment of the rent, a further covenant that the lessee and his assigns would at all times during the term purchase all the beer sold or consumed upon the premises from the plaintiffs or their successors in the brewing business, and a provision for re-entry on nonpayment of rent or non-performance of any of the covenants. The lease also contained a proviso that so long as the lessee, his executors, administrators, or assigns, or the tenant or occupier for the time being of the premises should take and purchase all porter, ale, and stout, and all other malt liquors to be sold or consumed at or upon the premises, or otherwise required for the purposes of the trade of a victualler and beerseller carried on in or upon the premises, from the lessors or their successors in the trade of brewers carried on by them, the lessors, their executors, administrators, or assigns, would accept from the lessee, his executors, administrators, or assigns, the yearly rent of £150 for the payment of the yearly rent of £300 in full satisfaction and in lieu of the same yearly rent of £300. The defendant refused to take the plaintiff's beer, and dealt with a rival brewer.

Graham Hastings, Q.C., and G. Brooke Freeman for the plaintiffs.
Buckley, Q.C., and Allan Stuart for the defendant.

- A** **STIRLING, J.**, stated the facts, and continued: It is admitted that, if the covenant to take the beer is an absolute covenant, the injunction must go. The question is, therefore, whether the covenant is to be treated as an absolute covenant, or whether you can make out an agreement in the lease that the lessee may be at liberty to break that covenant on payment of the additional rent, and it is rightly, in my opinion, put as a question of the construction of the lease. The covenant is a covenant to pay £300, then there is a covenant which I have read relating to the taking of the malt liquor; there no doubt is a qualifying proviso that so long as the covenant is observed the lessor will accept a smaller rent. The meaning of that is this: "In order that your interest may coincide with your duty, I, the lessor, will take a smaller rent." It implies, to my mind, that the covenant is absolute, and if I were to read it as meaning that the lessee might break the covenant I should not be reading the covenant as it stands, and I should be making a new agreement for the parties. Therefore, as the defendant was willing to treat the hearing of the motion as the trial of the action, there will be a perpetual injunction in the terms of the notice of motion.

Motion granted.

Solicitors: *Boulton, Sons & Sandeman; Loxley & Morley.*

[*Reported by A. PULLING, Esq., Barrister-at-Law.*]

COLLINS AND OTHERS v. CASTLE

[CHANCERY DIVISION (Kekewich, J.), June 7, 8, 1887]

[Reported 36 Ch.D. 243; 57 L.J.Ch. 76; 57 L.T. 764;
36 W.R. 300]

Sale of Land—Building scheme—Restrictive covenant—Rights of purchasers inter se.

The vendor desired to sell the whole of his land, over a period of time, so as to form a building estate. Sales took place at different times, and restrictive conditions were imposed as to some lots, but not as to others. Purchasers of the lots subject to restrictive conditions were required to enter into a covenant with the vendor not to build houses of less than a stated value. Subsequently, one purchaser declared his intention to build houses of less than this value. In an action by other purchasers for an injunction,

Held: a purchaser was entitled to an injunction to restrain another purchaser from committing a breach of the restrictive condition by building houses of less than the stated value, and, therefore, the action succeeded.

Notes. Considered: *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342. Applied: *Tindall v. Castle* (1893), 62 L.J.Ch. 555. Referred to: *Reid v. Bickerstaff*, [1908-10] All E.R.Rep. 298.

As to burden of covenants relating to use or enjoyment of land, see 34 HALSBURY'S LAWS (3rd Edn.) 368; and for cases see 40 DIGEST (Repl.) 348.

Case referred to:

(1) *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q.B.D. 261; 54 L.J.Q.B. 545; affirmed (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 255, 2143.

Also referred to in argument:

Western v. MacDermott (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, 2886.

Keates v. Lyon (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 388; 40 Digest (Repl.) 343, 2780.

Master v. Hansard (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 31 Digest (Repl.) 189, 3207.

Renals v. Cowlishaw (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.

Action by the plaintiffs, purchasers of lots on a building estate, for an injunction to restrain the defendant, a purchaser of other lots on the estate, from committing a breach of the restrictive covenants.

In 1856 the Marquis Camden laid out his estate, near Tunbridge Wells, for building purposes, and sold certain portions. A common form of covenant was entered into by the various purchasers with the Marquis Camden that they would not erect any dwelling-house of a less value than £1,200. In August, 1866, the marquis died. In 1875 the trustees of the will of the Marquis Camden sold certain other portions of the estate, and similar conditions were imposed as in the previous sale with regard to the building of houses of the value of £1,200 at least. In 1882 further portions were sold by the trustees including some lots near Pembury, at a distance of about two miles from what was called the Camden Park Estate. With regard to some of the lots there were conditions that the purchasers should enter into a deed of covenant with the trustees, their heirs, successors in estate, and assigns and other the person or persons for the time being entitled to the rents and profits of the unsold parts of the Camden Park Estate in similar terms to that entered into at the sale in 1875. As to other lots, that the purchaser should erect one dwelling-house only on each lot, to cost £1,000 at the least, and as to some lots there were no restrictions whatever. The plaintiff, B. F. Collins, became the purchaser at this sale of eight lots for £5,280. As to seven of these lots there were no building restrictions, and as to one it came under the condition that a house of the value of £1,000 was to be built upon it. On July 4, 1883, another sale took place of the land not sold at the last sale, and also of the remaining portions of the Camden Park Estate. As to some lots there were restrictions as to buildings; as to others, none. The plaintiff, B. H. Collins, bought some lots without restriction, and another plaintiff, Mrs. Douglas, bought others also without restriction. In 1884 eight lots (lots 9 to 16 on a plan), which were unsold at the sale in 1883, were sold to the defendant, F. J. Castle, subject to the restrictive conditions as to building houses of a value of not less than £1,200. On June 4, 1885, a deed of covenant was entered into by F. J. Castle with the trustees, their appointees, heirs, and assigns, and others the person or persons for the time being entitled to the receipt of the rents and profits of such of the lands as had not been sold since the death of the Marquis Camden, to erect only one dwelling-house on lots 9 to 11, at a cost of £1,200 at least for each house, and as to lots 12 to 16 not to build anything but dwelling houses with not less than an acre of land attached, or of less value than £1,200. The defendant intimated his intention of building houses of a less value than £1,200, the plaintiffs brought this action, and claimed an injunction to restrain the breach of the restrictive conditions by the defendant.

Warmington, Q.C., and *Chadwyck Healey* for the plaintiffs.

Barber, Q.C., and *Heath* for the defendant.

KEKEWICH, J.—The first remark to be made upon this case is that the plaintiffs do not sue upon the covenant contained in the deed of covenant of June 4, 1885, entered into by the defendant. It is not, strictly speaking or properly, an action on the covenant, though it has been so stated in argument by the defendant, naturally, and perhaps necessarily, but, I think, not properly. The covenant entered into in the deed is a covenant by Mr. Castle, the defendant, contemporaneously with his purchase, and in pursuance of the conditions entered into with his vendors. I do not see how he could have made a covenant with any other

A persons at that time, nor how he could have entered into any obligation directly with the plaintiffs on which they could now sue. They cannot sue upon a covenant contained in a deed to which they were no parties. The covenant is with the vendors, their appointees, heirs, and assigns—the vendors being the trustees under the will of the marquis—and the plaintiffs are neither appointees, heirs, nor assigns within the meaning of the words in the covenant. It is a covenant also with

B “others the person or persons for the time being entitled to the receipt of the rents and profits of such of the lands now or hereafter part of the Camden Park Estate as had not been sold since the death of the marquis.”

The plaintiffs are owners of property which had been sold since the death of the testator. The plaintiffs, therefore, cannot sue on a covenant not entered into with them or any person through whom they can claim.

C That, however, is not really the question before me. The real question I have to decide is this: Are the plaintiffs entitled as a matter of inference from all the facts and circumstances of the case; or, in other words, can the court see in those facts and circumstances an intention that they should be entitled to the benefit of the conditions restricting the use of their neighbours' property? That is the

D real question; and it is one which but for the last case upon the subject, *Nottingham Patent Brick and Tile Co. v. Butler* (1), would have made it necessary for me to look into many authorities and put them together, in order to see whether the doctrine to be evolved from them fitted the present case or not. I am relieved from that difficulty by that case. I invited counsel for the defendant to criticise the authorities, but I do not now think it necessary to go into those cases, and for

E this reason, that the case I have referred to is the most recent one, and contains an elaborate judgment of WILLS, J., which has been approved of by the Court of Appeal, and has settled the doctrine of the court upon this particular subject. It did not profess to lay down a new principle. It professed to be only the statement of the courts of equity applied, according to the principles of the Judicature Acts, in the Queen's Bench Division. WILLS, J., professed to follow the prior decisions

F in the Court of Chancery, and he did so when he states what the principle is. Perhaps, if I may venture to criticise the judge's language, it is scarcely a principle in a legal sense; it is a statement of the law. But whether that is so or not, it is equally valuable and equally binding upon me. The learned judge states (15 Q.B.D. at p. 268) that the principle or statement of the law deducible from the cases is:

G “that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se for their own benefit.”

H
J It is to be observed that LORD Esher, M.R., in giving judgment in the same case on appeal, says (16 Q.B.D. at p. 784): “I think that WILLS, J.'s view of the law on this subject is perfectly correct. In my view he is right in saying that:” Then follows a statement of what LORD Esher, M.R., considers to be the law, which is not a repetition of, or a quotation from, WILLS, J.'s judgment, but is a statement of what LORD Esher, M.R., himself considers to be the law upon the subject; but it is not intended to differ, and it does not substantially differ from WILLS, J.'s own statement. I, therefore, have not merely WILLS, J.'s statement of the principle, but I have the opinion of the Court of Appeal, expressly given by

LORD ESHER, M.R., and LINDLEY, L.J., that that statement is correct. I have that to guide me, and I think it would be improper of me to consider whether it is the statement which I myself would have deduced from the cases or not. But in saying that, I do not, of course, for a moment mean to suggest that I should not have deduced the same principle if I had put it into my own language.

With reference to some of the remarks which were made upon that case in argument, I can see that, in applying the *Nottingham Case* (1), and the principle there laid down, to the present case, I am, to some extent, extending the doctrine, in the sense that I am applying it to a new state of facts, and a set of facts not perhaps contemplated by the learned judges who dealt with that case. But an extension of the doctrine of any case is, in certain circumstances, not only legitimate and right, but inevitable. For a judge to extend a doctrine by applying it to a different subject altogether is hazardous, and may be exceedingly wrong; but to apply the principle to a different set of facts from that which has been found before is merely an application of principles to details which it is the duty of the court to do every day. I wish also to say this, that I do not intend or desire to decide questions which have not arisen. I can see that the *Nottingham Case* (1) and this case may suggest and may leave open a variety of questions of considerable interest.

Counsel for the defendant has suggested a difficulty which has already occurred to me. Supposing that the vendors in this case had thought fit to accede to Mr. Castle's request to be relieved from these restrictive conditions either before or after he had purchased, what would have been the position of the plaintiffs? Could they still have sued Mr. Castle, or the vendors? Is there any right in a purchaser to insist upon conditions being entered into and fulfilled where there has been no express contract by the purchaser that they shall be fulfilled? These are questions in different forms which I only throw out, and which will, no doubt, give rise to litigation hereafter. They do not arise here before me. I hold here in this particular case that, taking WILLS, J.'s own language, it is, under the circumstances, very difficult—I say more than difficult, it is impossible—to resist the inference that the conditions were intended for the common benefit of the purchasers; and I also hold that the plaintiffs bought on the faith that the conditions which they now seek to enforce, would be observed over the property of the common vendor.

It struck me at an early period of the case that these points would have to be considered, and I find that they are also put forward by WILLS, J. This difficulty certainly has occurred to me, and has had to be dealt with by counsel in argument. Does this rule, does this principle as laid down, apply only to the case where the common vendor is putting up for sale the whole of his property, and intending to sell the whole if he can at once, or as soon as circumstances permit? Or does it apply to the case where he either retains, or declares his intention of retaining, a portion for himself? LORD ESHER, M.R., in affirming WILLS, J.'s judgment, certainly points to the conclusion that if the doctrine is to be extended to other cases than where the whole of the property is put up for sale and sold, that is not what he at any rate means to decide. But then I must remember that the judgment of LORD ESHER, M.R., was delivered in a case where he found as a matter of fact that there was a sale of the whole of the property. There is nothing in his judgment to show that he would have held differently if some other elements of detail were added or were wanting. No doubt he does point to the whole property being put up for sale. LORD ESHER, M.R., says (16 Q.B.D. at p. 785):

"The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the

A property for himself. If he does not reserve any part, that is almost, if not quite, conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others."

B I must read that judgment with reference to the case before the court, where the whole of the property has been put up for sale, and was intended to be sold. LORD ESHER, M.R., is obviously reserving to himself the liberty of dealing with a case like the present when it arises.

C The other learned judges did not refer to that in any way, though LINDLEY, L.J., approved the judgment of WILLS, J. That learned judge had no intention of saying that it was necessary for the application of the principle which he laid down, that all the property should be put up for sale and no part retained, because in more than one passage he points to the fact of the whole of the property being sold as cogent evidence, and an important item in the consideration of the case; and, if it had occurred to him that he ought to say or to hold that the sale of the whole property was an essential part of the doctrine, he must have said so, and he could not have said what he did say in his judgment. I am not called upon to apply D the doctrine to a case where the owner of a property has put up for sale part of that property, reserving to himself any considerable portion. I am not applying it to a case where a vendor is only selling part of a large property; I am applying it to a case where he is really desirous of selling the whole, though not at one and the same time. It seems to me that to narrow the doctrine to a case where all the property is put up for sale at once by one auction, according to one scheme E once and for all determined, and never to be departed from, would be to narrow the doctrine far too much, and to give it a restricted application which could never have been intended.

F Here I find that in 1856 the Marquis Camden determined to sell part of his property, which may be conveniently called the Camden Park Estate. In 1857, having then sold some parts, he seems to have contemplated the sale by degrees of the whole of the property, and, with the assistance of his agent, he prepared plans, and mapped the whole out in lots. I think that is important, and is admissible as evidence to show the intention of the marquis. I do not think it is important or admissible in evidence for any other purpose, as there is no evidence that it was communicated to the defendant when he purchased. But in 1882 the property was put up for sale by the trustees of the will, and in the conditions of G sale the property is marked out in such a way as to show that by no means only that property which was then offered for sale had been in the market, because several houses had then been built, and, in fact, there are no less than five houses marked as built upon the Camden Park estate. However, that perhaps is of little importance as regards the present defendant, because he did not buy subject to those conditions. It may be important as regards one of the plaintiffs who bought H at that time. In the plan annexed to the conditions of 1883, I find not only those five houses which were built before 1882 again marked, but I find two properties marked as sold—one in the extreme left of the plan, and the other being that sold to the plaintiff Collins. That plan included property which had never been included before, and the defendant, who bought subject to the conditions of 1883, had express notice on the face of that plan that the whole of the I property had been, or was then, laid out in building lots intended for sale in one general scheme. I cannot but think that we have it here shown that the intention of the vendor was from first to last to sell, as and when circumstances permitted, the whole of the property, and convert it into building land—a thing which cannot be done in the neighbourhood of Tunbridge Wells, or indeed anywhere else, in a hurry, and which requires the exercise of judgment. I think that is enough for the application of the doctrine.

Then some difficulties are raised apart from that, and the first is that we have not got here one entire property. It is true that the property is described in

different ways, and a distinction has been drawn in argument between Camden Park and Camden Park Estate. I am not sure that the defendant is entitled to raise that question, because I think that he was bound to know about it. I will not dwell upon that, because we have had evidence to show that the property which was offered for sale was known as the Camden Park Estate. Then we have also the Pembury property, and it has been argued that I cannot apply the doctrine which the plaintiffs ask me to apply because I cannot say to what property it has to be referred. That would be so if I were dealing with a covenant, because in that case I must spell the application of the covenant to any particular property out of the words of the covenant. But here I have to consider the intention of the parties, and what is the irresistible inference from all the facts. It is a question of fact, an inference which has to be drawn from the circumstances of the case. Counsel for the plaintiffs suggested that a man might be offering at the same time a property in Yorkshire and a property in Sussex, and perhaps under similar conditions; and, if so, the court would apply by inference the Yorkshire conditions to the Yorkshire property; that is to say, as far as they were necessary, in favour of Yorkshire purchasers, and the conditions as regards the Sussex property to the Sussex purchasers.

I do not feel any difficulty in saying that these conditions which are sought to be enforced, are applicable in favour of the purchasers of the Camden Park Estate as against purchasers of the Camden Park Estate. That seems to me to be the reasonable inference to be drawn. Then there is a more plausible argument to this effect, that the conditions are different as regards different lots; that there is more than one property; that some lots are altogether free from conditions; that some were in the first instance put up for sale subject to conditions, and were afterwards sold free from conditions; and not only that, but that one of the plaintiffs actually bought a part of the property free from conditions, and that, therefore, it does not lie in his mouth to say that the conditions can be enforced. To my mind that does not make the slightest difference. It is true there are different conditions applicable to different lots, and to different bunches of lots, and it is not only reasonable, but what one might have expected. When a considerable property is to be put up for sale to be laid out in building lots, you would expect those who have the management of it to say,

"So much shall be laid out for building houses worth £1,200; on the other side of the road there shall be less valuable houses—£1,000 will do for them. Further off we want a different class altogether—£600 will do for that; and perhaps it will be as well to leave a few more acres entirely free. Persons may wish to turn them to the use of other purposes than building; we will not bind them to do anything with them."

In the development of a building estate, judgment is required in these matters, and it is against one's common experience to find an extensive property laid out on the principle that only houses of a particular class shall be built all over the estate. Here I think there is a church and a vicarage to be built upon two of the plots. Such matters have to be considered in developing a building property. I do not see why, because one man has a property on which he can build a house for £600, he should not call upon another to fulfil his condition to build a house for £1,200. I can well conceive a man buying a property of this kind for a shop, and saying, "It is very important to me that within reasonable reach of my shop door there should be large residential houses. I should never have thought of buying a piece of land on which to build a shop unless I could have been quite certain that within reasonable reach there would be residences of persons who would deal with me. That is the value of the land to me, not that I should have the land, but that there should be persons who will dwell near me, and deal with me."

- A On the other hand, the persons who have the £1,200 properties may very reasonably require that there shall be smaller properties, or, on the other hand, that there shall not be properties which will depreciate the value or the amenities of those which they purchase. The defendant's argument on this point seems to me to be made under a misapprehension, rendered necessary perhaps by the exigencies of his position, of the circumstances under which a building estate is developed.
- B That being so, it is suggested that there were some motives of the plaintiffs other than those which are put forward in the pleadings, evidence, and argument. Mr. Collins, I think, is said not to wish to build at all upon his land; and I think it is also suggested that Mrs. Douglas did not wish to build upon her land, and therefore that they cannot be coming here simply to enforce the covenant. I have nothing whatever to do with the motives. What I have to see is, in the first
- C place, whether the plaintiffs are entitled to enforce these restrictions according to the law; and, in the second place, is it important to them that they should enforce them? When a man is suing upon a covenant, leaving out of the question those minima about which the law is said not to care, it is immaterial whether there is damage or not. A man is entitled to enforce that covenant, which is a species of property.
- D In a case like this, however, I think it is important to prove damage; but when a man has proved the damage, then, to my mind, if he is right to sue, the right to relief follows. Apart from any question of evidence, it seems to me obvious that a man who has purchased his property, knowing that within a short distance another property is put up for sale on the condition that on that other property there should be built houses of not less value than £1,200 each, can allege damage if the houses are built on that property of a less value than £1,200 each; and that it is quite immaterial whether he intends to build on his own property or not. In either case damage may exist. It may be damage of a different sort or to a different amount, but that there will be damage I cannot for a moment doubt. I should hold that quite apart from the evidence. But evidence was put in, and damage as the result of the defendant's intended operations was proved; and the
- E only witnesses called to contravene the evidence of the plaintiffs were obliged to refer to hypothetical matters not in accordance with the facts of the case.
- F Therefore, I hold that the plaintiffs here have established these two things: First, that they are entitled to sue the defendant, not on the covenant, but to enforce the covenant in this way in so far as it is in accordance with the conditions subject to which he bought, and subject to which the plaintiffs knew that
- G he must buy if the vendors did their duty; and, secondly, that the damages which they will sustain if the defendant is not restrained are sufficient to enable them to maintain an action in this court. That being so, I think they are entitled to the injunction which they ask for by the statement of claim, which is substantially in proper form, and should run in words so as to restrain the defendant from dealing with the land which he has bought in breach of the restrictive conditions concerning the same as expressed in the deed of covenant. The defendant
- H must pay the costs of the action.

Judgment for the plaintiffs.

Solicitors: *Sole, Turner & Knight, for Cripps & Son, Tunbridge Wells; Smith, Stenning & Croft, for Peerless & Beeching, Tunbridge Wells.*

[Reported by G. MACAN, ESQ., Barrister-at-Law.]

Re BEVAN'S TRUSTS

[CHANCERY DIVISION (Kay, J.), February 12, 19, 1887]

[Reported 34 Ch.D. 716; 56 L.J.Ch. 652; 56 L.T. 277;
35 W.R. 400]

Perpetuities—Will—Application of rule—Gift to children—Direction to pay at twenty-five—Separate fund—Gift over on death of tenant for life.

By her will, dated Oct. 15, 1828, the testatrix, who died on Mar. 18, 1829, gave her property to trustees on trust to pay the interest on a bond of £5,000 to her sister C., for life, and on her death she desired the interest to be paid to her own daughter J., she having first attained twenty-five. If J. married and died leaving children, then such interest was to be for their maintenance and education, and the principal was to be divided among them as they severally attained twenty-five. There was a gift over of the principal sum if J. should die without issue. J. attained twenty-five on Jan. 26, 1837; she married in 1842 and had two children. C. died in 1854, and J. died on Aug. 9, 1886, survived by her two children who now petitioned for payment out of the fund in court.

Held: the general rule in *Leake v. Robinson* (1) that, where there was no gift except a direction to pay as the objects attained a particular age beyond the limits of perpetuity, the attainment of the age was of the essence of the gift, might give way to a particular indication of a contrary intention; in the present case, having regard to the subject being a separate fund and to the gift over being on the death of the tenant for life without issue, the gift would not be construed as being void for remoteness, but the fund vested in the children of J. living at her death.

Notes. Distinguished: *Re Jobson, Jobson v. Richardson* (1889), 59 L.J.Ch. 245.

As to the rule against perpetuities and its effect on construction, see 29 HALSBURY'S LAWS (3rd Edn.) 286; and for cases see 44 DIGEST (Repl.) 1104 et seq.

Cases referred to:

- (1) *Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 44 Digest 1056, 9092.
- (2) *Saunders v. Vautier* (1841), 4 Beav. 115; Cr. & Ph. 240; 10 L.J.Ch. 354; 41 E.R. 482; 44 Digest 1090, 9406.
- (3) *Dundas v. Wolfe Murray* (1863), 1 Hem. & M. 425; 32 L.J.Ch. 151; 71 E.R. 185; sub nom. *Dundas v. Murray*, 1 New Rep. 429; 11 W.R. 359; 44 Digest 1100, 9500.
- (4) *Pearks v. Moseley* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 44 Digest 569, 3861.
- (5) *Bree v. Perfect* (1844), 1 Coll. 128; 2 L.T.O.S. 476; 8 Jur. 282; 63 E.R. 351; 44 Digest 1104, 9552.
- (6) *Ingram v. Suckling* (1859), 33 L.T.O.S. 89; 7 W.R. 386; 44 Digest 1105, 9556.

Also referred to in argument:

- Re Parker, Barker v. Barker* (1880), 16 Ch.D. 44; 44 Digest 1086, 9368.
Williams v. Clark (1851) 4 De G. & Sm. 472; 64 E.R. 918; 44 Digest 1060, 9129.
Walker v. Mower (1852), 16 Beav. 865; 51 E.R. 819; 44 Digest 1105, 9553.
Gardiner v. Slater (1858), 25 Beav. 509; 53 E.R. 731; 44 Digest 490, 3097.
Thomas v. Wilberforce (1862), 31 Beav. 299; 54 E.R. 1153; 44 Digest 1048, 9022.
Murray v. Tancred (1840), 10 Sim. 465; 59 E.R. 695; 44 Digest 1062, 9146.
Boughton v. James (1848), 1 H.L.Cas. 406; 10 L.T.O.S. 497; 9 E.R. 815, H.L.; 44 Digest 595, 4198.
Mair v. Quilter (1843), 2 Y. & C.Ch. Cas. 465; 63 E.R. 208; 44 Digest 1069, 9225.

- A** **Petition** by G. J. Morris and C. J. Morris his wife, and by A. E. Atkinson, the wife of Charles Howard Atkinson, asking that it might be declared that the interests taken by the children of Julia Jerram under the will of Juliana Bevan, in a legacy or sum of £5,000 were vested interests, and were not contingent upon their attaining the age of twenty-five years, and that the gift in favour of such children contained in the will was not void for remoteness, and that the residue of the money, after providing for costs, might be divided into two equal shares, and that one of such shares might be paid to the petitioner, C. J. Morris, on her separate receipt, and that the other of such shares might be paid to the petitioner A. E. Atkinson.

- By her will, dated Oct. 15, 1828, the testatrix, Juliana Bevan, of Little Stonham, Suffolk, gave and bequeathed to her sister Caroline Bevan, John Whitmore, and the Rev. John Wilcox, all her property, in trust for the uses following: namely, the interest of £5,000 secured to her by bond, the testatrix gave and devised to her sister Caroline Bevan for life, and after her death she desired the interest of the principal sum of £5,000 to be paid to her daughter Julia (she having first attained the age of twenty-five years). Further, the testatrix willed that her daughter having married and dying leaving children, the interest to be appropriated for the maintenance and education of such children, of whom the testatrix thereby constituted her executors guardians as to the due application of it, according to their wisdom and uncontrolled discretion, and the principal to be divided amongst them as they should severally attain the age of twenty-five years. In case of Julia dying without leaving issue, then the principal sum of £5,000, with its accumulations (if any), was to go to the Rev. John Wilcox. The testatrix appointed Caroline Bevan, John Whitmore, and John Wilcox, executors of her will. The testatrix died on Mar. 18, 1829, and the will was proved. Testatrix's daughter Julia attained the age of twenty-five years on Jan. 26, 1837, and on Aug. 30, 1842, married G. T. Jerram, by whom she had two children only, namely, the petitioners C. J. Morris and A. E. Atkinson. Caroline Bevan died on June 13, 1854, and C. D. Bevan, her executor, transferred £3,500 Three Per Cent. Consolidated Bank Annuities, being the sum representing the estate of the testatrix, into court. Julia Jerram died on Aug. 9, 1886, and this petition was then presented.

Frank Wright for the petitioners.

Marten, Q.C., and *Rawlinson* for the next-of-kin.

Cur. adv. vult.

- G** Feb. 19, 1887. **KAY, J.**, stated the facts and continued: The question is whether this £5,000 vested in the children of Julia who were living at her death, or, whether it only vested in those who attained twenty-five, in which case the gift would be void for remoteness, and the property would belong to the next-of-kin of the testatrix as in case of intestacy.
- H** The subject of this gift is a specific fund separated from the rest of the testator's property, so that the doctrine of the court which vests a gift of such a fund at the earliest moment, as in *Saunders v. Vautier* (2) and *Dundas v. Wolfe Murray* (3) applies to this bequest. It is impossible to suppose that intestacy was contemplated by this testatrix. The gift over is in case of the death of Julia without leaving issue, an event which did not happen. If the testatrix had intended that only those children of Julia should take who attained twenty-five, the gift over would naturally have been in case none of those children attained twenty-five. Supposing there were no objection on the ground of remoteness, if this bequest is contingent, this extraordinary consequence follows, that in case a child of Julia survived her and did not attain twenty-five, that child would take nothing, but the gift over could not take effect, and there would be an intestacy.
- I**

Am I bound to give a construction to this will which I am sure was not the meaning of the testatrix, and which will also produce the unfortunate result that the gift to the children must fail, whether they attain twenty-five or not, because

it is void for remoteness? If there be any doubt about the construction, as LORD SELBORNE said in *Pearks v. Moseley* (4) (5 App. Cas. at p. 719), this is a matter which may be taken into consideration. The argument is this: a canon of construction it is said was laid down in *Leake v. Robinson* (1), that where there is no gift except a direction to pay as the objects attain twenty-five, the attainment of the age is of the essence of the gift, which must be read as a bequest to those only of the class who attain the specified age. A number of other cases were cited in which this rule was applied. A

On the other hand, there are cases in which the general rule has been made to give way to particular indications of a contrary intention. In *Bree v. Perfect* (5) the gift was upon trust to pay the interest to Frances Bree for life, and at her death the principal to be equally divided amongst such of her children as should be living at the time of her death, as they respectively attain twenty-one, but if she die without leaving issue, over. On the ground of this limitation over, the court held that the principal vested in the children living at the death of Frances Bree. This case was followed by WOOD, V.-C., in *Ingram v. Suckling* (6). The gift there was of certain leasehold property to trustees upon trust for the testator's wife for life, and after her death for his daughters Ann and Amelia during their lives as tenants in common, and in case either of his daughters should die under twenty-one without leaving issue, to the survivor, and after the respective deaths of his said daughters, then in trust for their respective children as and when they should respectively attain the age of twenty-one years, as tenants in common, and in case his said daughters should die without leaving lawful issue, then over. WOOD, V.-C., held that the children of the daughters took a vested interest whether they attained twenty-one or not. He relied upon *Bree v. Perfect* (5), and also upon the circumstance that there was a separation of the leaseholds from the rest of the estate; this fact and the terms of the gift over seem to have been the main grounds of his decision. B

These cases are not distinguishable from the present, and they have never been overruled. In this case the class who are *prima facie* intended to be benefited are the children of Julia who survive her. For their benefit the whole of the income is to be applied. Does the testatrix mean more than this, that this trust for maintenance is to continue in the case of each child until that child attains twenty-five? I read the will as if she had said: E

"Upon the death of Julia the £5,000 shall vest in such of my children as may be then living; and I desire my executors to apply the income for the maintenance of them all until each attains twenty-five, when the share of that child is to be paid over to him." F

This makes the gift over consistent. If any child survives Julia, the gift over is inoperative. There is ample authority, as I have shown, for treating this case as an exception to the rule in *Leake v. Robinson* (1), by reason of the subject being a separate fund, and the gift over being on the death of the tenant for life without leaving issue. That construction seems to me, for the reasons I have given, much more natural than the other, which would make the gift void. I, therefore, hold that the fund vested in the children of Julia who were living at her death. G

Order accordingly.

Solicitors: *Waterhouse, Winterbotham & Harrison; Walters, Deverell, Walters & Wood.* H

[Reported by FRANCIS E. ADY, ESQ., Barrister-at-Law.] I

A

Re DIRECT SPANISH TELEGRAPH CO., LTD.

[CHANCERY DIVISION (Kay, J.), December 1, 16, 1886]

[Reported 34 Ch.D. 307; 56 L.J.Ch. 353; 55 L.T. 804;
35 W.R. 209; 3 T.L.R. 240]

B

Company—Capital—Reduction—Discretion of court—Questions for consideration—Injustice between different classes of shareholders—Refusal to confirm—Company to prepare new scheme—Companies Act, 1867 (30 & 31 Vict., c. 131), s. 11.

C

The capital of a company, as increased, was £190,000, divided into 13,000 ordinary shares of £10 each, £9 paid-up, of which 12,931 had been issued and 6,000 preference shares of £10 each, fully paid-up, all of which had been issued, with a preferential dividend of 10 per cent., and it was provided that the deficiency in any one year was to be made up out of the profits of the next and subsequent years. The company lost part of its assets and passed resolutions which were confirmed by the company to reduce its capital to £95,000 by writing off £5 from the amount paid-up on each issued share and from the nominal amount of each unissued share. No dividends had been paid on the ordinary shares and some preference dividends were in arrear. The effect of the reduction would be to enable the company to repay the arrears due to the preference shareholders. On a petition for the sanction of the court to the proposed scheme,

D

E

Held: the power of the court under s. 11 of the Companies Act, 1867, to confirm the reduction was discretionary, and it must be exercised by confirming, with or without conditions, or refusing to confirm, on a consideration of all the circumstances; the court should take into account whether the proposed scheme would work injustice between the different classes of shareholders; if the court should consider such to be the case, it would not be the function of the court to impose conditions which would amount to an alteration of the scheme, but should such an alteration be requisite, the proper course would be to refuse to confirm the reduction and leave the company to prepare a new scheme, if it thought fit; in the circumstances of the present case the court would confirm the scheme for reduction.

F

Notes. Section 11 of the Companies Act, 1867, has been replaced by s. 68 of the Companies Act, 1948: see 3 HALSBURY'S STATUTES (2nd Edn.) 517.

G

Applied: *Re Quebrada Railway, Land and Copper Co.* (1889), 40 Ch.D. 363; *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.* (1890), 63 L.T. 578. Referred to: *Re Barrow Hæmatite Steel Co.* (1888), 39 Ch.D. 582; *Re Crystal Palace District Electric Supply Co.* (1900), 44 Sol. Jo. 644.

H

As to questions for the court on confirmation of a reduction of capital of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 157; and for cases see 9 DIGEST (Repl.) 150 et seq.

Petition by the Direct Spanish Telegraph Co., Ltd., asking the court to sanction resolutions, passed and confirmed at extraordinary general meetings of the company for the reduction of their capital.

I

The company was incorporated in 1872 with a nominal capital of £130,000 divided into 13,000 shares of £10 each, of which £12,931 shares were issued, £9 being paid up on each share. The company began business by buying a cable laid between the Lizard and Bilbao for £12,000.

The articles of association of the company authorised the directors, with the sanction of a special resolution of the company, to increase the capital by the issue of preference shares, the capital created by the issue of such shares to be considered as part of the original capital, and to be subject to the same provisions in all respects as if it had been part of the original capital. It was also provided that

the company might reduce its capital. In 1874 the company bought a cable laid between Barcelona and Marseilles for £45,000, and for that and other purposes, in accordance with the articles, they increased their capital by £60,000, they passed resolutions empowering the directors to issue 6,000 new shares of £10 each to be paid in full on allotment, the holders to be entitled to a preferential dividend of 10 per cent. annually, and it was provided that if in any year the net profits of the company should not be sufficient to pay the whole of the preferential dividend for that year, the balance should be paid out of the profits of the next or subsequent years. In accordance with the resolutions 6,000 preference shares were issued, and fully paid up. In 1886 the cable between the Lizard and Bilbao became worn out, and had to be abandoned, in consequence of which the assets of the company, as representing the issued capital, showed a deficiency of £95,000. The company, in September and October, 1886, passed special resolutions to reduce the whole capital, both original and preference, amounting to £190,000 to £95,000, by writing off £5 from the amount paid up on each issued share, and £5 from the nominal amount of each unissued share. On Oct. 29, 1886, Bacon, V.-C., upon a motion in an action of Bannatyne, on behalf of himself and the other preference shareholders, against the company, granted an interim injunction restraining the defendants acting upon the resolutions. On Nov. 23, the Court of Appeal dissolved the injunction, holding that the preference shareholders were only entitled to 10 per cent. on their capital, subject to the liability of such capital being reduced in accordance with the articles.

Rigby, Q.C., and Phipson Beale for the company.

KAY, J.—The court is asked to confirm a resolution for reduction of the capital of this company. The case is one in which creditors are not affected, because no capital is to be returned, nor is the liability of the shareholders to be diminished, but the company having sustained serious losses by the destruction of one of their submarine telegraph cables, desire to write off a portion of the paid-up capital on which they pay dividends, and thus to enable them to release part of a reserve fund which they have been forming, and which they now propose to apply in payment of the arrears due on the preference shares. The shares are preference shares of £10 each fully paid up, and ordinary shares of the same nominal amount, on which only £9 has been paid. Dividends are paid not on the nominal amount, but upon the amount paid up upon each.

In the articles is a provision that the company should have power by special resolution to reduce their capital, and alter the amount and denomination of their shares. The preference shareholders having taken shares subject to this provision, it has been held, in a litigation commenced by some of them to restrain the present proceedings for reduction, that it would not be contrary to the contract with them to do so; that they cannot maintain that there was an absolute bargain to divide among them an annuity equal to the total amount of the dividends on their paid-up capital; but that the contract was to pay to each 10 per cent. on such capital, subject to the liability that the capital might be reduced by proper proceedings for that purpose under the terms of the articles. The power given to the court by s. 11 of the Companies Act, 1867, to confirm a resolution to reduce capital, is a discretionary power; that is to say, the court must exercise it by confirming with or without conditions, or declining to confirm on a full consideration of all the circumstances.

One matter to be taken into account is whether the proposed scheme would work injustice between the different classes of the shareholders. I agree that, if the court should think that would be the effect, it would not be the function of the court to impose conditions which would amount to an alteration of the scheme; the proper course to take, if such an alteration should be requisite, would be simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they thought fit. Several cases of hardship and inequality as between shareholders were suggested. Suppose these were preference shareholders

A of £5 shares, and ordinary shareholders of £10 all paid up, and the proposal were to write £5 off each share, that would totally extinguish the preference shares for the benefit of the shareholders. If all the shares were £10 shares—but the preference were £5 paid, and the ordinary £10—writing off in that case would have the same effect until the rest of the capital was called up on the preference shares.

Again, if the proposal were to return capital to the shareholders, cases might arise involving questions whether the return should be in proportion to the nominal amount, or to the amount actually paid on each share. A return of capital in the winding-up of a company may perhaps be hardly analogous, because then the liability for further calls is taken away by dissolving the company. But, upon consideration, I do not think that the proposed reduction in this case will be unjust as between the shareholders. It is intended to write off £5 per share of the amount actually paid, both on the preference and ordinary shares. As dividends are paid only on the amount paid up per share, this will reduce the dividend payable to the preference shareholders by a larger amount than that payable to the ordinary shareholders; that is to say, supposing the profits to be sufficient to pay 10 per cent. on all the capital paid up, the preference shareholder would be entitled to receive £1 per share, and the ordinary shareholder only 18s. By the reduction the preference shareholder would be deprived of 10s., leaving him 10s. dividend per share, and the ordinary shareholder would be deprived of 10s., leaving him 8s. But unless an equal dividend had been paid on the preference and ordinary shares, which I understand has not been done in this case, the reduction may increase the chance of the ordinary shareholders receiving a dividend, or increase the amount per share which they may receive. The preference shareholders no doubt are induced to consent by the payment which is to be made of the arrears of their dividends. But this also will be an advantage to the ordinary shareholders, because in this company I understand they are not entitled to anything until the arrears on the preference shares have been provided for. There must be the usual advertisements in the "Gazette" and in the "Times" newspaper; and subject to this the court confirms the resolution.

F

Petition allowed.

Solicitors: *Blunt & Lawford.*

[*Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.*]

REID v. EXPLOSIVES CO., LTD.

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), May 3, 1887]

[Reported 19 Q.B.D. 264; 56 L.J.Q.B. 388; 57 L.T. 439;

35 W.R. 509; 3 T.L.R. 588]

Company—Debenture-holders' action—Receiver and manager—Appointment operating as dismissal of company's servants.

The plaintiff was employed by a company under a contract which provided that his service might be terminated by six months' notice. On the application of the debenture-holders the court ordered a receiver and manager to be appointed, and on his instructions the plaintiff continued his service and discharged his duties for more than six months at his former salary. The company was then sold to a new company, and the plaintiff was discharged without notice. In an action by the plaintiff for wrongful dismissal,

Held: the appointment of a receiver and manager operated as a discharge of the plaintiff from the service of the company; if he had then been dismissed he could have maintained his action; but now, owing to his employment for six months at the same salary after the appointment, he had suffered no damage; and, therefore, he could not recover.

Notes. Considered: *Midland Counties District Bank, Ltd. v. Attwood*, [1904-7] All E.R.Rep. 648; *Measures v. Measures*, [1910] 2 Ch. 248; *Whinney v. Moss Steamship Co.*, [1911-13] All E.R.Rep. 344. Distinguished: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160. Considered: *Re Vulcaan Coal Co.*, *Harrison v. Harbottle*, [1922] 2 Ch. 60. Referred to: *Turner v. Goldsmith* (1891), 60 L.J.Q.B. 247.

As to dismissal of servants of company by appointment of receiver, see 6 HALSBURY'S LAWS (3rd Edn.) 325; and for cases see 9 DIGEST (Repl.) 565 et seq. As to measure of damages for breach of contract by master, see 25 HALSBURY'S LAWS (3rd Edn.) 524; and for cases see 34 DIGEST (Repl.) 128 et seq.

Cases referred to in argument:

Gardner v. London, Chatham and Dover Rail. Co. (No. 1), *Drawbridge v. Same*, *Gardner v. Same (No. 2)*, *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325; 10 Digest (Repl.) 1273, 8993.

Re Oriental Bank Corpn., *MacDowall's Case* (1886), 32 Ch.D. 366; 55 L.J.Ch. 620; 54 L.T. 667; 34 W.R. 529; 9 Digest (Repl.) 566, 3733.

Re English Joint Stock Bank, Ex parte Harding (1867), L.R. 3 Eq. 341; 15 L.T. 528; 9 Digest (Repl.) 566, 3732.

Fripp v. Chard Rail. Co., *Fripp v. Bridgewater and Taunton Canal, etc., Co.* (1853), 11 Hare, 241; 1 Eq. Rep. 503; 22 L.J.Ch. 1084; 17 Jur. 887; 1 W.R. 477; 68 E.R. 1264; 10 Digest (Repl.) 1283, 9064.

Jefferys v. Smith (1820), 1 Jac. & W. 298; 37 E.R. 389; 36 Digest (Repl.) 490, 52.

Appeal by the plaintiff from a decision of MANISTY, J., on further consideration of an action for wrongful dismissal.

The plaintiff was a chemist, and was appointed manager of the works of the defendant company, which was a company engaged in the manufacture of explosives, at a yearly salary of £600, his employment being subject to be determined by six months' notice. The defendant company got into pecuniary difficulties, and application was made to the Chancery Division by the debenture-holders for the appointment of a receiver and manager. On May 22, 1885, Thorn was so appointed, and, the defendant company having immediately gone into voluntary liquidation, Thorn and Nutt were, on May 28, 1885, appointed liquidators. The plaintiff had notice of these appointments, and was told by Thorn, upon the day

A after his appointment as receiver, that it would make no difference to his (the plaintiff's) position. The plaintiff, therefore, continued his service at his former salary, and on Dec. 17, 1885, Thorn passed his accounts and was discharged from his office of receiver and manager. The business was carried on by the liquidators until Jan. 15, 1886, when it was sold to a new company, and the plaintiff was dismissed without notice. At the trial of the action the jury found that the plaintiff
B was not in the employment of Thorn after his appointment as receiver, but continued in the employment of the defendant company. MANISTY, J., on further consideration, held that the appointment of Thorn as receiver and manager operated to discharge the plaintiff from his employment, and also that the appointment of the liquidators would have the same effect. The learned judge, therefore, gave judgment for the defendant company. The plaintiff appealed.

C *Kemp, Q.C.*, and *McClymont* for the plaintiff.
Murphy, Q.C., and *Witt* for the defendants.

LORD ESHER, M.R.—In this case the plaintiff was formerly in the service of the stated defendant company, and has brought an action against them for wrongful dismissal. The action was tried by MANISTY, J., and a jury, and judgment
D was given for the defendant company, but it is said that judgment ought to be entered for the plaintiff upon the findings of the jury or that there ought to be a new trial.

One of the terms of the plaintiff's employment was that he should have six months' notice of dismissal. The defendant company got into difficulties, and Thorn was appointed receiver and manager of the business by the Chancery
E Division at the instance of the debenture-holders. Thorn carried on the business of the defendant company, and, in doing so, allowed the plaintiff, among others, to continue his services at his former salary; a day or two afterwards the defendant company went into voluntary liquidation, and Thorn and another gentleman were appointed liquidators. Thorn was still receiver and manager under the order of the Chancery Division, and he therefore at this time filled two capacities in the
F business of the defendant company. Matters went on thus for more than six months, until on Dec. 17, 1885, Thorn's status as receiver and manager came to an end, and from that time to Jan. 15, 1886, he acted as liquidator only, but still the plaintiff, with the consent of Thorn, went on in the business discharging the same duties. On Jan. 15, 1886, the sale of the business to a new company was carried out, and the plaintiff was dismissed without notice. It is in respect of that
G dismissal that the action is brought, upon the ground that he did not at that time receive six months' notice. The question is whether he was at that time entitled to six months', or any notice, and MANISTY, J., has held, notwithstanding the verdict of the jury, that the service of the plaintiff under Thorn, as receiver and manager, could not be treated as a continuance of his service to the defendant company. The judge came to the same conclusion as to the effect of the appoint-
H ment of Thorn and Nutt as liquidators in the voluntary liquidation.

Both those decisions have been challenged before us in argument, and we have first to consider what is the legal effect upon a contract of service of the appointment of a receiver and manager of the defendant company's business by the Court of Chancery at the instigation of debenture-holders or mortgagees. Supposing that there was one mortgagee of a business who, upon the failure of the mortgagor
I to carry out the terms of the mortgage, took possession of the business, what effect would that have upon the servants of the mortgagor who were entitled to notice of dismissal? Would it be equivalent to dismissal by the mortgagor? In my opinion the fact of the mortgagee taking possession of the business is equivalent to a dismissal of the servants, and as that occurs by default of the mortgagor it amounts to a wrongful dismissal, and the servants would have a right of action.

Is there any difference when a receiver and manager of the business is appointed by the court on behalf of a great number of mortgagees? The court is acting on behalf of all the mortgagees, and has power to appoint a receiver and manager,

who shall act in the interests of all, but the effect is the same as in the case of a single mortgagee who takes possession. It seems to me, therefore, that the result of such an appointment is to discharge all the servants from their service to their original employer, and that in such a case as I have put there is a wrongful dismissal, for which an action will lie. I, therefore, come to the conclusion that at the time when Thorn was appointed receiver and manager the plaintiff would have been entitled to bring an action for wrongful dismissal, and that, if nothing else were in the way, he could recover in that action, but now he has sustained no damage. He was taken on by Thorn to do the same service at the same salary, and that continued for more than six months, and consequently he suffered no damage by the wrongful dismissal at the hands of the defendant company, and is not entitled to recover anything. The judge also came to the conclusion that even if there had been no appointment of Thorn as receiver and manager the appointment of the liquidators would have had the same effect. I do not consider it necessary to decide that question. It seems to me that in any view of the case the plaintiff has no right of action against the defendant company, and that the appeal must, therefore, be dismissed.

FRY, L.J.—I have come to the same conclusion. By the agreement of service made between the plaintiff and the defendant company, the plaintiff was entitled to six months' notice of dismissal. The defendant company issued debentures, which may be described as mortgages of their business, and circumstances arose under which the mortgagees had a right to enter upon their property. When there are many mortgagees, all having a right to enter at the same time, the Court of Chancery has, in order to meet that difficulty, which is increased by the fact that the property is a going business, been in the habit of appointing, at the instance of such mortgagees, some person or persons to be not merely receivers but also managers. That was done in this case. Thorn was so appointed, and his appointment was an entry by the mortgagees. I am not prepared to lay down as a hard and fast rule that every entry of a mortgagee is a dismissal of the servants of the mortgagor from their employment. I think you must look to the facts of each case to see whether that has happened. But in this case I think that the facts do show that the entry of the mortgagees did determine the service of the plaintiff and was a dismissal, which was, under the circumstances of his agreement wrongful. But he has suffered no damage, because he was employed in an equally advantageous manner for a further period of more than six months, that is for more than the period for which he was entitled to notice, and, therefore, he cannot recover any damages. I do not think that the question as to the position of the liquidators now arises, in view of our decision, and I do not propose to decide anything with regard to it. I think that the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The plaintiff claims damages in lieu of six months' notice. He was employed for six months after the appointment of Thorn at the same salary as before, and, therefore, he cannot recover in this action if Thorn's appointment operated to discharge him. I agree with the Master of the Rolls that it did so, and I think the judgment of MANISTY, J., was right and should be affirmed.

Appeal dismissed.

Solicitors: *J. O. Jacob; Saunders, Hawksford, Bennett & Co.*

[*Reported by A. A. HOPKINS, Esq., Barrister-at-Law.*]

R. v. MILES

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Pollock, B., Hawkins, Grantham and Charles, JJ.), February 1, 18, 1890]

[Reported 24 Q.B.D. 423; 59 L.J.M.C. 56; 62 L.T. 572; 54 J.P. 549;

38 W.R. 334; 6 T.L.R. 186; 17 Cox, C.C. 9]

Criminal Law—Assault occasioning actual bodily harm—Grievous bodily harm—Unlawful wounding—Defence—Autrefois convict—Previous conviction by court of summary jurisdiction of assault—Defendant bound over by magistrate—Later charges based on same assault.

The defendant was convicted by a court of summary jurisdiction of assaulting one L., but the court was of opinion that the offence was of a trifling nature and discharged the defendant on his giving security to be of good behaviour. Subsequently, the defendant was charged on indictment with unlawfully wounding L., inflicting grievous bodily harm on him, and assaulting him and thereby occasioning him grievous bodily harm. These charges were all founded solely on the same act of assault as that in respect of which the defendant had been convicted by the court of summary jurisdiction.

Held: the conviction of the summary offence acted as a bar to the prosecution of the defendant for the indictable offences, they being based on the same assault though with circumstances of aggravation.

Notes. Applied: *Ryley v. Brown* (1890), 62 L.T. 458. Considered: *R. v. Thomas*, [1949] 2 All E.R. 662; *R. v. Campbell, Ex parte Hoy*, [1953] 1 All E.R. 684. Approved and Explained: *R. v. Hogan, R. v. Tompkins*, [1960] 3 All E.R. 149. Referred to: *R. v. Friel* (1890), 17 Cox, C.C. 325; *Reed v. Nutt* (1890), 59 L.J.Q.B. 311; *Williams v. Hallam* (1943), 112 L.J.K.B. 353.

As to special pleas, see 10 HALSBURY'S LAWS (3rd Edn.) 404-407; and for cases see 14 DIGEST (Repl.) 378 et seq. For the Offences Against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 786.

F Cases referred to:

(1) *Hartley v. Hindmarsh* (1866), L.R. 1 C.P. 553; Har. & Ruth. 607; 35 L.J.M.C. 255; 14 L.T. 795; 12 Jur.N.S. 502; 14 W.R. 862; 14 Digest (Repl.) 575, 5745.

(2) *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378; 44 L.J.M.C. 101; 33 L.T. 9; 39 J.P. 549; 23 W.R. 691; 14 Digest (Repl.) 383, 3747.

G (3) *R. v. Walker* (1843), 2 Mood. & R. 446; 7 J.P. 212; 14 Digest (Repl.) 384, 3749.

(4) *R. v. Stanton* (1851), 17 L.T.O.S. 280; 5 Cox, C.C. 324; 14 Digest (Repl.) 384, 3750.

(5) *R. v. Elrington* (1861), 1 B. & S. 688; 31 L.J.M.C. 14; 5 L.T. 284; 8 Jur.N.S. 97; 10 W.R. 13; 9 Cox, C.C. 86; 121 E.R. 870; sub nom. *R. v. Ebrington*, 26 J.P. 117; 14 Digest (Repl.) 384, 3751.

H (6) *R. v. Morris* (1867), L.R. 1 C.C.R. 90; 36 L.J.M.C. 84; 16 L.T. 636; 31 J.P. 516; 15 W.R. 999; 10 Cox, C.C. 480, C.C.R.; 14 Digest (Repl.) 383, 3736.

(7) *Wilkinson v. Dutton* (1863), 3 B. & S. 821; 32 L.J.M.C. 152; 8 L.T. 276; 9 Jur.N.S. 1104; 122 E.R. 307; 33 Digest (Repl.) 229, 618.

I (8) *Re Thompson* (1860), 6 H. & N. 193; 30 L.J.M.C. 19; 3 L.T. 409; 9 W.R. 203; 9 Cox, C.C. 70; sub nom. *Ex parte Thompson*, 25 J.P. 166; 7 Jur.N.S. 48; 14 Digest (Repl.) 225, 1881.

(9) *R. v. Taylor* (1869), L.R. 1 C.C.R. 194; 38 L.J.M.C. 106; 20 L.T. 402; 33 J.P. 358; 17 W.R. 623; 11 Cox, C.C. 261, C.C.R.; 14 Digest (Repl.) 359, 3497.

Also referred to in argument:

Holden v. King (1876), 46 L.J.Q.B. 75; 35 L.T. 479; 41 J.P. 25; 25 W.R. 62; 21 Digest (Repl.) 304, 662.

R. v. Bird (1851), 2 Den. 94; T. & M. 437; 20 L.J.M.C. 70; 16 L.T.O.S. 556; 15 J.P. 173; 15 Jur. 193; 5 Cox, C.C. 20, C.C.R.; 14 Digest (Repl.) 276, 2443. A

Case Stated by Sir Thomas Chambers, Q.C., Recorder of London.

At the session of the Central Criminal Court held on Dec. 16, 1889, George James Miles was arraigned before the learned recorder on an indictment which charged him in the first count with unlawfully and maliciously wounding Charles Living, in the second count with unlawfully inflicting grievous bodily harm on the said Charles Living, in the third count with assaulting the said Charles Living, and thereby occasioning him actual bodily harm, in the fourth count with a common assault on the said Charles Living, and in the fifth count with a common assault on Harry Anstey. The prisoner handed in a special plea in bar of his prosecution so far as the first four counts of the indictment were concerned, and pleaded Not Guilty as to those counts and the fifth count, and a special reply was put in by the prosecution. B C

The evidence offered by the defendant in support of his plea consisted of an examined copy of a record of the court of summary jurisdiction sitting at West Ham, and of evidence that the offences charged in the first four counts of the indictment related to the same matter as the offences mentioned in the said record, which stated that the defendant had been convicted of an assault on Charles Living, but had been discharged on giving security to be of good behaviour. The counsel for the prosecution did not dispute that the first four counts of the indictment referred to the same matter as the offence mentioned in the said record, but argued that the said record did not disclose any conviction within the meaning of the Offences Against the Person Act, 1861, s. 45, on the ground that the court had neither ordered the defendant to pay a fine nor to be imprisoned. In support of that contention he referred to *Hartley v. Hindmarsh* (1). The counsel for the defence argued that by the Summary Jurisdiction Act, 1879 [repealed by Magistrates' Courts Act, 1952] s. 16 (2) express power was given to the magistrate upon convicting a person of assault to discharge him conditionally on his giving security to be of good behaviour, and that s. 45 of the Act of 1861 must now be read with the section of the Act of 1879 referred to and that, consequently, the case quoted by the counsel for the prosecution was no longer in point. The recorder determined to hear the facts of the case upon the plea of Not Guilty, and, if necessary, to reserve the point raised on the pleadings for the consideration of the court. The defendant was ultimately convicted on the first four counts of the indictment, and acquitted on the fifth count, and the recorder reserved the question of the sufficiency of the plea in bar for the opinion of the court, and admitted the prisoner to bail pending its decision. The question for the opinion of the court was: Whether the proceedings before the court of summary jurisdiction against the defendant in respect of the assault upon Charles Living were a bar to the proceedings against him at the Central Criminal Court by indictment for the same offence. D E F G

By the Offences Against the Person Act, 1861 : H

"Section 44. If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under either of the last two preceding sections [common and aggravated assaults], shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. I

"Section 45. If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be

- A paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

The Summary Jurisdiction Act, 1879, s. 16, which empowered the court to discharge an accused person without punishment, was repealed by the Probation of Offenders Act, 1907, which permitted the release on probation of offenders in certain cases. The Act of 1907 was repealed by the Criminal Justice Act, 1948, of which see now ss. 3 to 12 dealing with probation and discharge: 12 HALSBURY'S STATUTES (2nd Edn.) 825.

Poland, Q.C. (with him *Warburton*), for the defendant, contended that both at common law and by statute the previous conviction before the court of summary jurisdiction was a bar to the present proceedings, which, although they charged the offence in a different manner, were in respect of the same offence.

Lockwood, Q.C. (with him *Besley*), for the prosecution.

Cur. adv. vult.

Feb. 8, 1890. **HAWKINS, J.**, read the following judgment.—The indictment in this case contains five counts. It is, however, only necessary to notice the first, second, third, and fourth, for upon the fifth the defendant was acquitted generally upon a plea of Not Guilty.

The first count charged an indictable offence under s. 20 of the Offences Against the Person Act, 1861, namely, that on Oct. 26, 1889, at the parish of West Ham, the defendant unlawfully and maliciously did wound one Charles Living. The second count charged an indictable offence under the same section, namely, that on the same day, and at the same place, the defendant unlawfully and maliciously did inflict grievous bodily harm in and upon the said Charles Living. The third count charged an indictable offence under s. 47 of the same Act, namely, that on the same day, and at the same place, the defendant unlawfully did assault the said Charles Living, and beat, wound, and ill-treat him, thereby occasioning to him actual bodily harm. The fourth count charged an indictable offence under the same section, namely, that on the same day at the same place the defendant unlawfully did assault the said Charles Living, and beat, wound, and ill-treat him. To these four counts the defendant pleaded Not Guilty, and also a plea in bar founded upon s. 45 of the same Act of Parliament.

The material allegations contained in that plea are, that on Oct. 28, 1889, the defendant was, upon the complaint of the said Charles Living, duly convicted before the court of summary jurisdiction sitting in and for the borough of West Ham,

"for that he, the defendant, on Oct. 26, 1889, did unlawfully assault and beat the said Charles Living, and that the said court, being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the defendant having given security to the satisfaction of the said court to be of good behaviour, was discharged."

The plea then alleges that the "assault and battery" of which the defendant was so convicted, and the wounding, assault, and battery in the first four counts of the indictment mentioned, are one and the same assault and battery, and not other and different. No question arises on the form of the reply, which substantially puts in issue the validity of the plea. On the trial before the recorder of London the defendant was found Guilty upon each of the said counts, subject to the validity and proof of his special plea, in support whereof the record of the convictions before the court of summary jurisdiction was put in, and it must be taken as found by the jury upon due proof that the first four counts referred to the same matter as the offence mentioned in the record of the summary conviction.

The enactments under which the plea in question is pleaded are ss. 44 and 45 of the Offences Against the Person Act, 1861. Section 42 enacts that where any

person shall unlawfully assault or beat any other person, two justices of the peace may, upon complaint by or on behalf of the party aggrieved, hear and determine such offence, and upon conviction such justices may either fine the offender a sum not exceeding £5, or commit him to prison for a term not exceeding two months. The assaults mentioned in this section are in s. 43 referred to as "common assaults and batteries." Then comes s. 44, which enacts:

"If the justices upon the hearing of any such case of assault or battery upon the merits . . . shall deem the offence not to be proved, or shall find the assault and battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By s. 45 it is enacted:

"If any person against whom such complaint . . . shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

The record of the proceedings before the justices is in these terms:

"West Ham Police-court, in the borough of West Ham, before the court of summary jurisdiction, sitting at the police-court, West Ham-lane, etc., the 28th day of October, 1889. George James Miles (hereinafter called the defendant) is this day convicted for that he on the 26th day of October, 1889, within the borough of West Ham, did unlawfully assault and beat one Charles Living. But the court being of opinion that the offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this court to be of good behaviour, is discharged."

This conviction was under the hand and seal of the magistrate for the borough of West Ham.

It is obvious that, if the defence rested solely upon the provisions of the Offences Against the Person Act, 1861, above set forth, grave objections might be made to its validity, for the case was not dismissed, and, even had it been so, no certificate of dismissal was given to the defendant. Moreover, although the record alleges that the defendant was convicted, and intimates the inexpediency of inflicting more than a nominal punishment, that nominal punishment is not fixed or determined, either as to its character or amount, and it will be noted that fine and imprisonment are the only punishments contemplated by s. 42. Therefore, no averment could be truly made that the defendant has paid the fine or suffered the imprisonment awarded. *Hartley v. Hindmarsh* (1) would, as it seems to me, be in point against the plea, had the provisions of the Act of 1861 stood alone. By the Summary Jurisdiction Act, 1879, however, which was passed long after the decision of *Hartley v. Hindmarsh* (1), important discretionary power was vested in justices as to the infliction of punishment, and as to discharge without punishment, upon conviction of offences punishable upon summary conviction. By s. 16 of that statute it is enacted:

"If upon the hearing of a charge for an offence punishable upon summary conviction . . . the court of summary jurisdiction think that though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment. (1) The court, without proceeding to conviction, may dismiss the information, and, if the court think fit, may order the person charged to pay such damages, not exceeding 40s., and such costs of the proceeding or either of them, as the court think reasonable, or (2) The court upon convicting the

A person charged may discharge him conditionally on his giving security with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the court think reasonable."

In cases of assault, where the complaint is dismissed, it seems to me that a certificate of dismissal is still necessary to entitle a defendant to the benefit of the provisions contained in s. 45 of the Act of 1861. But in cases where the justices, though they have convicted, think the offence deserving only of a nominal punishment, or of no punishment at all, and, acting under the power contained in s. 16 (2) of the Act of 1879, determine to discharge the defendant without any punishment on his giving merely security to be of good behaviour, and such security is given, I am, without expressing any settled opinion on the point, strongly inclined to think that nothing more is necessary to entitle him to the privileges conferred by s. 45 of the Act of 1861. For I think the giving of security for good behaviour under such circumstances is intended as a substitute for punishment, and that the effect of such substitution, coupled with the performance of the condition—i.e., the giving the security for good behaviour—would place the defendant precisely in the same position as if punishment had actually been inflicted and suffered. It certainly could never have been intended by the legislature that a person whose offence at the most deserved nothing beyond a nominal punishment, which had been foregone on his recognisances for good behaviour, should be in a worse position than a person whose offence had been visited by a substantial punishment which he had suffered.

There may be, and I think are, objections to the form of the plea as framed, but thinking, as I do, that the common law defence I am about to refer to is such as entitles the defendant to have the conviction in question quashed, it is not necessary to discuss them upon the present occasion. I would, however, observe that, inasmuch as these common law defences to the indictment would afford no defence to civil proceedings, it would be expedient in future, if justices desire to give a defendant the protection afforded by ss. 44 and 45 of the Act of 1861, that they should found their proceedings and judgment upon the provisions of that Act, rather than upon the Summary Jurisdiction Act, 1879, the provisions of which are not very clear, and when they were framed the previous enactments of the Act of 1861 were evidently not clearly remembered by the draftsman. The justices will do well also to bear in mind that they may also award damages under the later statute if they think it right to do so.

With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as BLACKBURN, J., said in *Wemyss v. Hopkins* (2) (L.R. 10 Q.B. at p. 381),

"on the well-established rule at common law that whenever a person has been convicted and punished for an offence by a court of competent jurisdiction, transit in rem judicatam—that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there may be two different punishments for the same offence."

This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited (*Wemyss v. Hopkins* (2)), where the appellant had been summarily convicted by justices under the Highway Act, 1835, s. 78, for an offence which, though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not

afterwards be convicted upon the same facts of an assault under s. 42 of the Offences Against the Person Act, 1861. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rule of law. A

The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this—that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the committal of the offence was followed by serious consequences. In this respect the criminal law is in unison with that which prevails in civil proceedings. Whoever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action simply on the ground that the damages were insufficient, or that the conduct of the defendant was since the verdict and judgment discovered to be more malicious than it was deemed to be at the trial? Judgment recovered in a former action was always a good plea at bar. B C D

In *R. v. Walker* (3) it was held by COLTMAN, J., that a conviction of an assault by wounding before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm.

In *R. v. Stanton* (4) the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault, founded upon the same facts. The jury found the prisoner Guilty of a common assault. In answer to a question of ERLE, J., why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction of an assault to a charge, whereupon the learned judge said that, in his opinion, the conviction would, if pleaded, have been an estoppel to the judgment for the felonious assault, and though not pleaded, he treated the charge as having been adjudicated upon. Ten years later the same point was decided in *R. v. Elrington* (5), where to an indictment for assault and maliciously wounding, and causing grievous bodily harm, etc., a plea that on the hearing of a charge for the same assault treated as a common assault before justices they had dismissed the complaint, was held a bar. The true ground upon which these decisions were based seems to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any further proceedings for or in respect of the same assault; and as the aggravating circumstances unless coupled with the assault amounted to no crime, there was nothing to support the indictment. E F G

No doubt it seems a little startling that a conviction of a common assault, accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault upon conclusive evidence that it was accompanied by an intent to murder, but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a court having jurisdiction, that adjudication ought to be final, and after all such miscarriages are very rare. No system of judicature can be suggested in which occasionally failure to ensure complete justice may not arise. After a most solemn and careful trial of an indictment for murder resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime, yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicated, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, H I

A their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decision upon matters within their jurisdiction cannot, as I have already shown, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form.

But it is not every summary conviction or acquittal of a common assault which will operate as a bar to an indictment for an offence in which that assault was an element. It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in felonious killing. So also of manslaughter: see *R. v. Morris* (6). So, again, a conviction of a common assault could not be pleaded in bar to an indictment for rape, though possibly it might be for an assault with intent to commit rape, for the essence of the crime of rape is a felonious assault by penetration of the person of the prosecutrix which justices have no jurisdiction to adjudicate upon. And although it is quite true that on a charge of common assault, evidence may be given of circumstances which, if true, would constitute a rape; and true also that the justices must form in their own minds an opinion as to the credibility of that evidence with a view to determining whether their jurisdiction to deal with the matter has been ousted or not; and true also that if they disbelieve that evidence they may nevertheless believe that an assault, though not one of the particular character constituting a rape, has been committed, and convict the person charged accordingly, as was done in *Wilkinson v. Dutton* (7); their conviction, nevertheless, would be no bar to an indictment for rape, for though incidentally they might be obliged to consider the evidence in order to determine whether they had jurisdiction over the charge before them, they would have no jurisdiction whatever to adjudicate upon the offence of rape, and their disbelief of the evidence would have no greater effect upon the charge of rape than if they had simply refused to commit for trial upon it, in which case no one would question that an indictment might be presented by anybody who was dissatisfied with the justices' refusal.

This subject was a good deal discussed in the Court of Exchequer in *Re Thompson* (8). It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that by convicting of a common assault when the facts point to a serious felony justice may be defeated, and a great criminal may escape the punishment due to his crime. True it is that it may so happen, so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy. Such misfortunes are mere accidents and of very rare occurrence, and are very unlikely to happen by reason of any default of the justices if they will pursue, as I am sure they ever endeavour, the simple course of steadily bearing in mind the charge before them. If that charge be one of felony or misdemeanour, punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial, or refuse to do so. In matters before them in which they are called upon to adjudicate they must do so, unless they have upon the facts an alternative to send for trial upon indictment.

In assault cases especial provision is made to this effect by s. 46 of the Offences Against the Person Act, 1861, by which it is

I "Provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same . . ."

In the case before us the doubts I once entertained are removed—the one and the same assault of which the defendant was convicted is the sole foundation

upon which the conviction at the Central Criminal Court is rested, although aggravations are added to it which at first sight make the offences appear different, more particularly the count for wounding—but I find it alleged, and found as a fact that that wounding formed part of the assault and battery of which the defendant was convicted, as well it might, without amounting to unlawful malicious wounding, which is purely an indictable offence under s. 20 of the Act of 1861. This is recognised law: see *R. v. Taylor* (9). For the reasons I have given I am now satisfied that the conviction before us ought to be quashed. A B

POLLOCK, B., read the following judgment.—This conviction ought, in my opinion, to be quashed. If the question depended solely upon whether the previous conviction pleaded by the prisoner was a good bar to the present indictment, as coming within the provisions of s. 45 of the Offences Against the Person Act, 1861, I should pause before I came to such a conclusion, as the language of this section is certainly not in accord with that of s. 16 of the Summary Jurisdiction Act, 1879. C

My decision is based upon broader grounds—that the conviction pleaded and the evidence given in support of it formed a good bar at common law to the present indictment. That indictment, by the first four counts, charged the prisoner in different forms with wounding and inflicting bodily harm on Charles Living. The prisoner, by his plea, alleged that he on a certain day was, upon the complaint of the said Charles Living, duly convicted before a court of summary jurisdiction for that he did unlawfully assault and beat the said Charles Living, and the court being of opinion that the offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the prisoner having given security to the satisfaction of the court to be of good behaviour, was discharged, as by the record appeared, which judgment and conviction still remained in force, and in support of this plea he produced the conviction, which was in the following form: D E

“The 28th day of October, 1889, George Miles (hereinafter called the defendant) is this day convicted for that he on the 26th day of October, 1889 . . . did unlawfully assault and beat one Charles Living. But the court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this court to be of good behaviour, is discharged.” F

This is a good conviction, and within the jurisdiction of the magistrate under s. 16 of the Summary Jurisdiction Act, 1879. G

At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred. And, therefore, the rule of law *nemo debet bis puniri pro uno delicto* applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts with the addition of malice and design. In *R. v. Walker* (3) it was held that a plea of *autrefois* convict of an assault before magistrates is a bar to an indictment for feloniously stabbing in the same transaction. *R. v. Stanton* (4) is to the same effect. These are decisions by single judges, but they were cited and approved of by the Court of Queen's Bench in *R. v. Elrington* (5), where COCKBURN, C.J., says (1 B. & S. at p. 696): H I

“We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form.”

A This is not only the law, but it is consonant with sound sense and the just treatment of defendants.

One case only is cited by the prosecution, which might at first sight seem to be contrary to this view, viz., *Hartley v. Hindmarsh* (1); but, upon looking at the decision in that case, it will be found that the conviction was not pleaded as a bar at common law, but, under the Offences Against the Person Act, 1861, s. 45, and the judgment of the court proceeded upon the grounds that there was no record of any conviction, and further, that the magistrate did not adjudicate upon the case, but as a conservator of the peace ordered the defendant to enter into recognisances.

C **LORD COLERIDGE, C.J.**—I am very glad that the delivery of the opinion of the court was adjourned for a week, because it has enabled my brother **HAWKINS** to go very fully into the matter, and to deliver a very elaborate judgment. But, so far as saying that I agree with all he has said, I do not feel at liberty to go. I do not say for a moment that I differ from his judgment, but I have only this moment heard it for the first time, and it must, therefore, stand on the authority of my learned brother alone, which is quite sufficient to support it. I ought to say for myself that at the conclusion of the arguments I was prepared to give my judgment on the grounds put by my learned brothers **POLLOCK** and **CHARLES**. My learned brother **CHARLES** has written a judgment in which he has embodied the views I took of the case, and I desire it to be taken as expressing not only the views of my brothers **GRANTHAM** and **CHARLES**, but also my own views on the matter.

E **CHARLES, J.**—George James Miles was indicted at the December sessions of the Central Criminal Court before the recorder of London for (i) unlawfully and maliciously wounding Charles Living; (ii) unlawfully inflicting on him grievous bodily harm; (iii) assaulting him and occasioning him actual bodily harm; (iv) common assault. He handed in a special plea in bar of these charges. This plea was proved at the trial; indeed, it was not disputed that the offences charged in the first four counts related to the same matter as the offence mentioned in the record, but counsel for the prosecution argued that the record did not disclose any conviction within the meaning of the Offences Against the Person Act, 1861, s. 45, the court having neither ordered the defendant to pay a fine nor to be imprisoned. The counsel for the defendant argued that by s. 16 (2) of the Summary Jurisdiction Act, 1879, express power was given to the magistrate upon convicting a person of assault to discharge him conditionally on his giving security to be of good behaviour, and that s. 45 of the Act of 1861 must be read with the section above referred to. The defendant was convicted on the first four counts of the indictment, and the recorder reserved the following question for the opinion of the court:

H “Whether the proceedings before the court of summary jurisdiction against the defendant in respect of the assault upon Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence?”

I The answer to this question does not, in my opinion, depend in any way on the construction of s. 45 of the Act of 1861 and s. 16 of the Act of 1879. I think the proceedings were a bar apart from any statutory provision, and that the conviction should be quashed in accordance with the well-established rule at common law—that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again, and I see no reason why it should not be acted upon in this case. It cannot be material that a magistrate has power by statute to deal with a convicted person otherwise than by fine or imprisonment, for it is the conviction, and not the nature of the sentence, that constitutes the bar. The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. This being the view which I take of the case, it is unnecessary to decide whether the defendant

is entitled to the protection provided by s. 45 of the Act of 1861. I may add that upon the question reserved no point arises on the form of the special plea, which however I think may be regarded as an informal plea of autrefois convict.

LORD COLERIDGE, C.J.—It is, therefore, the unanimous opinion of the court that the conviction should be quashed.

Conviction quashed.

Solicitors: Seeley & Son; C. C. Sharman.

[Reported by R. C. GLEN, Esq., Barrister-at-Law.]

Re CRAWSHAY. CRAWSHAY v. CRAWSHAY

[CHANCERY DIVISION (North J.), January 22, 23, 1890]

[Reported 43 Ch.D. 615; 59 L.J.Ch. 395; 62 L.T. 489;
38 W.R. 600]

Power of Appointment—Fraud on power—Appointment to object of power with directions for settlement—Alternative appointment to other object of power—Wish, if prior appointment invalid, that alternative appointee should settle fund according to appointor's wishes—No evidence of bargain between appointor and appointee—Absolute appointment.

A testator, having under a settlement, made in 1828, power to appoint by will to and among his children a sum of £35,000, by his will, made in 1865, bequeathed £150,000 to his daughter Jessy, and directed that this legacy should be paid to four trustees named in the will, and should be held by them upon trust for her during her life, with remainder to her issue. By virtue and in exercise of the power contained in the settlement, the testator appointed £10,000, part of the £35,000, to the same daughter, and directed that the same should be paid to the four trustees before named with reference to the legacy of £150,000, and should be held by them upon the trusts thereinbefore declared thereof. The testator then appointed two sums of £10,000 and £7,000 respectively in favour of two other daughters, and he appointed the residue of the £35,000 to his son Robert absolutely, and in case he had exceeded his power in not appointing the £10,000 to his daughter Jessy unconditionally, but in directing the settlement thereof, and in case Jessy, or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement if required so to do, then he appointed that the said sum of £10,000 should go and belong to his son Robert, "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." There was no evidence (other than the will itself) of any bargain between the son and the testator that the former would settle the £10,000.

Held: the appointment of the £10,000 in favour of Jessy was invalid, and, there being no evidence of any bargain by the son that he would settle the sum of £10,000, that sum was validly appointed and passed to him absolutely free from any obligation to settle it.

Notes. Considered: *Re Crawshay, Hore-Ruthven v. Public Trustee*, [1948] 1 All E.R. 107.

As to a fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275-281; and for cases see 37 DIGEST 502 et seq.

A Cases referred to:

- (1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 14 Jur. 182; 41 E.R. 1379; 37 Digest 99, 346.
- (2) *Carver v. Bowles* (1831), 2 Russ. & M. 301; 9 L.J.O.S.Ch. 91; 39 E.R. 409; 37 Digest 121, 533.
- (3) *Pryor v. Pryor* (1864), 2 De G.J. & Sm. 205; 4 New Rep. 82; 33 L.J.Ch. 441; 10 L.T. 360; 10 Jur.N.S. 603; 12 W.R. 781; 46 E.R. 353; 37 Digest 511, 1031.
- (4) *Re Marsden's Trust* (1859), 4 Drew. 594; 28 L.J.Ch. 906; 33 L.T.O.S. 217; 5 Jur.N.S. 590; 7 W.R. 520; 62 E.R. 228; 37 Digest 513, 1048.
- (5) *Roach v. Trood* (1876), 3 Ch.D. 429; 34 L.T. 105; 24 W.R. 803, C.A.; 37 Digest 491, 855.

C

Also referred to in argument:

- Blacket v. Lamb* (1851), 14 Beav. 482; 21 L.J.Ch. 46; 18 L.T.O.S. 115; 16 Jur. 142; 51 E.R. 311; 37 Digest 492, 861.
- Freme v. Clement* (1881), 18 Ch.D. 499; 50 L.J.Ch. 801; 44 L.T. 399; 30 W.R. 1; 37 Digest 384, 1.

D

- Carter v. Taggart* (1848), 16 Sim. 423; 60 E.R. 938; 37 Digest 468, 679.
- Champney v. Davy* (1879), 11 Ch.D. 949; 48 L.J.Ch. 268; 40 L.T. 189; 27 W.R. 390; 8 Digest (Repl.) 372, 598.
- Re Turner's Settled Estates* (1884), 28 Ch.D. 205; 54 L.J.Ch. 690; 52 L.T. 70; 33 W.R. 265, C.A.; 37 Digest 512, 1038.
- Re Harries' Trust* (1859), John. 199; 70 E.R. 395; 37 Digest 469, 680.

E

- Easum v. Appleford* (1840), 5 My. & Cr. 56; 10 L.J.Ch. 81; 4 Jur. 981; 41 E.R. 292; 37 Digest 465, 654.
- Wallgrave v. Tebbis* (1855), 2 K. & J. 313; 25 L.J.Ch. 241; 26 L.T.O.S. 147; 20 J.P. 84; 4 W.R. 194; 69 E.R. 800; sub nom. *Walgrave v. Tebbis*, 2 Jur.N.S. 83; 8 Digest (Repl.) 385, 785.

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- Tee v. Ferris* (1856), 2 K. & J. 357; 25 L.J.Ch. 437; 20 J.P. 563; 2 Jur.N.S. 807; 4 W.R. 352; 69 E.R. 819; 8 Digest (Repl.) 385, 780.
- Moss v. Cooper* (1861), 1 John. & H. 352; 4 L.T. 790; 70 E.R. 782; 8 Digest (Repl.) 385, 779.
- Lady Topham v. Duke of Portland* (1869), 5 Ch. App. 40; 39 L.J.Ch. 259; 22 L.T. 851; 18 W.R. 235, C.A.; 37 Digest 503, 965.

G

- Duke of Portland v. Lady Topham* (1864), 11 H.L.Cas. 32; 10 Jur.N.S. 501; 12 W.R. 697; 11 E.R. 1242; sub nom. *Duke of Portland v. Lady Topham*, *Lord Bentinck v. Lady Topham*, 34 L.J.Ch. 113; 10 L.T. 355, H.L.; 37 Digest 503, 963.

Rowbotham v. Dunnett (1878), 8 Ch.D. 430; sub nom. *Robotham v. Dunnett*, 47 L.J.Ch. 449; 38 L.T. 278; 26 W.R. 529; 8 Digest (Repl.) 385, 781.

H

Lomax v. Ripley (1855), 3 Sm. & G. 48; 3 Eq. Rep. 301; 24 L.J.Ch. 254; 24 L.T.O.S. 323; 1 Jur.N.S. 272; 3 W.R. 269; 65 E.R. 558; 8 Digest (Repl.) 386, 788.

Jones v. Badley (1868), 3 Ch. App. 362; 19 L.T. 106; 16 W.R. 713; 8 Digest (Repl.) 386, 798.

Woolridge v. Woolridge (1859), John. 63; 28 L.J.Ch. 689; 33 L.T.O.S. 254; 5 Jur.N.S. 566; 70 E.R. 340; 37 Digest 498, 906.

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Sadler v. Pratt (1833), 5 Sim. 632; 58 E.R. 476; 37 Digest 490, 849.

Churchill v. Churchill (1867), L.R. 5 Eq. 44; 37 L.J.Ch. 92; 16 W.R. 182; 37 Digest 498, 907.

Page v. Leapingwell (1812), 18 Ves. 463; 34 E.R. 392; 8 Digest (Repl.) 417, 1412.

Petre v. Petre (1851), 14 Beav. 197; 18 L.T.O.S. 14; 15 Jur. 693; 51 E.R. 262; 37 Digest 469, 685.

Wright v. Weston (1859), 26 Beav. 429; 53 E.R. 963; 23 Digest (Repl.) 434, 5031.

- Wilson v. Kenrick* (1885), 31 Ch.D. 658; 55 L.J.Ch. 525; 54 L.T. 461; 2 T.L.R. 214; 37 Digest 471, 695.
- Morgan v. Gronow* (1873), L.R. 16 Eq. 1; 42 L.J.Ch. 410; 28 L.T. 484; 37 Digest 462, 636.
- Scholfield v. Spooner* (1884), 26 Ch.D. 94; 53 L.J.Ch. 777; 51 L.T. 138; 32 W.R. 910, C.A.; 40 Digest (Repl.) 549, 564.
- Booth v. Alington* (1856), 6 De G.M. & G. 613; 26 L.J.Ch. 138; 28 L.T.O.S. 211; 3 Jur.N.S. 49; 5 W.R. 107; 43 E.R. 1372; 37 Digest 469, 686.
- Holyland v. Lewin* (1884), 26 Ch.D. 266; 53 L.J.Ch. 530; 51 L.T. 14; 32 W.R. 443, C.A.; 37 Digest 467, 670.
- Wright v. Goff* (1856), 22 Beav. 207; 25 L.J.Ch. 803; 27 L.T.O.S. 179; 2 Jur.N.S. 481; 4 W.R. 522; 52 E.R. 1087; 37 Digest 512, 1043.
- Goldsmid v. Goldsmid* (1842), 2 Hare, 187; 12 L.J.Ch. 113; 7 Jur. 11; 67 E.R. 78; 37 Digest 512, 1037.
- Birley v. Birley* (1858), 25 Beav. 299; 27 L.J.Ch. 569; 31 L.T.O.S. 160; 4 Jur.N.S. 315; 6 W.R. 400; 53 E.R. 651; 37 Digest 511, 1030.

Originating Summons taken out by the trustees of a sum of £10,000 appointed by the will of William Crawshay, to determine the question whether that sum had been validly appointed by the will.

By a voluntary settlement made on Aug. 7, 1828, a sum of £35,000, secured by a bond of the testator payable within six months after his death to the trustees of the settlement, was vested in them, upon trust that they should pay, assign, and transfer the same unto, between, or among all and every, or any such one or more of seven named children of the testator (three of whom were respectively named Amelia, Jessy, and Annette), as the testator should by deed or will appoint, and in default of appointment, and subject thereto, in trust for the seven children in equal shares as therein mentioned. The settlement contained a hotchpot clause in the usual form. In October, 1849, the testator's daughter Jessy married Alfred Crawshay, her cousin, and by the settlement made on her marriage, dated Oct. 17, 1849, she assigned all her interest in the sum of £35,000 to the trustees of her settlement, to be held by them upon the trusts therein declared. By his will, dated Oct. 21, 1865, the testator bequeathed the sum of £150,000 Consols to his daughter Jessy, and he directed that that legacy should be paid or transferred to four persons who were named in the will as trustees, or the survivors or survivor of them, and that it should be held by them upon trust as to the income thereof of his daughter Jessy during her life, for her separate use, without power of anticipation, and after her death upon trust as to the principal for her children or remoter issue as she should by deed or will appoint, and in default of such appointment, and subject thereto, upon trust for her children as therein mentioned. In default of issue the legacy was to be held upon trust for such persons as she should by deed or will appoint, and in default of and subject to any such appointment the same was to devolve and belong to her then next-of-kin, exclusively of any husband. The testator gave a similar legacy in the same way to his daughter Amelia. The will contained a recital that by the settlement of August, 1828, the testator had power to appoint by his will the sum of £35,000 to or amongst any one or more of his children as therein mentioned. The will also contained the following provision:

"Now, therefore, my will is, and by virtue of the said power and of every or any other power enabling me in that behalf, I appoint that the sum of £10,000, part of the said last mentioned sum, shall go and belong to my daughter Amelia, the sum of £10,000, further part thereof, shall go and belong to my daughter Jessy, and the sum of £7,000, further part thereof, shall go and belong to my daughter Annette, but my will is that, as to the two first mentioned sums of £10,000 and £10,000, the same shall be paid to the respective trustees hereinbefore named and appointed with reference to the legacies hereinbefore bequeathed to them my said two daughters respectively, and be held upon the

A trusts and for the intents and purposes hereinbefore declared of and concerning those legacies."

The testator then directed that the sum of £7,000 appointed to his daughter Annette should be paid to trustees to be named by his executors, and be settled and held upon the trusts therein mentioned. The testator continued as follows:

B "And as to the residue of the said sum of £35,000 I appoint and declare that the same shall go and belong to my son Robert T. Crawshay, his executors, administrators, and assigns, absolutely; and in case I have exceeded my power in not appointing the said sums of £10,000, £10,000, and £7,000 unconditionally, but in directing the settlement thereof respectively as aforesaid and in case my said daughters Amelia, Jessy, and Annette respectively, or their
C respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof if required so to do, then I appoint that the said sums of £10,000, £10,000, and £7,000 respectively shall also go and belong to my said son Robert T. Crawshay absolutely, but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as
D aforesaid, so as thereby to carry out my wishes."

On Nov. 7, 1867, Robert T. Crawshay executed a declaration of trust of the £10,000 appointed to Jessy, to carry out the testator's wishes. Jessy Crawshay (who survived her husband) by her will, dated Jan. 29, 1885, professedly in exercise of the powers of appointment conferred on her by the will of the testator with regard to the legacy of £150,000 and the sum of £10,000 appointed by his will to
E her as aforesaid, appointed various sums to her children (one of whom was Jessy Sandeman) and their issue. And she declared that any child or grandchild of hers who might object to or try to defeat the exercise of the powers of appointment and other the provisions and intentions of her will should forfeit all benefits conferred on him or her by the will, and that every appointment or bequest made to him or her, or for his or her benefit, should for this purpose be considered as having been
F made to her daughter Jessy Sandeman. Jessy Crawshay died on July 17, 1889. The defendants to the summons were the trustees of the settlement of Oct. 17, 1849, Mrs. Sandeman, the other children of Mrs. Alfred Crawshay, the trustees of their settlements, and their children. The summons asked for the determination of the following questions: (i) Whether the trustees of the settlement of 1849 were entitled to have the sum of £10,000 appointed to Jessy Sandeman paid or transferred to them; (ii) whether the plaintiffs held that sum upon the trusts declared
G by the will of William Crawshay as well as the declaration of trust dated Nov. 7, 1867, executed by Robert T. Crawshay.

Bramwell Davis and Reginald Winslow for the plaintiffs.

Seward Brice, Q.C., and R. F. Norton for Jessy Sandeman

Napier-Higgins, Q.C., and P. S. Stokes; Cozens-Hardy, Q.C., and G. Murray

H for other defendants in the same interest.

Everitt, Q.C., and J. W. Cunliffe for the trustees of Jessy Crawshay's marriage settlement.

E. Wilkinson for the trustees of Mrs. Sandeman's settlement.

I **NORTH, J.**, read the provisions of the will above stated down to the absolute appointment of the residue of the £35,000 to the son of R. T. Crawshay, and observing that the £35,000 was a sum which the testator had bound himself to pay upon his death, and that, therefore, it was not a fund requiring conversion, or capable of either increase or reduction, but was a definite sum which would be payable in cash sterling at the time of the appointor's death, that being the date at which the appointment would take effect, and continued: The testator directs that the £10,000 which he in the first instance appoints to his daughter Jessy absolutely, shall be paid to four special trustees whom he had appointed in a previous part of the will with reference to a legacy of £150,000 which he had

bequeathed to his daughter Jessy to be held by them upon the trusts and for the intents and purposes which he had already declared of or concerning that legacy. Therefore, the £10,000 is to be paid by the executors to the special trustees, and not to Jessy at all, and when it is paid to the special trustees it is to be held by them upon the same trusts as those declared of the £150,000, which include a larger class than the settlement of 1828, and powers which are not comprised in it. Jessy is not to receive the money and to proceed to settle it, but the money which the testator gives to Jessy he gives to her by means of this direction, that it is to be paid to trustees named by him, and to be held by them upon the trusts, etc., thereinbefore declared of the legacy under which Jessy takes only a life interest. Then the testator, after appointing £10,000 and £7,000 in a similar way to two other daughters, appoints that the residue of the £35,000 shall go and belong to his son Robert Thompson Crawshay absolutely.

Accordingly, we have the gift to Jessy followed by a direction that whatever is given to her is to be paid to trustees, who are to hold it upon certain trusts under which her interest is only a limited one; and, if the will had stopped there, it might have been said that, as under the first words of the gift Jessy took absolutely subject to the trusts afterwards created, if those trusts failed the original gift remained untouched, as in *Lassence v. Tierney* (1), *Carver v. Bowles* (2), and a great many other similar cases. But the will does not stop there, for the testator goes on to say, "and in case I have exceeded my power in not appointing" Jessy's £10,000 "unconditionally, but in directing the settlement thereof as aforesaid." That shows clearly that he thought that, in doing what he had previously done, he might possibly be held by construction of law to have exceeded his power. In what way? Because he had not given the £10,000 to the daughter absolutely free from any condition. This shows that, in his view at any rate, the only gift to her was as part of the arrangement, and for the purpose of the arrangement, for effecting a settlement of the £10,000, and it shows also that, considering there was some doubt as to his power to do what he had done, he thought it necessary to provide for what was to be done in case the law should prevent what he had already attempted to do from taking effect as he hoped that it would.

He says, "In case I have exceeded my power in not appointing the fund unconditionally," in other words, "If what I have done cannot take effect, and the £10,000 is undisposed of, and in case my daughters Amelia, Jessy, and Annette respectively, or their respective husbands or others having any right or power to object to the settlement thereof as aforesaid, shall so object, or shall not confirm such settlement thereof, if required so to do," which comes to this, "If I have exceeded my power, and if, by reason of an objection on the part of any person entitled to object, that which I have attempted to do cannot be confirmed," then something else is to be done.

It is quite clear that there cannot even now be any confirmation by all the persons who would be interested in the fund in default of appointment of the disposition by way of settlement previously made. It is true that Jessy Crawshay did all she could to confirm it, but unluckily she had not an absolute interest. In my opinion, the testator was dealing with failure by reason of some invalidity in the previous appointment, and the absence of confirmation by all persons whose consent would be necessary to make the appointment valid. He contemplates the possibility that he might not be able to procure a confirmation from every person interested in disputing it, and he goes on to deal with the fund in a different way. If that is so, he says that Jessy's £10,000 (as I will call it for brevity) "shall also go and belong to my son Robert T. Crawshay absolutely." That is clearly a disposition of the £10,000 which he had already appointed in a way which he now treats as possibly invalid. Robert T. Crawshay was an object of the power, and, so far as I have yet gone, the gift to him is clearly good. It is suggested that it is bad by reason of that which follows, and which I will consider presently. But pausing at this point, there is a clear gift to him of the £10,000 in an event which the testator contemplated as possible, and which has actually happened, and, in

- A my opinion, he takes the £10,000 under that gift, and not under the gift of the residue of the £35,000. I do not think it necessary to consider whether, supposing there had been no express gift to Robert T. Crawshay in the event which has happened of the £10,000 settled upon Jessie, and the £7,000 settled upon Annette, those sums would, in case the prior disposition thereof had failed, have passed to Robert under the gift to him of the residue of the £35,000. But, in my opinion,
- B he cannot in the event which has happened take Jessie's £10,000 under the appointment of the residue, because it is clear that the testator did not consider that in that event it would go to him under the gift of residue, for in that particular event the testator gives the £10,000 to Robert in express words. I hold that the £10,000 cannot go to Robert as part of the residue of the £35,000, there being another express gift of it to him which is inconsistent with its passing under the gift of residue.
- C But then arises the question whether Robert can take the £10,000 at all by reason of the words which follow. The direction is, first, that the £10,000 is to go and belong to Robert absolutely, and then follow these words, "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." That is entirely inconsistent with the notion that under the first gift to Jessie she had taken
- D an absolute interest in the £10,000. I think it is quite clear that she did not. Then the only question is whether the £10,000 thus given to Robert is so given to him for the purpose of his applying it for the benefit of persons who are not objects of the power that the gift must fail. The phrase, "who will, I am assured, settle the same voluntarily," is capable of different meanings. It may mean: "I feel certain, not because he has ever said anything to me or I to him on the subject, but I know that is what he will do with it." That is the natural and simple meaning of the words. But the words "I am assured" may also mean "he assures me," or "as my solicitor tells me." If the words mean "as he assures me," that is, if they show that there was a bargain between the two that, though this fund was given to Robert absolutely, with a statement that he might settle it voluntarily if he chose to do so, and he had really bound himself to settle it according to the testator's wishes, then, in my opinion, the appointment would be void. But if, on the other hand, the fund is really given, as it purports to be, to Robert absolutely, not subject to any trust, but that he might do what he liked with it, and if the word "voluntarily" is truly used, then, if he does settle it as the testator says he should like him to do, and as he endeavoured to do himself, that would be an entirely voluntary act on his part, and the appointment to him would be valid.
- G There is no evidence of any conversation, or arrangement, or bargain, or even understanding between the father and son, or that the son had any knowledge that there was any such provision in the will before the will was opened after the testator's death, and the contents made known to the family. And even if the son did know of the provision in the will before the testator's death, yet, unless it was made known to him under circumstances which showed he had accepted a trust, and had bound himself to carry out his father's wishes, I do not think his knowledge would make that gift invalid.
- H

In my opinion, the real meaning of the words is, not that Robert was bound to settle the fund, but that it was given to him absolutely, and that the testator having shown what he wished done by trying to do it himself, and having on this hypothesis failed in doing it, left it entirely to the son whether he would or would not settle the fund upon the daughter. In point of fact the son had settled it, but that is immaterial, yet it was absolutely free to him to deal with the fund as he pleased.

A number of cases have been cited, and one or two of them seem to me material. In *Pryor v. Pryor* (3) the law was no doubt correctly laid down. KNIGHT BRUCE, L.J., said (2 De G.J. & Sm. at p. 210):

"The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee

will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is that the appointment would not have been made but for the bargain, then the appointment is bad. The question is to which of these two classes of cases the present case belongs."

That is precisely the question in the present case. The conclusion to which I come upon the will is that which I have already stated. There is no evidence whatever, and I have to get as best I can at the intention of the parties as it is shown upon the face of the will. I confess that *Re Marsden's Trust* (4) did appear to me at first to create some little difficulty, but I observe that even in that case *KINDERSLEY, V.-C.*, said (4 *Drew.* at p. 599):

"Unless it can be shown that the trustee having the discretion [meaning for this purpose the person having power to appoint] exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purpose of the trust, the court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but, if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion and not matter amounting to a judicial inference or conviction from the facts, the court will not act upon it. But if, on the other hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly, or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the court will not permit such an exercise of the power to prevail."

In the present case there is no evidence to introduce any element even of suspicion, or indeed anything which is not to be found in the will itself. I have no materials for coming to the conclusion that the will is not honestly framed and expressed for the purpose of giving effect to it, and there is nothing behind it for me to consider.

In *Re Marsden's Trust* (4) the facts were very peculiar, and it has been treated by other judges as a somewhat exceptional case, and I think it is so for this reason. There the mother, who had under the settlement a power of appointment among children, desired to make a provision for the father out of a settled fund, his circumstances being such that she thought he ought to be assisted in that way. This intention was openly discussed. The father was not an object of the power, and, therefore, he could not take any part of the settled fund under an appointment. A solicitor was consulted, and he advised that an appointment could not be made to the father, and that project thereupon dropped. An arrangement was then made between the father and the mother that the whole fund should be appointed by the mother to the eldest child, who was at that time an infant, and who did not require any immediate provision to be made for her, with the object that, when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her under an arrangement between her father and mother with the object of enabling the daughter to provide for her father. One cannot help seeing what an influence would have been brought to bear upon the daughter when the father told her that, and that it would be practically impossible that she should resist doing that which it was the intention of her father and mother that she should do, and the doing of which, under the influence thus exercised upon her, would be an entire perversion and misapplication of the fund, taking it away from the persons in whose favour it ought to have been appointed and giving it to a stranger. If an appointment of that kind is obtained by means of undue influence, of course it cannot stand, and I think that is shown by the later cases.

That, I think, is the true explanation of *Re Marsden's Trust* (4), and I do not think it is in any way inconsistent with the law as stated in *Pryor v. Pryor* (8).

- A The same conclusion is, I think, to be drawn from *Roach v. Trood* (5). I come to the conclusion that an absolute appointment to Jessy was never made, that the only gift to her was by way of the direction that the trustees of the settled fund were to have the sum appointed to her, and upon the same trusts, and that such a settlement was beyond the power of the testator. Under those circumstances it appears to me that it was open to him to appoint the sum of £10,000 absolutely and unconditionally to Robert, and I think that is what he did, and that the words which were relied upon as showing that it was really appointed to him conditionally do not lead to that result, and do not, therefore, operate to make the appointment bad.

C *The order as drawn up declared that the plaintiffs held the £10,000 upon the trusts of the declaration of trust executed by Robert Thompson Crawshay on Nov. 7, 1867.*

Solicitors: A. R. & H. Steele; Lawrance, Graham & Long; Cunliffes & Davenport; Bell, Broderick & Gray.

[Reported by G. E. JEFFERY, Esq., Barrister-at-Law.]

D

E

COCHRANE v. MOORE

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), January 20, April 28, 1890]

[Reported 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T. 153;
54 J.P. 804; 38 W.R. 588; 6 T.L.R. 296]

F

Gift—Gift inter vivos—Gift of chattel capable of delivery—Need of actual delivery—Sufficiency where delivery precedes gift.

To constitute a valid verbal gift inter vivos of a chattel capable of delivery there must be actual delivery of the chattel by the donor to the donee.

Per LORD ESHER, M.R.: There cannot be a gift without a giving and taking.

G

Effective delivery may be made before the making of the gift, as where a bailor, having bailed a chattel to a bailee, gives the chattel to the bailee.

Notes. Considered: *Re Alderson, Alderson v. Peel* (1891), 64 L.T. 645. Explained: *Kilpin v. Ratley*, [1892] 1 Q.B. 582. Considered: *Valier v. Wright and Bull* (1917), 33 T.L.R. 366. Explained: *Re Stoneham, Stoneham v. Stoneham*, [1918-19] All E.R.Rep. 1051. Considered: *Shepherd v. Cartwright*, [1954] 3 All E.R. 649. Referred to: *Rawlinson v. Mort* (1905), 93 L.T. 555; *Re Wasserberg, Re Union of London and Smiths Bank, Ltd. v. Wasserberg*, [1914-15] All E.R.Rep. 217; *Hislop v. Hislop*, [1950] W.N. 124.

H

As to making a valid gift inter vivos, see 18 HALSBURY'S LAWS (3rd Edn.) 379-389; and for cases 25 DIGEST (Repl.) 553 et seq.

I

Cases referred to:

- (1) *Irons v. Smallpiece* (1819), 2 B. & Ald. 551; 106 E.R. 467; 25 Digest (Repl.) 548, 3.
- (2) *Bunn v. Markham* (1816), 7 Taunt. 224; 2 Marsh. 532; Holt, N.P. 352; 129 E.R. 90; 25 Digest (Repl.) 605, 394.
- (3) *Reeves v. Capper* (1838), 5 Bing.N.C. 136; 1 Arn. 427; 6 Scott, 877; 8 L.J.C.P. 44; 2 Jur. 1067; 132 E.R. 1057; 25 Digest (Repl.) 554, 44.
- (4) *Shower v. Pilch* (1849), 4 Exch. 478; 154 E.R. 1301; sub nom. *Sharr v. Pilch*, 19 L.J.Ex. 113; 14 L.T.O.S. 135; 25 Digest (Repl.) 556, 59.

- (5) *Bourne v. Fosbrooke* (1865), 18 C.B.N.S. 515; 5 New Rep. 375; 34 L.J.C.P. 164; 11 Jur.N.S. 202; 13 W.R. 497; 144 E.R. 545; 25 Digest (Repl.) 555, 46.
- (6) *Douglas v. Douglas* (1869), 22 L.T. 127; 25 Digest (Repl.) 554, 30.
- (7) *Patterson v. Williams*, L. & G. temp. Plunk., 95.
- (8) *London and Brighton Rail. Co. v. Fairclough* (1841), 2 Man. & G. 674; 2 Ry. & Can. Cas. 544; Drinkwater, 196; 3 Scott, N.R. 68; 10 L.J.C.P. 133; 5 J.P. 513; 133 E.R. 916; 10 Digest (Repl.) 1224, 8577.
- (9) *Lunn v. Thornton* (1845), 1 C.B. 379; 14 L.J.C.P. 161; 4 L.T.O.S. 417; 9 Jur. 350; 135 E.R. 587; 39 Digest 404, 399.
- (10) *Ward v. Audland* (1845), 8 Beav. 201; 14 L.J.Ch. 145; 9 Jur. 384; 50 E.R. 79; 25 Digest (Repl.) 586, 255.
- (11) *Flory v. Denny* (1852), 7 Exch. 581; 21 L.J.Ex. 223; 19 L.T.O.S. 158; 155 E.R. 1080; 7 Digest (Repl.) 5, 9.
- (12) *Winter v. Winter* (1861), 4 L.T. 639; 9 W.R. 747; 25 Digest (Repl.) 556, 60.
- (13) *Danby v. Tucker* (1883), 31 W.R. 578; 25 Digest (Repl.) 555, 48.
- (14) *Re Ridgway, Ex parte Ridgway* (1885), 15 Q.B.D. 447; 54 L.J.Q.B. 570; 34 W.R. 80; 2 Morr. 248; 25 Digest (Repl.) 555, 49.
- (15) *Hudson v. Hudson* (1627), Lat. 214, 263; 82 E.R. 352; 24 Digest (Repl.) 780, 7684.
- (16) *Flower's Case* (1597), Noy, 67; 74 E.R. 1035; 25 Digest (Repl.) 556, 57.
- (17) *Hooper v. Goodwin* (1818), 1 Swan. 485; 1 Wils. Ch. 212; 36 E.R. 475; 25 Digest (Repl.) 580, 212.
- (18) *Wortes v. Clifton* (1614), 1 Roll. Rep. 61; 81 E.R. 328; 25 Digest (Repl.) 554, 39.

Appeal by the plaintiff from a decision of LOPES, L.J., sitting as an additional judge of the Queen's Bench Division on the trial by him without a jury of an interpleader issue.

The question in the issue arose in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claimed the money under a bill of sale executed by one Benzon, comprising this and other horses. The defendant claimed it under an earlier gift of one-fourth of the horse to him by Benzon. In June, 1888, the horse was the property of Benzon, being kept at the stables of a trainer named Yates, in or near Paris, and on June 8 he was ridden in a steeplechase by Moore, a gentleman rider. In consequence of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by LOPES, L.J., Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse. A few days subsequently Benzon wrote to Yates and told him of the gift to Moore. But he did not inform Moore, nor did Moore know, of any communication to Yates of the fact of the gift. On July 9, 1888, Cochrane advanced £3,000 by way of a loan to Benzon, and took from him a promissory note for £3,500, payable on Aug. 9, following. On July 16 of the same year, Cochrane advanced to Benzon a further sum of £4,000, and took a promissory note for £4,800, payable on Sept. 16. On July 26 Cochrane advanced to Benzon two sums of money: One, £1,680 10s. 11d. (to be paid to one Sherard, a trainer), and £745; making together £2,425 10s. 11d. On the same day Benzon executed a bill of sale for £10,000, under which Cochrane claimed. Kilworth and other horses were included in the schedule to this instrument. It was proved by the evidence of the witnesses, whom the learned judge believed, that before the execution of the bill of sale, Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon.

Addison, Q.C., and *Henn Collins, Q.C.*, (*Kisch* with them) for the plaintiff.
Pollard and *Hugh Mitchell* for the defendant.

April 28, 1890. The following judgments were read.

FRY, L.J.—The judgment I am about to read is that of **BOWEN, L.J.**, and myself. [His LORDSHIP stated the facts, and contd.:] On these facts it was argued that there was no delivery and receipt of the one-fourth of the horse, and, consequently, that no property in it passed by the gift. The learned judge has, however, held that delivery is not indispensable to the validity of the gift. The proposition on which the lord justice proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made per verba de presenti by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We, therefore, feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination.

The proposition adopted by the lord justice is in direct contradiction to the decision of the Court of King's Bench in the year 1819 in *Irons v. Smallpiece* (1). That case did not proceed upon the character of the words used, or upon the difference between verba de presenti and verba de futuro, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a court consisting of LORD TENTERDEN (then ABBOTT, C.J.), and BEST and HOLROYD, JJ., refused a rule nisi, and all held delivery to be necessary. The Chief Justice said (2 B. & Ald. at p. 552):

"I am of opinion that, by the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee."

He went on to refer to *Bunn v. Markham* (2) as a strong authority. These observations of the Chief Justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift inter vivos, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will as well as gifts inter vivos, then by instrument he meant testamentary instrument, and his language was correct. HOLROYD, J., was equally clear on the principal point (*ibid.* at p. 553):

"In order to charge the property by a gift of this description there must be a change of possession."

By "this description" we understand him to mean a gift inter vivos.

The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority. Thus in *Reeves v. Capper* (3) the Court of Common Pleas under TINDAL, C.J., referred to *Irons v. Smallpiece* (1) and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee" as being good law without the expression of any doubt. In 1849, in *Shower v. Pilck* (4), the same question came before the Court of Exchequer, and the court without hesitation affirmed the ruling of LORD TRURO (then WILDE, C.J.) at nisi prius, and adopted the rule of *Irons v. Smallpiece* (1). The alleged gift in question was per verba de futuro, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. ALDERSON, B., said (4 Exch. at p. 479):

"To pass the property there must be both a gift and a delivery: here there is hardly a gift."

LORD CRANWORTH (then ROLFE, B.) said (*ibid.* at p. 479):

"There must be a delivery to make the gift valid; here there is a mere statement that the goods which the defendant has in her possession the owner will give her."

Again (in 1865), in *Bourne v. Fosbrooke* (5), ERLE, C.J., adopted the rule in *Irons v. Smallpiece* (1) as undoubted law; and in 1870, in *Douglas v. Douglas* (6), the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favour. In Ireland, in like manner, the doctrine has been asserted, LORD PLUNKETT, L.C., holding delivery to be the only admissible evidence of the gift of a personal chattel: *Patterson v. Williams* (7).

We have thus a great body of authority in favour of the necessity of delivery; but, on the other hand, there are several authorities which require consideration. The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of *Irons v. Smallpiece* (1), by SERJEANT MANNING in a note on *London and Brighton Rail. Co. v. Fairclough* (8), in which he impugned the accuracy of *Irons v. Smallpiece* (1) and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider. In 1845, in *Lunn v. Thornton* (9), MAULE, J., interlocutorily observed that he had always thought LORD TENTERDEN's opinion in *Irons v. Smallpiece* (1) very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case SERJEANT MANNING appended a note similar to that in the second volume of MANNING AND GRANGER's reports.

Two years afterwards (1847) LORD WENSLEYDALE, in *Ward v. Audland* (10), quoted the passage from LORD TENTERDEN's judgment already cited, and observed: "that is not correct." To which counsel replied by referring to the criticism of MAULE, J., and the learned judge made no further observation. The criticism of the two learned judges was probably directed to the same point, namely, the use of the expression, deed or instrument. LORD CRANWORTH was present as a baron of the Exchequer during the argument in *Ward v. Audland* (10), and, as we have seen, two years afterwards unhesitatingly adopted *Irons v. Smallpiece* (1), and that without note or comment—a course which he would hardly have pursued if he knew that LORD WENSLEYDALE considered the case itself bad law. In 1852, in *Flory v. Denny* (11) where the authorities lastly cited were mentioned, LORD WENSLEYDALE referred to the two notes of SERJEANT MANNING, and read a portion of the latter, but expressed no opinion as to the correctness or incorrectness of the conclusion.

In 1861 *Winter v. Winter* (12) came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his son as his servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own, and paid the wages of the crew. WIGHTMAN, J., upheld the title of the son on the ground of a change in the possession consequent on the gift, and CROMPTON, J., on the ground that actual delivery of the chattel is not necessary to a gift inter vivos, and that it was sufficient that the conduct of the parties showed that the ownership had been changed. BLACKBURN, J., simply concurred. What, however, is most to our present point, CROMPTON, J., said, that although *Irons v. Smallpiece* (1) and *Shower v. Pilek* (4) had not been overruled, they had been hit hard by the subsequent cases.

In 1883 *Danby v. Tucker* (13) came before POLLOCK, B., sitting as a judge of the Chancery Division, and he declined to follow the decision of *Irons v. Smallpiece* (1), saying that he certainly could not accede to the proposition generally that the actual delivery of a chattel was necessary to create a good gift inter vivos. He said (31 W.R. at p. 580):

"The question to be determined is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the

A part of the recipient to receive, and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a court of common law, and, of course, the same result would follow in a court of equity."

Lastly, in 1885 CAVE, J., in *Re Ridgway* (14) (15 Q.B.D. at p. 449), expressed his opinion

B "that it is going too far to say that the retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances. It is strong evidence against the existence of such an intention."

C These two last-named authorities have been followed by LOPES, L.J., in the case now before us, feeling that when sitting as a judge of the first instance he could not rightly depart from them. There is thus some difference of judicial opinion as to the rule stated in *Irons v. Smallpiece* (1). We cannot think that the few recent decisions to which we have referred are enough to overrule the authority of that decision, and the cases which have followed it; but they make it desirable to inquire whether the law as declared before 1819 was in accordance with that decision, or with the judgment of POLLOCK, B., in *Danby v. Tucker* (13). This inquiry into the old law on the point is one of some difficulty, for it leads into rarely-trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested. The law enunciated by BRACON in his book "*De Acquirendo Rerum Dominio*," seems clear to the effect that no gift was complete without tradition of the subject of the gift. He says (vol. i, p. 128),

F "Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris, et donatorii; alioquin dicitur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valét donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (p. 300): "Item non sufficit chartam esse factam et signatam nisi probetur donationem esse perfectam, et quod omnia, quæ donationem faciunt, rite præcesserunt, et subsequatam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, et quod charta rite facta sit, et vera et bona et cum solemnitate recitata et audita, tamen nunquam valebit donatio, nisi tunc demum, cum fuerit traditio subsequuta, et sic poterit charta esse vera, sed sine facta seysina, nuda."

G And to the same effect is another passage in chap. xviii, 1, p. 310.*

H In BRACON's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham: SELECT PLEAS IN MANORIAL COURTS, p. 142 †; see also PROFESSOR MAITLAND's papers on the SEISIN OF CHATELS, the BEATITUDE OF SEISIN, and the MYSTERY OF SEISIN: LAW QUARTERLY REVIEW, i, 324; ii, 484; iv, 24, 286, as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognised was between things corporeal and things incorporeal; no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery

* Item non valet donatio, nisi subsequatur traditio, quia non transfertur per homagium res data, nec per chartarum vel instrumentorum confectionem quamvis in publico fuerint recitata.

† Published by the Selden Society.

of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts? It has been suggested that BRAC^TON, while purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of JUSTINIAN, gift had been a purely consensual transaction, and did not require delivery to make it perfect: Inst. ii, vii.

Coming next to the great law-writers of the reign of Edward I, they hold language substantially the same as that of BRAC^TON, except indeed that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. FLETA says

"Donatio est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut res a vero ejus possessore ad alium transferatur. Dare autem est rem accipientis facere cum effectu, alioquin inutilis erit donatio, cum irritari valeat et revocari."

(lib. iii, c. 3.) He then proceeds to discuss various kinds of gifts, and says:

"Alia perfecta, et alia incepta et non perfecta; ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondem fuerit subsecuta."

(loc. cit.; see also lib. iii, c. 15.) In lib. iii, c. 7, he discusses the necessary elements of donations, and, among other things, the effect of duress on a gift, and here the necessity of delivery is again clearly shown, because, according to FLETA, a promise made without duress followed by delivery under duress is not a valid gift. He says:

"Refert tamen utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promiserò, et postea gratis tradiderò, talis metus non excusat; sed si gratis promiserò et compulsus tradiderò tunc excusat metus."

BRITTON held substantially the same language. In citing him we shall prefer the translation of MR. NICHOLS to the Norman-French of the original. In his chapter on Gifts (lib. ii, c. 3), he gives a very clear description of the nature of a gift. He says (pp. 220, 221):

"A gift is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made, if the thing given does not so belong to the receiver the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested."

And again (lib. ii, c. 3, pp. 225-6):

"Some gifts are complete, where both rights unite in the purchaser; others are begun, and not completed; and such titles are bad, as in case of gifts granted whereof no livery of seisin follows."

Passages of similar import will be found in lib. i, c. 29, and lib. ii, c. 8.

The third writer of the age of Edward I is one of a very different character from FLETA and BRITTON—we mean HORN, the author of the MIRROR OF JUSTICES. He attacked the judges and the administration of the law in his day with a vehemence which it is to be hoped was undeserved. But though among the 155 abusions or abuses of the law which stirred his soul to wrath, some relate to seisin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms (chap. v, s. 1, para. 75) that

- A "the law requires but three things in contracts : 1. The agreement of the wills ;
2. Satisfaction of the donor ; 3. Delivery of the possession and gift."

B In the reign of Edward IV a step seems to have been taken in the law relative to gifts which resulted in this modification—that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattels given, it was now held that the gift by deed was good and operative until dissented from by the donee. Thus, in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by CHORE and other justices that if a man executes a deed of gift on his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a court of record. In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (CATESBY and PIGOT), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, etc., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, etc. But the court said that such a gift is not good without notice, for a man cannot give his goods to me against my will. An earlier case in D the same reign has been cited as bearing on the present question.

In Michaelmas Term, 2 Edw. 4, pl. 26, fol. 25, a case arose on trespass of goods, in which LAICON was counsel for the defendant, and the court was engaged in considering the sufficiency of his pleas. In the course of the discussion LAICON put this question :

- E "Suppose I give to you my goods, which are at Everwike, and before that you are seised of them, a stranger takes them away, have you not a writ of trespass against the stranger?"

Which he then proceeds to answer :

- F "Yes, sir, for by the gift at once the property was in you and the possession by the writ is adjudged in you presently."

DANBY, the Chief Justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (*car la si vous pled. vr. matter accord, et justif, et vous confess. prisee hors de son poss.*). But immediately after this discussion LAICON found his argument so hopeless (*videns opinionem curiæ contra eum*) that he seems to have amended his pleadings. This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to show whether the parties to the discussion had in contemplation a gift by deed or not.

- H The cases already referred to which occurred a few years later seem to show that the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day. BROOKE, in his ABRIDGMENT (Trespass, 303) cites this case of the 2 Edw. 4, and seems to put it upon a somewhat different ground to the YEAR BOOK itself. He says that DANBY agreed in LAICON's argument,

- I "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local."

We can find no authority for these reasons in the entry which he professes to be abstracting. This case, as explained by BROOKE, seems to underlie the proposition asserted twice in *Hudson v. Hudson* (15) discussed in 2 Wms. SAUNDERS, 47, 6 a, to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them

I can bring trespass; for property, it was added, draws possession in chattels personal. The court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made: and this point was not material to the matter under consideration by the court. Moreover, where a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV must be mentioned. In Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55, it was said by BRIAN, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant and then he could have his law—*quod fuit concessum*. The case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII perhaps requires consideration (Hilary Term, 21 Hen. 7, pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs:

"If I give to a man my cow or my horse, he may take the one or the other at his election: and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him."

The case is interesting as the first one which we have found which emphasises the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry.

It was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend in cases in which there was a value consideration, upon the mind and consent of the parties, and that it was thus gradually established that, in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery. This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign: see *Plowd. 11 b*, and see a learned note, 2 *Man. & Ry.* 566.

A *Flower's Case* (16) (which seems to have been decided in 39 Elizabeth) appears to show that the necessity of delivery was then upheld by the court. The case is thus stated by NOR (p. 67):

B "A. borrowed one hundred pound of B. and at the day brought it in a bagg and cast it upon the table before B. and B. said to A. being his nephew, I will not have it, take it you and carry it home again with you. And by the courts that is a good gift by paroll, being cast upon the table. For then it was in the possession of B. and A. might well wage his law. By the court, otherwise it had been, if A. had only offer'd it to B. for then it was chose in action only, and could not be given without a writing."

C The court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew—so that the nephew might wage his law, i.e., might conscientiously swear that he was not indebted to his uncle: see the case discussed in *Douglas v. Douglas* (6).

In JENKINS'S CENTURIES (3rd Century, Case ix), it is said:

D "A gift of anything without a consideration is good; but it is revocable before the delivery to the donee of the thing given. Donatio perficitur possessione accipientis. This is one of the rules of law."

—a statement made with little reference to the other matters treated of in the case. We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

E BLACKSTONE'S discussion of the subject of gifts of chattels is, perhaps, not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities. He says (book 2, c. 30):

F "A true and proper gift or grant is always accompanied with delivery of possession and takes effect immediately. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform."

In 1818 the year before *Irons v. Smallpiece* (1) was decided, SIR THOMAS PLUMER, M.R., in *Hooper v. Goodwin* (17) said (1 Swan. at p. 491):

"A gift at law or in equity supposes some act to pass the property; in donations inter vivos . . . if the subject is capable of delivery, delivery."

G These are, so far as we can find, all the relevant authorities before the decision in *Irons v. Smallpiece* (1), though they are not all the authorities that have been cited as relevant. But several that have been relied upon appear to us to have no real bearing on the point at issue. Thus in *Wortes v. Clifton* (18), COKE arguendo, uses as an illustration of the difference between the civil law and ours—that in the civil law is not good without tradition—but that it is otherwise in our law. Here, for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed. In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery (PERKINS' PROFITABLE BOOK "Grant," 57; 2 SHEP. TOUCHES. 227; COMYN DIG. "Biens" D. 2) have been cited as if they likewise asserted that a gift was good without delivery—a proposition which they do not affirm, or, as we think, imply.

I This review of the authorities leads us to conclude that, according to the old law, no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that, as regards gifts by parol, the old law was in force when *Irons v. Smallpiece* (1) was decided; that that case, therefore, correctly declared the existing law; and that it has not been overruled by the

decision of *POLLOCK, B.*, in 1883 (*Danby v. Tucker* (13)), or the subsequent case before *CAVE, J.* (*Re Ridgway* (14)). We are, therefore, unable in the present case to accept the law on this point as enunciated by *LOPES, L.J.*, in deference to the two latest decisions. But, assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case—the first, whether the undivided fourth part of the horse admits of delivery, or whether, on the other hand, it is to be regarded as incorporeal and incapable of tradition; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion, because, in our judgment, what took place between Benzon and Cochrane, before Benzon executed the bill of sale to Cochrane, constituted the latter a trustee for Moore of one-fourth of the horse Kilworth. Another objection to Cochrane's title was based on the bill of sale, which bore date July 26, 1888, and stated the consideration as a sum of £7,575 then owing by Benzon to Cochrane, and of the further sum of £2,425, then paid by Cochrane to Benzon, making together a sum of £10,000; whereas in fact at the date of the bill of sale Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September, and for sums amounting together to £8,300. It is said that by an agreement arrived at at the time this £8,300 due in futuro was to be taken as between the parties as represented by the sum of £7,575, but, if so, this agreement should, in our opinion, have been stated in the bill of sale, and we are, therefore, of opinion that the document was void as not truly stating the consideration for which it was given. For these reasons we are of opinion that this appeal should be dismissed with costs.

LORD ESHER, M.R.—In my opinion, it always was the law of England that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of and as a mere gift, or by will. Once conclude that such was always the law, and it follows that it is the common law. That law could not and cannot be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent court. But each of the above propositions is a fundamental proposition of law, i.e., a proposition which is not evidence of some other proposition which has to be proved, but a proposition the existence of which—i.e., the facts necessary to constitute which—is to be proved by evidence. The moment those facts are proved the proposition of law is proved, to which the legal tribunal will give effect. Although no court can properly alter such a fundamental proposition, the amount or nature of the evidence which will satisfy a court of the existence of such a proposition, as applicable to a particular case, may vary, and has varied, at different epochs.

I have no doubt that in every one of the propositions above enumerated, unless it be in the case of a gift by will, there was a time when, as part of the evidence of the existence of the proposition in a particular case, the courts always required that there should have been an actual delivery of the chattel in question. Though there was proof of a contract for good consideration, in a form which would now pass the property in a chattel without delivery, proof of actual delivery was required. Though the transfer was contained in a deed, proof of actual delivery was required. Equally the statement that one had declared in mere writing or in words that he did then, at the moment, transfer, without consideration, his chattel to another, and that the other did at the same moment state in writing or in words that he accepted such transfer, was not acted upon by the courts as proof of a gift executed, without proof also of an actual delivery. The evidence required in all cases was not complete without proof of an actual delivery. But in some of the cases the courts undoubtedly do not now require proof of an actual delivery. They do not require

A that piece of evidence. They do not in the case of a transfer by deed, or in the case of a transfer by a contract for good consideration, showing in its terms an intention that the ownership should pass at once before or without immediate delivery. If I thought that there was not a difference between those cases and the case of what has been called a gift in words by the donor, and an acceptance in words by the donee of a chattel, I should be strongly inclined to think that, even
B though the courts would have required in such case proof of an actual delivery, up to and including *Irons v. Smallpiece* (1), the courts might now in such case, as former courts did in the other cases, be satisfied by other evidence of the gift by the one and the acceptance of the gift by the other, which are the facts which constitute the proposition of a transfer of ownership of a chattel by way of and as a gift.

Up to the time of *Irons v. Smallpiece* (1), and afterwards, I have no doubt the
C courts did require proof of an actual delivery in such a case. Upon long consideration, I have come to the conclusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is
D a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the court on a question of gift or not is that the one gave and the other accepted.

E The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word,
F without giving; the other cannot accept then and there such a giving without then and there receiving the thing given. After these two things done, the donor could not get possession of the chattel without bringing an action to force the donee to give it back. Short of these things being done, the donee could not get possession without bringing an action against the donor to force him to give him the thing. But, if we are to force him to give, it cannot be said that he has given. Suppose the
G proposing donor offers the thing saying: "I give you this thing—take it;" and the other says, "No, I will not take it now; I will take it tomorrow." I think the proposing donor could not in the meantime say correctly to a third person: "I gave this just now to my son or my friend." The answer of the third person would (I think rightly) be: "You cannot say you gave it him just now; you have it now in your hand. All you can say is, that you are going to give it him tomorrow, if then
H he will take it."

I have come to the conclusion that in ordinary English language, and in legal effect, there cannot be a "gift" without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift. That being so, the necessity of their
I existence cannot be altered unless by Act of Parliament. For these reasons, I think that the decision in *Irons v. Smallpiece* (1) cannot be departed from, and I cannot agree with the decisions which have been cited to us of POLLOCK, B. (*Danby v. Tucker* (13)), and CAVE, J. (*Re Ridgway* (14)). I think, therefore, that we cannot agree with the main reason given by LOPES, L.J., for his decision in the present case, which he gave because he thought that, sitting as a judge of the Queen's Bench Division, he ought to follow the later decisions. His own opinion was in favour of maintaining *Irons v. Smallpiece* (1).

But I do entirely agree with what I understand was another ground on which he was prepared to decide this case, and which he found, as a fact, existed, namely, that the deed on which the claimant's case rested was obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud. For this reason, and the others mentioned by my brother FRY, I think the appeal must be dismissed. I wish to say that I am not prepared to differ in any respect from the judgment of my learned brothers; but I wish to add my own particular reason.

Appeal dismissed.

Solicitors: *Cooper & Sons; A. E. Sidney.*

[*Reported by A. H. BITTLESTONE, Esq., Barrister-at-Law.*]

MIDLAND RAIL. CO. AND ANOTHER v. ROBINSON

[HOUSE OF LORDS (Lord Herschell, Lord Watson, Lord FitzGerald* and Lord Macnaghten), May 2, 3, December 13, 1889]

[Reported 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194;
54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100]

Railway—Land—Purchase—Exception of mines and minerals—Opencast workings—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 77.

By s. 77 of the Railways Clauses Consolidation Act, 1845: "The [railway] company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased. . . ."

The word "mines" in the section is to be interpreted in the widest sense that can properly be given to it, and does not apply only to those minerals which, according to the custom of the district where they are situate, would ordinarily be won by underground workings, but comprehends all beds or strata of minerals which would be got by opencast or surface operations.

Great Western Rail. Co. v. Bennett (1) (1867), L.R. 2 H.L. 27, applied.

Glasgow Corpn. v. Farie (2), ante, p. 115, discussed and explained.

Railway—Land—Purchase—Subjacent or adjacent minerals—Owner "desirous of working the same"—Working by lessees or licensees—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 78.

By s. 78 of the Railways Clauses Consolidation Act, 1845: "If the owner, lessee, or occupier of any mines or minerals lying under the railway . . . be desirous of working the same, such owner, lessee, or occupier shall give to the [railway] company notice in writing of his intention so to do, thirty days before the commencement of working . . . and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway and if the company be willing to make compensation . . . [the owner, etc.] shall not work or let the same. . . ."

A mine-owner is "desirous of working" a mine or minerals even though he intends to do so, not by himself, but by his lessees or licensees.

* LORD FITZGERALD was present during the argument, but died before the House gave judgment.

- A Notes.** A new s. 78 of the Railways Clauses Consolidation Act, 1845, has been substituted by s. 15 of the Mines (Working Facilities and Support) Act, 1923, the substituted section being in substantially the same terms as the original section.

- Considered: *Ruabon Brick and Terra Cotta Co. v. Great Western Rail. Co.*, [1893] 1 Ch. 427; *Great Western Rail. Co. v. Blades*, [1901] 2 Ch. 624; *Bolsover Urban District Council v. Bolsover Colliery Co.*, [1947] 1 All E.R. 130. Referred to: *Bradford Corp'n. v. Pickles*, [1894] 3 Ch. 53; *Re Arbitration Between Lord Gerard and London and North Western Rail. Co.*, [1895-9] All E.R.Rep. 1144; *Re Todd, Birlestone and North Eastern Rail. Co.*, [1903] 1 K.B. 603; *Great Western Rail. Co. v. Carpalla United China Clay Co.* (1908), 73 J.P. 23; *North British Rail. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *A.-G. for Isle of Man v. Moore*, [1938] 3 All E.R. 263; *Mosley v. George Wimpey & Co.*, [1944] 2 All E.R. 135.

As to the rights relating to minerals under or near land acquired for a railway, see 26 HALSBURY'S LAWS (3rd Edn.) 353 et seq.; and for cases see 11 DIGEST (Repl.) 162 et seq. For the Railways Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

- D** (1) *Great Western Rail. Co. v. Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, 375.
 (2) *Glasgow Corp'n. v. Farie*, ante, p. 115; 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 11 Digest (Repl.) 163, 363.
 (3) *Caledonian Rail. Co. v. Dixon* (1879), 7 R. (Ct. of Sess.) 216; affirmed sub nom. *Dixon v. Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820; 43 L.T. 513; 45 J.P. 108; 29 W.R. 249, H.L.; 11 Digest (Repl.) 168, 395.
E (4) *Bell v. Wilson* (1866), 1 Ch. App. 303; 35 L.J.Ch. 337; 14 L.T. 115; 12 Jur.N.S. 263; 14 W.R. 493; 33 Digest (Repl.) 723, 2.
 (5) *Errington v. Metropolitan District Rail. Co.* (1882), 19 Ch.D. 559; 51 L.J.Ch. 305; 46 L.T. 443; 30 W.R. 663, C.A.; 11 Digest (Repl.) 108, 40.

- F** Also referred to in argument:

Darvill v. Roper (1855), 3 Drew. 294; 3 Eq. Rep. 1004; 25 L.T.O.S. 302; 3 W.R. 467; 61 E.R. 915; sub nom. *Davvell v. Roper*, 24 L.J.Ch. 779; 33 Digest (Repl.) 723, 1.

Hext v. Gill (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957; 33 Digest (Repl.) 728, 44.

- G** *Smith v. Great Western Rail. Co.* (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; sub nom. *Great Western Rail. Co. v. Smith*, 26 W.R. 130, H.L.; 11 Digest (Repl.) 169, 397.

Midland Rail. Co. v. Haunchwood Brick and Tile Co. (1882), 20 Ch.D. 552; 51 L.J.Ch. 778; 46 L.T. 301; 30 W.R. 640; 11 Digest (Repl.) 162, 354.

- H** *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 49, 269.

Rosse v. Wainman (1845), 14 M. & W. 859; 11 Digest (Repl.) 63, 894.

Caledonian Rail. Co. v. Sprot (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 11 Digest (Repl.) 175, 434.

Great Western Rail. Co. v. Fletcher (1860), 5 H. & N. 689; 2 L.T. 803; 6 Jur.N.S. 961; 8 W.R. 501; 157 E.R. 1355; sub nom. *Fletcher v. Great Western Rail. Co.*, 29 L.J.Ex. 253; 24 J.P. 516, Ex. Ch.; 11 Digest (Repl.) 167, 390.

- I** *Earl of Jersey v. Neath Poor Law Union Guardians* (1889), 22 Q.B.D. 555; 58 L.J.Q.B. 573; 53 J.P. 404; 37 W.R. 388; 5 T.L.R. 337, C.A.; 33 Digest (Repl.) 726, 27.

Pountney v. Clayton (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283; 47 J.P. 788; 31 W.R. 664, C.A.; 11 Digest (Repl.) 302, 2088.

Davis v. Treharne (1881), 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.; 33 Digest (Repl.) 851, 1033.

Aspden v. Seddon (1875), 10 Ch. App. 394; 44 L.J.Ch. 359; 32 L.T. 415; 39 J.P. 597; 23 W.R. 580; subsequent proceedings (1876), 1 Ex.D. 496; 46 L.J.Q.B. 353; 36 L.T. 45; 41 J.P. 804; 25 W.R. 277, C.A.; 33 Digest (Repl.) 851, 1035; 825, 874.

Love v. Bell (1884), 9 App. Cas. 286; 53 L.J.Q.B. 257; 51 L.T. 1; 48 J.P. 516; 32 W.R. 725, H.L.; 11 Digest (Repl.) 67, 913.

Buchanan v. Andrew (1873), L.R. 2 Sc. & Div. 286; sub nom. *Henderson v. Andrew*, 37 J.P. 436, H.L.; 33 Digest (Repl.) 844, 1004.

Jamieson v. North British Rail. Co. (1868), 6 Sc.L.R. 188; 11 Digest (Repl.) 163, *430.

Elliot v. North-Eastern Rail. Co. (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 11 Digest (Repl.) 172, 420.

R. v. Dunsford (1835), 2 Ad. & El. 568; 1 Har. & W. 93; 4 Nev. & M.K.B. 349; 2 Nev. & M.M.C. 524; 4 L.J.M.C. 59; 111 E.R. 219; 33 Digest (Repl.) 724, 7.

Appeal from a decision of the Court of Appeal (COTTON, LINDLEY and LOPES, L.JJ.), affirming a decision of CHITTY, J., reported 37 Ch.D. 386.

Rigby, Q.C., Sir A. Watson, Q.C., W. P. Beale, Q.C., and Baker for the appellants.

Sir Horace Davey, Q.C., Romer, Q.C., P. Gye and Radcliffe for the respondents.

Their Lordships took time for consideration.

Dec. 9, 1889.—The following opinions were read.

LORD HERSCHELL.—The main question in this case is whether certain beds of ironstone and limestone lying under and near the railway of the appellants are their property or the property of the respondent.

The appellant company, the Kettering, Thrapstone and Huntingdon Rail. Co., whose railway and undertaking are now under statutory powers worked by the other appellants, the Midland Rail. Co., purchased from the respondent's father and predecessor in title, in the year 1865, certain land on which a portion of their railway has been constructed. The purchase was made by virtue of the Company's Act passed in 1862 which incorporated the Railways Clauses Consolidation Act, 1845. The grant of the land contained no special provisions relating to the mines and minerals under the same. This being so, s. 77 of the incorporated Act operated to except from the grant any

"mines of coal, ironstone, slate, or other minerals . . . except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works."

It is admitted that there lay beneath the lands purchased, at depths varying from six to thirty-six feet, beds of ironstone and limestone, and it is not disputed that these are "minerals" within the meaning of the enactment just referred to. The principal question for your Lordships' determination is whether these beds of ironstone and limestone are "mines of" ironstone and other minerals, according to the true interpretation of that enactment, and, therefore, excepted from the conveyance to the company. I say this because, although considerable difference of opinion existed among those of your Lordships who were parties to the judgment in *Glasgow Corp'n. v. Farie* (2), I think all were agreed that the words "mines of" had relation not only to the word "coal" but to "ironstone, slate, or other minerals" also.

The turning point, therefore, of the decision upon this part of the case must be the interpretation to be put upon the word "mines" in s. 77 of the Railways Clauses Consolidation Act, 1845. It is contended on behalf of the appellants that the word "mines" is to be construed as applying only to those minerals which, according to the custom of that part of the country where they are situate, would ordinarily be won by underground workings, and that it does not comprehend minerals which

A according to such custom would be got by surface operations. It is contended, on the other hand, that the word comprehends all beds or strata of minerals without any reference to the method of working them. I have already, in *Farie's Case* (2), expressed my opinion as to the construction to be put upon the same words in a very similar enactment contained in the Waterworks Clauses Act, 1847. After
B carefully considering the able arguments addressed to your Lordships in the present case, I have seen no reason to alter the conclusion I then arrived at. I desire only to say that, when I stated (ante at pp. 125, 126) that, in my opinion, the reservation extended

“to all such bodies of mineral substances lying together in seams, beds, or strata, as are commonly worked for profit and have a value independent of the surface of the land,”

C I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not. I used them in order to emphasise the fact that it was not every scattered piece of mineral lying under the land that could be called a “mine,” but only mineral substances lying in seams, or beds, or strata.

D In dealing with this case it must be remembered that all that your Lordships have to do is to interpret the words of this enactment, and not to lay down (even if it were possible) any general rule as to the interpretation of the word “mines.” I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In
E such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under s. 77 of
F the Railways Clauses Consolidation Act, 1845, the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate.

G The object of s. 77 and the following sections was considered and explained in *Great Western Rail. Co. v. Bennett* (1). LORD CRANWORTH said (L.R. 2 H.L. at p. 40):

“It was obviously the intention of the legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary
H law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface.”

I The effect of this legislation was obviously very advantageous to the railway companies, and inflicted no wrong upon the owner of the minerals. The company, in the first instance, paid only for the surface of the land, and for such minerals as had to be taken in the making of the railway. They enjoyed the support of the underlying minerals for an indefinite term without paying for it. The mineral owner, as I have said, suffered no wrong. He still retained the ownership of the minerals, and the right to work them, which was all that he possessed before. The only burden imposed upon him, if it can be so called, was that when desirous of working the mines he should give the company an opportunity of purchasing them.

It appears to me that these considerations point to the intention of the legislature having been to use the word "mines" in the widest sense that can properly be given to it. Why should the legislature have reserved, and exempted the company from the necessity of purchasing, beds of minerals lying at such a depth below the surface, or with superincumbent strata of such a character that the minerals would ordinarily be worked by underground operations, and compelled the company at once to purchase and pay for beds of minerals which would, in ordinary course, be won by surface operations? It is urged that in the latter case the working of the minerals would remove the very thing which the company had bought, and directly interfere with the existence of the railway. But it must be remembered that the surface might be rendered just as unfit for railway purposes by subterranean workings as it would be by operations from the surface.

The learned counsel for the appellants asked what the company could be said to have acquired by the purchase of the land if its very surface could be directly interfered with by mining operations? I fully feel the force of this question and the difficulty which it involves. If this difficulty were altogether got rid of by the construction contended for by the appellants, I admit that a strong ground could be shown for yielding to their contention. But it was properly conceded by the learned counsel for the appellants that this was not the case. Where a "mine," within the meaning attributed to that word by them, cropped out at or near the surface on a part of the railway, the same difficulty would arise; for it was not denied that this would be part of the mine, and, therefore, within the reservation. So, too, although a seam of minerals may lie at such a depth beneath the surface of the land purchased that it would ordinarily be got by underground workings, yet, owing to the works necessary for making the railway, be it a cutting or tunnel, the minerals may come to form the surface on which the railway rests. Such a seam would be a "mine" within the construction suggested, and, therefore, reserved to the landowner, together with the right to work it, and yet the same question might be asked: Can it have been intended that such owner should have the right to take away the surface upon which the rails are laid?

It seems to me, too, that the appellants' construction, if adopted, would of itself give rise to serious difficulties and inconveniences. When land was to be taken for the purposes of a railway it would be necessary to ascertain what minerals lay beneath the land which would not, according to the usual manner of working in the district, be got by underground workings. For these would become the property of the railway company, and their value must, of course, be taken into account in fixing the price to be paid for the land purchased. And further the question what minerals were reserved, and, therefore, whose the property in them was, might have to be determined many years after the purchase by an inquiry into what was the usual mode of working in the district at the time of the conveyance, which, perhaps, might not have been the same as at the time when the controversy arose. And there are some cases where it might be almost impossible to say what minerals were, and what were not reserved. Beds of slate, I believe, exist which have been worked both by surface workings at the face and by levels driven underground. How much of such seams of slate would be reserved, and how much fall to be purchased by the company, would, I think, on the contention of the appellants, be a question almost impossible of solution.

But besides this, under s. 78 the owner of mines not under the railway, but within the prescribed distance from it, is bound to give notice before working, so that the company may have the option of purchasing. If the word "mines" bears the meaning I have attributed to it, the company need not concern themselves about the existence of minerals, whether near the surface or not, within the prescribed distance. But, if it is to have the more limited construction contended for by the appellants, it would be necessary for the company not only to ascertain what minerals lie under the lands adjoining any embankments or other works which would be injured by the working of what I will call surface minerals, but often to

A purchase these minerals, and the land under which they lie, for the protection of their works from subsidence.

Seeing, then, that the difficulties pointed out by the appellants are not avoided by adopting their view, and that its adoption would give rise to the difficulties and inconveniences I have pointed out, I think your Lordships will do well to construe the language used with the aid of the light that is thrown upon it by the intention of the legislature as manifested in the provisions relating to mines and minerals lying under and near the railway. And the considerations upon which I have dwelt point to the conclusion I have already indicated, that the widest construction ought to be given to the word "mines" which is possible, without improperly straining the language used. Is there anything in the terms of the enactment compelling the narrower construction for which the appellants contend? I think not.

Applying oneself to the consideration of the word "mines," apart from the document or context in which it is found, I cannot think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working. If aid is sought from the lexicons, and the definitions there given are reviewed, I do not think that they afford support to such a construction. DR. JOHNSON, I may observe, defines a "quarry" as a "stone mine." I see no reason to doubt the soundness of the view I expressed in *Farie's Case* (2), that in ordinary parlance the word "mines" is not used to describe unwrought beds of minerals. I think it is ordinarily applied only to beds of minerals which are being or have been wrought; but in the enactment with which we are dealing it is obviously impossible so to interpret the word. I have already pointed out why I think the meaning attributed to the word by the courts, when contracts between individuals have been under consideration, does not afford a guide for construing this enactment. These are my reasons for adhering to the construction which I put upon the words "mines of coal, ironstone, slate, or other minerals" in *Farie's Case* (2).

So far I have dealt with the case apart from authority; but it is not unworthy of consideration that the decided cases support the view adopted by the court below. In *Great Western Rail. Co. v. Bennett* (1), LORD CHELMSFORD, L.C., says (L.R. 2 H.L. at p. 38):

"That this section reserves to the mineowner all the minerals, however near they may be to the surface, unless the company choose to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried or used in the construction of the company's works,' as these will of course be the minerals lying nearest to the surface."

I admit the force of the criticism of the appellants' counsel, that the words quoted by LORD CHELMSFORD do not necessarily lead to the inference he drew from them, inasmuch as in making the railway it might be necessary in cuttings or tunnels to carry away or use minerals lying far below the surface. But the fact remains that the noble and learned Lord intimated the opinion that all the minerals, however near they might be to the surface, were reserved. And the other learned Lords who took part in the judgment, not only do not dissent from LORD CHELMSFORD's view, but use language which I think shows that they shared it. An opinion thus expressed ought not to be lightly departed from. It is impossible to say how many transactions in the last twenty years may have been carried through on this view of the law. There has been no judicial expression of a contrary opinion that I am aware of until quite recently, in *Farie's Case* (2), while both in this country and in Scotland the point has been actually decided in accordance with the view taken by the learned judges in the present case. Indeed, in *Caledonian Rail. Co. v. Dixon* (3), where the point was decided against the company by the Court of Session, although the case was brought to your Lordships' House by way of appeal upon another point, the railway company did not seek for a review of the decision of the Court of Session on the question now in controversy.

It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he had no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with the court below that this objection cannot, upon the true construction of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase the minerals. I quite concur with what *COTTON, L.J.*, said (37 Ch.D. at p. 397), that

"there must be not only an expression of desire but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the court would not allow that to be acted upon."

But in the present case the learned judge who tried the action, and the Court of Appeal, have come to the conclusion that there was a real and bona fide desire to work.

After considering the arguments insisted upon by the learned counsel for the appellants I find myself unable upon this point to differ from the courts below. I am not a little influenced by the fact that the minerals on either side of the railway in the immediate neighbourhood of these now in question have actually been gotten by lessees of the respondent. It is urged that the minerals under the railway were left unworked because the respondent thought he had no right to them. This matters not as regards the point I am now concerned with. Indeed, it seems to me to make the case of the respondent stronger. For the reasons I have submitted to your Lordships, I think the judgment appealed from should be affirmed, and the appeal dismissed.

LORD WATSON.—I also am of opinion that both courts below have come to a right conclusion in this case, and that the judgment of the Court of Appeal, sustaining the decision of *CHITTY, J.*, ought to be affirmed. Questions of nicety have arisen, and may yet arise, as to the particular substances meant to be included in the general words "or other minerals," as these occur in s. 77 of the English, and s. 70 of the Scottish Railways Clauses Act, 1845. I do not think that any substantial question of that kind is presented in this case. The substances to which the argument at the Bar has been confined are "ironstone," which is one of the minerals specially excepted in these clauses, and "limestone," which appears to me to be so much ejusdem generis with the minerals enumerated that it must necessarily be held to come within the description of "other minerals."

The real point of difficulty which this case presents is due to the circumstance that the statutory exception is not of "minerals," but of "mines of minerals." It is mutually conceded that the ironstone and limestone below the appellants' railway, which the respondent has notified his intention to excavate, can only be worked, and according to the custom of the district would be properly worked, by open cast. But the appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being "mined," using that term in its strictest sense, as signifying operations conducted wholly underground, and not open to the light of day.

That is a proposition which your Lordships had recently occasion to consider in *Glasgow Corp'n. v. Farnie* (2). In that case I came to the conclusion that every substance, being a mineral within the meaning of these clauses, is reserved to the owner irrespective of the method by which it may be wrought. I there said that, in s. 18 of the Waterworks Clauses Act, 1847 (which is in the same terms as ss. 77 and 70 of the Railway Clauses Acts of 1845), the word "mines" must be taken to signify "all excavations by which the excepted minerals may be legitimately worked and got." I do not think it is necessary to say more than that

A I adhere to the views which I adopted in *Glasgow Corpn. v. Farie* (2). But, on consideration, I think it is more accurate to say that the expression "mines of coal, etc." is used by the legislature to denote the minerals in situ, and has no reference to the manner in which they can be worked. The result is the same, and rests upon the same considerations.

B I concur in the reasons which have just been assigned for his opinion by LORD HERSCHELL. After all, this is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines. The general policy of the Railway Clauses Acts, and their special provisions, alike appear to me to point to the result at which the noble and learned Lord has arrived. In my opinion, the appellants have failed to substantiate their averment that the respondent does not entertain a real and bona fide intention of working the minerals in question; and I, therefore, concur in the judgment which has been moved.

LORD MACNAGHTEN.—The principal question, if not the only question, in this case is, what is the meaning of the word "mines" as used in s. 77 of the Railways Clauses Consolidation Act, 1845, and in the heading to that part of the Act. On this question I have the misfortune to differ from your Lordships. I abide by the views I expressed in *Farie's Case* (2). I continue to think that the word was used both in the heading and in the section in the sense which, if I am not mistaken, every English judge who had occasion to consider the meaning of the word, before *Farie's Case* (2) was decided, took to be its ordinary signification.

E It seems to me that on such a point the opinions of such judges as KINDERSLEY, V.-C., TURNER, L.J., and SIR GEORGE JESSEL, M.R., are probably a safer guide than any definitions or illustrations to be found in dictionaries. KINDERSLEY, V.-C., was clear on the point. So was TURNER, L.J., who agreed with the Vice-Chancellor on that question in *Bell v. Wilson* (4), and dealing with an exception of "mines within and under the lands whether opened or unopened," observed that those are "words which are ordinarily used with reference to underground workings." In *Errington v. Metropolitan District Rail. Co.* (5), where, contrary to the view thrown out by some of the noble and learned Lords in *Great Western Rail. Co. v. Bennett* (1), it was held that railway companies could acquire mines compulsorily, SIR GEORGE JESSEL, M.R., remarks (19 Ch.D. at p. 571):

G "There are no mines in the ordinary sense under these lands; at least it is not shown there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface."

H If that be the ordinary meaning of the word, if it was really the intention of Parliament that all minerals however worked should be deemed to be excepted from conveyances to railway companies unless expressly mentioned therein, I cannot conceive why the word "minerals" is not to be found in the heading to this part of the Act, or why the word "minerals" was not used in s. 77 instead of the expression "mines of coal, ironstone, slate, or other minerals," or why the legislature in the heading and in that section avoided the use of the common, obvious, and well-understood expression "mines and minerals."

I Whether the view of the appellants or that of the respondent be accepted, some difficulties and inconveniences unquestionably may present themselves. But I think the appellants were right in saying that the difficulties which attend their construction, however formidable they may appear in argument, are not really practical difficulties, and that those difficulties are reduced to a minimum since it has been decided that railway companies are not disabled from purchasing mines compulsorily if they think fit to do so. It was said in argument that, if the appellants' construction were adopted, railway companies might be exposed to danger by the working of surface minerals on adjacent lands. But in answer it was

pointed out that, if surface minerals are not within the enactment with respect to "mines lying under or near the railway," the ordinary rule as to adjacent support so far as regards surface minerals would be applicable. A

Some reliance was placed on certain expressions in LORD CHELMSFORD's opinion in *Great Western Rail. Co. v. Bennett* (1) which seem to show that in his Lordship's opinion all minerals of whatever kind, and however near the surface, were reserved by the Act to the landowner. But it is to be observed that the question which has arisen in the present case could not possibly have arisen in that case, because the exception in the conveyance under consideration in that case did not follow the words of the Act. It excepted in terms both minerals and mines. The point, therefore, possibly was not present to his Lordship's mind. On the other hand, LORD WESTBURY's opinion seems to favour the appellants' construction. That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's Case* (1). But I do not think that it necessarily follows from that circumstance that a mine-owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface. For these reasons, and the reasons I have expressed in *Farie's Case* (2), I should, but for your Lordships' opinion, be disposed to reverse the judgment under appeal. B C D

Appeal dismissed.

Solicitors: *Beale & Co.*; *Capel Cure & Ball*, for *Lamb & Stringer*, Kettering.

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*] E

R. v. POWNALL AND OTHER JUSTICES

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Mathew, J.), April 18, 1890]

[*Reported* 63 L.T. 418; 54 J.P. 438; 6 T.L.R. 282]

Licensing—Licence—New licence—Erection of house "in accordance with plans"—"Substantial alteration"—Question for justices—Licensing Act, 1874 (37 & 38 Vict., c. 49), s. 22.

A provisional licence had been granted upon plans which had been confirmed by the confirming committee. These plans had been prepared for a site on a level surface, whereas the site was on a slope, and it became necessary to alter the plans. The premises having been completed in accordance with the altered plans, an application was made to the licensing justices for the final order, but this application was refused as the justices took the view that the building was not "in accordance with the plans," under the Licensing Act, 1874, s. 22, and that they had no jurisdiction to sanction any variation in plans which had been confirmed by the confirming authority. F H I

Held: (i) a house was completed "in accordance with the plans" if it was completed "in substantial accordance with the plans"; (ii) if the house was completed in substantial accordance with the plans, the justices were bound to grant a final order, and they were not called on to bear in mind the fact that the plans had been approved by the confirming authority; (iii) if there was a substantial variation between the house as completed and the plans, the justices would be justified in refusing to grant the final licence; (iv) whether or

A not the house was completed in accordance with the plans was a question of fact for the justices, but the Divisional Court would interfere with their finding in the present case as there was evidence that they had taken into account other matters besides the pure matter before them.

B PER LORD COLERIDGE, C.J.: A substantial alteration means not an alteration necessitated by circumstances, leaving the house practically just what it was before, but a real substantial alteration in the character of the building from that which was originally licensed and confirmed.

Per MATHEW, J.: A substantial variation is something which makes the premises intended to be used as a public-house less fit than they would have been if the plans had been accurately followed.

C **Notes.** The Licensing Act, 1872, s. 37, has been repealed, and under the Licensing Act, 1961, s. 12, "no justices' licence granted after the coming into force of this section [i.e. on Nov. 1, 1961] shall require confirmation." The Licensing Act, 1874, s. 22, has been replaced by the Licensing Act, 1953, s. 10, as modified by the Licensing Act, 1961, s. 15.

D As to provisional licences, see 22 HALSBURY'S LAWS (3rd Edn.) 545-546; as to the effect of alterations and additions on renewal, see *ibid.* 550; and for cases see 30 DIGEST (Repl.) 44-45. For the Licensing Act, 1953, s. 10, see 33 HALSBURY'S STATUTES (2nd Edn.) 156; and for the Licensing Act, 1961, ss. 12 and 15, see 41 HALSBURY'S STATUTES (2nd Edn.) 584 and 587.

Case referred to in argument:

E *R. v. Adamson* (1875), 1 Q.B.D. 201; 45 L.J.M.C. 46; 24 W.R. 250; sub nom. *R. v. Tynemouth Justices*, 33 L.T. 840; 40 J.P. 182; 33 Digest (Repl.) 333, 1580.

F **Rule Nisi** for a mandamus commanding the licensing justices of the Holborn Division of the county of London to hear and determine the matter of an application for a final order, declaring that the house called the "Three Horse Shoes" had been completed in accordance with the plans for a provisional licence made in the year 1886.

G The case was previously before the court sub nom. *R. v. London Justices* (62 L.T. 458). Under a private improvement Act, the Metropolitan Board of Works purchased and pulled down four fully licensed houses, one of which was "The Three Horse Shoes," in High Street, Hampstead. The board abandoned three of these licences, and applied to the licensing justices for leave to remove the licence of the Three Horse Shoes to a new site in Heath Street, Hampstead. In March, 1886, the justices of the Holborn Licensing Division, on the application of the board, granted to the clerk of the board an order sanctioning the provisional removal of the licence to the new site, and they also granted a provisional licence for a house to be erected on such site. These orders were confirmed on May 5.

H At the annual licensing meeting in March, 1887, the board, not having completed the improvements, applied for a renewal of the provisional grants, and the justices renewed the provisional licence for the house to be erected on the new site, but not the provisional licence for removal of the old licence. In November, 1887, the board sold on a building lease the new site with the benefit of the provisional licence to Messrs. Buxton and Hanbury, and a lease was granted to them, in which they, the lessees, covenanted to build a public-house in pursuance of certain plans at a cost of £3,000. These plans had been prepared for a house on a level site, whereas the new site was on a considerable slope. At the annual licensing meeting in March, 1888, Messrs. Buxton and Hanbury applied for a renewal to the board's clerk of the provisional licence granted in 1886, and renewed in 1887. This application was refused, but, on appeal to the Middlesex Quarter Sessions, the justices allowed the appeal, and renewed the provisional licence, which was transferred by the licensing justices, on June 5, 1888, to Messrs. Buxton and Hanbury. The public-house was subsequently erected by the purchasers, Messrs. Buxton and Hanbury, on the new site, in accordance substantially with the

original plans, but the plans having been prepared for a level site, the three side entrances were at some height above the level of the pavement. A

At the annual licensing meeting for the Holborn Division Messrs. Buxton and Hanbury, having completed the public-house, applied to the justices for a final order, under s. 22 of the Licensing Act, 1874, which the justices refused on the ground that the original plans had not been followed. Application was then made to the justices to renew the provisional licence so as to enable alterations to be made in accordance with the plans. This application was refused by the justices; but, on appeal, the County of London Sessions reversed that decision and renewed the provisional licence. A rule for a certiorari to quash this order of the sessions was discharged in December, 1889: see *R. v. London Justices*, 62 L.T. 458. B

In January, 1890, application was made to the licensing justices for the final order, but the justices refused to grant a final order on the ground that, on the case being last argued before the court, the judges were not reminded that the original plans had been settled by the confirming authority, and the licensing justices thought that they had no jurisdiction to alter these plans, or accept any alteration in them. They, therefore, refused the final order. A rule nisi for a mandamus was then obtained to command them to hear and determine the application for the final order. Upon the granting of this rule, the court (LORD COLERIDGE, C.J., and LORD ESHER, M.R.) stated that the justices had taken a wrong view in supposing that they were called upon to vary the approved plan, and that the real point which they had to determine was whether the house had been built substantially in accordance with it. C

By s. 37 of the Licensing Act, 1872:

"In counties a grant of a new licence shall not be valid unless it is confirmed by a standing committee of the county justices, in this Act called the county licensing committee." E

By s. 22 of the Licensing Act, 1874:

"Any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would, on application, have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly. A provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices made after such notice has been given as may be required by the justices at a general annual licensing meeting or a special sessions held for licensing purposes. Such declaration shall be made if the justices are satisfied that the house has been completed in accordance with such plans as aforesaid, and are also satisfied that no objection can be made to the character of the holder of such provisional licence." F

The justices did not show cause by counsel, but an affidavit made by the chairman was read. This affidavit set out s. 37 of the Licensing Act, 1872, as to confirmation by the county licensing committee, and s. 22 of the Licensing Act, 1874, and submitted that a provisional licence having been confirmed, there could be no deviation from the plans upon which it was originally granted; that the new provisional licence was refused because the justices were of the opinion that in consequence of the demolition of property caused by the improvements in Hampstead, no licensed house was there required; that the alterations proposed by the owners would affect and interfere with the internal arrangements, and that the justices considered that the house differed materially from the plans confirmed by the licensing committee, and that they had no power to sanction such difference; that G

A the application was opposed by nine hundred inhabitants, and the justices did not consider the licence required. The affidavit concluded as follows :

B “Whether they, the justices, are at liberty, in making a final order, to allow any variation from the plans approved by the licensing committee; but if they have power to make trifling variations, they submit that they would not have been justified in granting a final order in respect of a house which is in their opinion substantially at variance with the plans sanctioned by the licensing committee.”

Poland, Q.C., and Forrest Fulton (Sir Charles Russell with them) in support of the rule.

C **LORD COLERIDGE, C.J.**—If the conclusion against which the applicants for this mandamus are struggling were to be arrived at, the consequence would certainly follow that in such a building as one of those enormous structures in London, costing perhaps hundreds of thousands of pounds, if there was a water-closet placed on one side of the door instead of another, and the plans for it had been approved by the licensing justices and by the confirming committee, if there was the very slightest alteration made in those plans in the erection, the whole of the hundreds of thousands of pounds expenditure would be utterly thrown away by the simple and unappealable decision of a court of half-a-dozen magistrates, on the ground that the building had not been erected “in accordance with the plans”—these being the words of the statute—and that, therefore, they had no jurisdiction but to refuse a licence to a building so constructed.

E In this case, a very considerable sum of money, nearly £7,000, which has been expended upon the faith of the public bodies, upon as binding an undertaking in honour between the parties to it as ever was made in this world, and as honourably fulfilled by the applicants in this case as ever understanding was fulfilled, would all be thrown away because, from some blunder in the plans, some mistake in copying the plans, some clerical error, so to speak, in the plans, there was an erection F which was not in absolute and strict accordance with every line and every detail of the original pieces of parchment or paper as the case might be which had been laid before the two authorities—the licensing justices and the confirming committee. The conclusion, if it were really the conclusion of the law, would call out loudly for a change in the law for the purpose of preventing such gross injustice as might result from such a state of the law, if it existed.

G I must say—and I speak with respect—it seems that, against the very clearest intimation that could be given, the magistrates of the Holborn Division appear to have thought that not only had we not said that that was the state of the law, but that the consequence of it and the result of it had never been brought to our minds at all; whereas the whole matter would have been a matter of indifference, and would have hardly been worth while to bring before this court, if it had not been for H the very serious interests involved, and the cruel injustice that would have been done to the applicants if the view of the Holborn justices were correct.

Following the master as he read the affidavit of Mr. Pownall, it is very difficult to put one’s finger exactly upon the point upon which Mr. Pownall relies to show cause why this mandamus should not go. The first objection was, that the house had been too long in building, and they would not grant a licence. Then they were I obliged to grant the licence, because the quarter sessions granted it. Then there was a question whether it should be renewed, and they said there was no appeal in the case of a refusal to renew this licence. There being an appeal to this court, that appeal was prosecuted successfully by the applicants, and the licence was renewed.

Then came the question whether there was to be a final order under the Act of Parliament. The final order is obliged to be given by the Act of Parliament; the justices have no discretion, according to the Act of Parliament, if all conditions precedent have been properly fulfilled, which they had been here—I mean all

proper bodies having been applied to, and the proper consents having been got— they are obliged to give the final order, which it is only just they should be obliged to give, because upon the faith of getting the final order all the money has been laid out. They are obliged to give the final order if the building is constructed in accordance with the plans. A

Then the applicants were met first of all with the objection. "It is not in accordance with the plan; Oriel Street is on a hill, and this plan shows a flat. B You have built your house on a hill, therefore, you have not built your house according to the plan." Then the applicants say that, "Of course, speaking literally, that is true, but we have done the best we could; we have made the doors opening into Oriel Street. It is true, from the necessity of the case, that on the lower part of the house the doors are some way above the level of the road, but we will meet that by steps." The justices say that that would be a great C difference, a very substantial difference, and that it was never intended that the approach to the house should be by steps, because, as the Master of the Rolls pointed out, to frequenters of public-houses that might be an inconvenient mode of ingress and egress. Then the applicants say, "We will do the best we can; we will construct the entrances as well as we can on the flat, and the doors which are on the slope we will turn into windows." That, as I understand, is what has been D done, and that is how it stands.

Then they apply again. The justices say, "We cannot do that because you have substantially altered; you have turned doors into windows; you have now failed entirely to bring it in accordance with the plans; and as we sanctioned those plans on the flat, and as the confirming authority confirmed the plans on the flat, and as we cannot get at the confirming authority to know what they would have said if it had been pointed out to them that there was this mistake, our jurisdiction is at an end. We cannot give you the order. We the less regret it because E we do not think a public-house is required at all.

Then they come to this court, and this court tells them that they may consider this question, and then says Mr. Pownall, "It seems to have entirely escaped the Queen's Bench Division that there were two authorities." Well, we should have F been abnormally stupid if it had escaped us, and the sanction of the confirming authority was made one of the points before us when the case was argued. I suppose we did not sufficiently express ourselves in terms. This thing could not possibly have been helped being done, because there was the Act of Parliament, and the house could not have been built without the sanction of the confirming authority.

The matter then came again before the Queen's Bench Division, and we had the G advantage of the Master of the Rolls sitting here, and he took exactly the same view. He said in pointed terms that "in accordance" means substantial accordance, and he agreed with the illustration I put, that if the contention of the justices was correct, £6,000 or £7,000, or perhaps £60,000, might be spent in the erection of a magnificent hotel, and because of some undoubted alteration, an unquestioned alteration in the plans either inside or outside, they might say H that they had no authority to grant a licence. LORD ESHER, M.R., as well as myself, gave the strongest possible intimation that that was not so, and that they had the power of looking at the thing fairly, and that they were not bound by the strict, literal, line-by-line, accurate accordance with the plans; but that they must look at the thing broadly and sensibly, and see whether, to a common intent, as it used to be said, the building as put up was substantially that which had been I designed, and that, if it was so, then by the words of the statute they were obliged to give the licence which they have hitherto refused.

It is very difficult to make out upon what exact ground the magistrates have now appeared, because they have appeared, though not by counsel. They have intimated throughout that they do not think the house is required, and they do not think that the plans would have been approved if they had been as they are now. Therefore, they intimate various grounds, but they submit as their chief ground the paragraph which occurs in Mr. Pownall's affidavit, and I suppose Mr. Pownall there

A speaks for his colleagues as well as for himself. These are the words of it: "The justices submit whether they are at liberty in making a final order to allow any variation from the plans approved by the licensing committee; but if they have power to allow trifling variations, they submit that they would not have been justified in granting a final order in respect of a house which, in their opinion, is substantially at variance with the plans sanctioned by the licensing committee."

B If this house really was substantially at variance in the ordinary sense of the word, I quite agree that they would have a perfect right to refuse the licence which is in dispute; but if they ask these questions, and they really and truly desire information, I answer that question thus: they may allow variations—how much or how little must be left in each case to their good sense. "In accordance," the Master of the Rolls said, and I said and I repeat it, means in substantial
C accordance, and if the house is substantially in all essential respects that which the licensing justices approved of, and the confirming authority sanctioned, then they are bound to grant the final order.

Then they ask, secondly, in effect, whether they are bound to do that in a case where they think there is a substantial difference. Answering it first of all by the letter, I say they are not bound. If, honestly looking at the case, they come to the
D conclusion that there has been a substantial alteration, not an alteration necessitated by the circumstances, leaving the house practically just what it was before, but a real substantial alteration in the character of the building from that which was originally licensed and confirmed, I say they have jurisdiction undoubtedly to refuse that licence. But I take the liberty to add this, that there are cases which show that, even on questions of fact, they must bring to the determination of it a
E clear judicial mind, and that if their determination of fact is made under such circumstances that this court can see that other matters than the pure matter before them have entered into their decision, then it is not a judicial decision, it is not an exercise of jurisdiction, and, toties quoties, this court will interfere to compel justice to be done.

F **MATHEW, J.**—I am entirely of the same opinion on both points. As my Lord has pointed out, the justices tell us, and I accept their statement, that they are desirous of being informed whether they are to be at liberty, in making a final order, to allow any variation from the plans approved by the licensing committee. The answer to that is, yes. It is an answer that one is at the pains of repeating, because on a former occasion, when this matter was discussed and we were assured
G that the justices were only anxious to know what their duty was in the matter, we went out of our way to inform them that, in our judgment, a variation might be allowed, supposing it was not shown to be a substantial variation. By "substantial variation" I understand something that makes the premises intended to be used as a public-house less fit than they would have been if the plans had been accurately followed.

H Mr. Pownall appears to have thought that that intimation of our view on a former occasion was rash and reckless, because we had not noticed, as he thought, that the plans had been submitted not merely to the justices, but also to the licensing committee. His argument appears to be, that no variation could be permitted from those plans without the sanction of the licensing committee as well as the justices. I once more repeat, that it is for the justices to say whether the final
I order shall be made or not, and they are not called upon to bear in mind the fact that the plans were approved not merely by them, but by some other body whose jurisdiction in the matter ends with their approval. It is for the justices, and the justices alone, to say, finally, whether the plans have been substantially followed or not.

Then with reference to the other point, they desire to be informed if they have the power to allow trifling variations—whether they would be justified in granting a final order in respect of a house which is in their opinion substantially at variance with the plans sanctioned by the licensing committee. I quite agree with what my

Lord has said that, if there be a substantial variation, they would be justified A
in refusing to grant the licence, that is, substantial in the sense in which I have
used the expression. They must be guided in their determination by judicial
reasons and judicial reasons only, and as I believe they desire to be informed here
whether in the judgment of the court there is any evidence in the particular case
that the structure was not in substantial accordance with the plans, I venture to
express my opinion that there is no such evidence, and that the duty of the justices B
in this case is, judicially and properly exercised, to grant this final order.

Rule absolute for mandamus.

Solicitors: *Clapham & Fitch.*

[Reported by W. ORR, Esq., Barrister-at-Law.] C

R. v. GREENFELL. Ex Parte DIRECTORS OF GREAT WESTERN RAIL. CO.

[QUEEN'S BENCH DIVISION (Mathew and A. L. Smith, JJ.), February 10, 1888]

[Reported 20 Q.B.D. 410; 58 L.T. 765; 52 J.P. 772;
36 W.R. 506; 16 Cox, C.C. 410; 57 L.J.M.C. 31] E

*Coroner—Quashing of inquisition—Power of court—Irregularity on its face—
Insufficient designation of person charged with manslaughter—Coroners Act,
1887 (50 & 51 Vict., c. 71), s. 20 (1).*

By their inquisition a coroner's jury found that "the directors of the Great F
Western Railway Co." did feloniously kill and slay G. On a rule for a certiorari
to remove the inquisition into the Queen's Bench Division to be quashed on the
ground that it was bad on the face of it for not describing the persons charged
by name, or to amend it under s. 20 (1) of the Coroners Act, 1887.

Held: s. 20 (1) of the Coroners Act, 1887, only contemplated an amendment G
by the criminal court before which the persons charged would be brought up for
trial and did not impair the power of the Queen's Bench Division to quash an
irregular inquisition; in the present case the inquisition was irregular on the
face of it, and it would be quashed.

Per A. L. SMITH, J.: I am by no means certain that charging a body of
directors like this, without naming them, "sufficiently designates" the person
charged within the meaning of s. 20 (1). H

Notes. Considered: *R. v. Oxford Circuit (Clerk of Assize)*, [1897] 1 Q.B. 370.

As to jurisdiction of Queen's Bench Division to quash a coroner's inquisition,
see 8 HALSBURY'S LAWS (3rd Edn.) 529; and for cases see 13 DIGEST (Repl.) 164 et
seq. For s. 20 of the Coroners Act, 1887, see 4 HALSBURY'S STATUTES (2nd Edn.)
834. I

Rule Nisi for certiorari on behalf of the directors of the Great Western Rail-
way Co. directed to G. P. Greenfell, Esq., one of the coroners of the county of
Cornwall, the Director of Public Prosecutions, and the next-of-kin of T. J. George,
deceased, to show cause why a writ of certiorari should not issue to remove into the
Queen's Bench Division an inquisition taken before the coroner on Jan. 30, 1888,
and why the inquisition, when removed, should not be quashed on the ground that
it was bad on the face of it for not describing the persons charged by name. The
inquisition in question found:

A "that the directors of the Great Western Railway Co. on Jan. 20 in the year aforesaid, did feloniously slay one Theophilus John George, against the peace of our Lady the Queen, her Crown and dignity."

Poland for the Director of Public Prosecutions.

Asquith for the next-of-kin of the deceased.

B *Sir Henry James, Q.C.*, and *R. S. Wright* for the directors of the Great Western Railway Co.

C **MATHEW, J.**—I am of opinion that this rule must be made absolute. There can be no question that this inquisition is, on the face of it, irregular, and should be quashed. The question which we have to determine is whether s. 20 of the Coroners Act, 1887, affects and impairs the power of the Court of Queen's Bench to quash an inquisition which is irregular on the face of it. I am clearly of opinion that it does not. What s. 20 of the Act of 1887 contemplates is an amendment by the criminal court before which the inquisition may come when the person in question is brought up for trial. We have nothing to do with the power of that court. It is our duty here to exercise the established authority of this court and quash this inquisition.

D **A. L. SMITH, J.**—I am of the same opinion. I entirely agree that our original jurisdiction to quash informal inquisitions is not touched by the statute; but I wish to say further that, if it were, I am by no means satisfied that an amendment could be made in this case, under s. 20 of the Coroners Act, 1887, by any court. The section says, where an inquisition charging a person with murder or manslaughter "sufficiently designates" that person. I am by no means certain whether E charging a body of directors like this, without naming them, "sufficiently designates" the person charged within the meaning of this section.

Rule absolute granted.

Solicitors: *Solicitor to the Treasury; Bolton & Co.*, for *W. Dale*, Penzance; *R. R. Nelson*.

F [*Reported by R. A. BENNETT, Esq., Barrister-at-Law.*]

ANDREWS v. BARNES

[COURT OF APPEAL (Cotton, Fry and Lopes, L.JJ.), May 29, 30, June 12, 1888]

[Reported 39 Ch.D. 133; 57 L.J.Ch. 694; 58 L.T. 748; 53 J.P. 4;
36 W.R. 705; 4 T.L.R. 609]*Costs—Practice—Jurisdiction—Costs as between solicitor and client—Action against trustees of charitable fund—Action dismissed—Unjustifiable litigation.*

There was inherent in the Court of Chancery, and there is now in the High Court of Justice, in matters of equitable jurisdiction a general and discretionary power to give costs as between solicitor and client.

An action was brought by the vicar and churchwardens of a parish to recover from the defendants, the members of a local committee, a small fund, which had been handed over to them for a charitable purpose. The plaintiffs alleged that the fund had been handed over subject to a condition which had become incapable of fulfilment. At the trial the plaintiffs failed to make out their case and the action was dismissed. The trial judge, being of opinion that the action was unjustifiable and that the fund ought not to be diminished, ordered the plaintiffs to pay the defendants' costs as between solicitor and client.

Held: the trial judge had jurisdiction to make the order.

Quære, whether the judges of the High Court have any power to award costs as between solicitor and client in matters of common law jurisdiction.

Mordue v. Palmer (1) (1870), 6 Ch. App. 22, approved.

Cockburn v. Edwards (2) (1881), 18 Ch.D. 449, doubted.

Notes. Referred to: *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; *Read v. Gray*, [1952] 1 All E.R. 241; *The Maystone and the Albion*, *Thomason v. Swan*, *Hunter*, and *Wigham Richardson, Ltd.*, [1954] 2 All E.R. 859.

As to practice and procedure on costs, see 30 HALSBURY'S LAWS (3rd Edn.) 419 et seq.; and for cases see DIGEST (Practice) 890 et seq.

Cases referred to:

- (1) *Mordue v. Palmer* (1870), 6 Ch. App. 22; 40 L.J.Ch. 8; 23 L.T. 752; 35 J.P. 196; 19 W.R. 86; Digest (Practice) 899, 4397.
- (2) *Cockburn v. Edwards* (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; 30 W.R. 446, C.A., Digest (Practice) 900, 4399.
- (3) *Jones v. Coreter* (1742), 2 Atk. 400.
- (4) *Burford Corpn. v. Lenthall* (1743), 2 Atk. 551; 26 E.R. 731, L.C.; 8 Digest (Repl.) 530, 2727.
- (5) *A.-G. v. Haberdashers' Co.* (1792), 4 Bro.C.C. 103; 29 E.R. 800; 8 Digest (Repl.) 444, 1345.
- (6) *Currie v. Pye* (1811), 17 Ves. 462; 34 E.R. 179; 8 Digest (Repl.) 536, 2851.
- (7) *Ex parte Thorp* (1791), 1 Ves. 394.
- (8) *Dungey v. Angove* (1794), 2 Ves. 304; 30 E.R. 644; 29 Digest (Repl.) 621, 502.
- (9) *Ex parte Simpson* (1809), 15 Ves. 476; 33 E.R. 834; 4 Digest (Repl.) 557, 4912.
- (10) *Edenborough v. Archbishop of Canterbury* (1826), 2 Russ. 93; 38 E.R. 271; 19 Digest (Repl.) 398, 2001.
- (11) *Palmer v. Walesby* (1868), 3 Ch. App. 732; 37 L.J.Ch. 612; 19 L.T. 1; 16 W.R. 924; 33 Digest (Repl.) 690, 1413.

Also referred to in argument:

A.-G. v. Cuning (1843), 2 Y. & C. Ch. Cas. 139; 7 Jur. 187; 63 E.R. 61; 19 Digest (Repl.) 425, 2371.

- A *Turner v. Collins* (1871), L.R. 12 Eq. 488; 40 L.J.Ch. 614; 25 L.T. 264; on appeal, 7 Ch. App. 329; 41 L.J.Ch. 558; 25 L.T. 779; 20 W.R. 305, L.C.; 12 Digest (Repl.) 114, 674.
- Re Mills' Estate* (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 35 W.R. 65; 3 T.L.R. 61; Digest (Practice) 869, 4114.
- B *Saunders v. Saunders* (1855), 3 Drew. 387; 25 L.J.Ch. 26; 26 L.T.O.S. 66; 1 Jur.N.S. 1008; 4 W.R. 26; 61 E.R. 951; 18 Digest (Repl.) 7, 32.
- Forester v. Reade* (1870), 6 Ch. App. 40; 24 L.T. 79; 19 W.R. 114; 42 Digest 449, 204.
- Poole v. Pass* (1839), 1 Beav. 600; 8 L.J.Ch. 305; 48 E.R. 1074; 35 Digest 614, 3516.
- C *A.-G. v. Compton* (1842), 1 Y. & C.Ch. Cas. 417; 6 J.P. 183; 62 E.R. 951; 8 Digest (Repl.) 471, 1732.
- Neaves v. Spooner* (1887), 57 L.T. 879; 36 W.R. 257; Digest (Practice) 853, 3985.
- Christie v. Christie* (1873), 8 Ch. App. 499; 42 L.J.Ch. 544; 28 L.T. 607; 21 W.R. 493, C.A.; Digest (Practice) 63, 536.
- Cartwright v. Hateley* (1791), 1 Ves. 292; 3 Bro.C.C. 238; 30 E.R. 349; 1 Digest (Repl.) 448, 1009.
- D *Fenner v. Taylor* (1821), 5 Madd. 470; 6 Madd. 3; 56 E.R. 975; 24 Digest (Repl.) 916, 9209.

Appeal by the plaintiffs from so much of the judgment of KAY, J., as gave costs as between solicitor and client in an action brought by the plaintiffs, the vicar and churchwardens of the parish of St. Luke's, Kentish Town, claiming repayment by the defendants, the members of a local committee, of a sum of £164 2s. 3d. with interest thereon, which had been handed over to the defendants for a charitable purpose, viz., the erection of a parish room or vestry, which purpose it was said, had failed.

The fund had arisen partly from collections made in the church at the offertory and at other services, partly from moneys placed in the almsboxes at the church, partly from voluntary subscriptions, and partly from the proceeds of a bazaar which was held in the parish. It had been invested by the defendants in the purchase of consols. The plaintiffs contended that the fund had been handed over to the defendants on a condition which no longer existed. The defendants contended that the fund was handed over to them without any condition whatever. KAY, J., dismissed the action on the ground that the plaintiffs had failed to establish their case, and, being of opinion that the litigation was unjustifiable, and that it was the duty of the court to protect the fund to the utmost, ordered the plaintiffs to pay the costs of the defendants, who held the fund as trustees, as between solicitor and client, so as not to throw their costs, in excess of party and party costs, upon the small charitable fund.

- II *Swinfen Eady* for the plaintiffs.
Marten, Q.C., and S. W. Worthington for the defendants.

Cur. adv. vult.

June 12, 1888. **FRY, L.J.**, delivered the following judgment of the court. In this case, the plaintiffs sought to recover from the defendants a small sum of money held on trust for certain parochial purposes. The plaintiffs failed, and KAY, J., dismissed the action, with costs to be paid by the plaintiffs as between solicitor and client, on the ground that the fund ought to be preserved intact and unimpaired by the plaintiffs' wrongful claim, and that this would not be the case if the defendants were to receive the difference between costs on the two scales out of the fund, which, as trustees, they would be entitled to, if not paid by the plaintiffs. The only question raised is whether KAY, J., had any jurisdiction to make this order. The suit, relating to the custody and possession of a trust fund, is clearly one which would have been proper and peculiar to the Court of Chancery when that

court existed, and the question, therefore, is whether that court had jurisdiction to make such an order in such a case. The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. LORD HARDWICKE, L.C., in *Jones v. Coxeter* (3) said (2 Atk. at p. 400):

"The giving of costs in equity is entirely discretionary, and is not at all conformable to the rule of law"

The same great judge in *Burford Corpn. v. Lenthall* (4), said (2 Atk. at p. 551):

"... courts of equity have in all cases done it [i.e., dealt with costs], not from any authority [i.e., as we understand, from any statutory or delegated authority], but from conscience, and arbitrio boni viri, as to the satisfaction on one side or other on account of vexation."

An examination of the older General Orders of the court made, not under any statutory authority, but from the general and inherent authority of the Lord Chancellor, will show that the court exercised a most wide discretion not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fulness of the costs. These General Orders will be found to use very varied language expressing different measures of estimation. We have references not only to "costs" and "ordinary costs" (Ord. Nov. 17, 1635, Saunders, p. 180), but to "full costs" (Ord. Aug. 22, 1654, *ibid.* p. 262); "full costs and charges in travel, attendance, and otherwise" (*ibid.* p. 265); "good costs" (Ord. Jan. 14, 1617-8, p. 219, Nov. 17, 1635, p. 183); "very good costs" (Ord. Nov. 17, 1631, p. 66, June 25, 1658, p. 280); "utmost costs to be assessed by the court" (Ord. Jan. 29, 1618-9, p. 116); "utmost cost and charge to be assessed by the court" (Ord. April, 1596, p. 69); "double costs" (Ord. Nov. 17, 1635, p. 182); "treble costs and quadruple costs" (Ord. Jan. 29, 1618-9, p. 117). It would be useless to attempt to ascertain the precise value of the expressions used, but they are inconsistent with any notion that the court was confined to one measure of costs. The same control over the amount of costs is shown by the language, frequent in such orders, which asserts the full discretion of the court in this matter. "Such costs as the court shall think reasonable" (Ord. Oct. 29, 1683, p. 359) and "such costs as their Lordships shall think fit to inflict" (Ord. Oct. 29, 1692, p. 397) are instances of numerous like expressions.

Again, the makers of these orders exercised a right to fix arbitrarily the amount of costs to be paid in particular cases. Thus in 1669 (Ord. Feb. 12, 1669-70, p. 335) 10s. was fixed as the costs to be paid for every frivolous exception to a master's report, which sum in 1689 (Ord. Jan. 17, 1689-90, p. 387) was increased to 20s.; and many similar instances may be found. Lastly, in the particular case now before us of the failure of the plaintiffs we find the orders of Aug. 22, 1654 (p. 265) providing that the plaintiff should pay the defendant

"his full costs upon a bill of costs to be allowed by the six clerks, or any two of them; and in case the court upon the hearing shall find the suit to have been vexatious, the court shall give additional costs against a plaintiff, to be pronounced by the court at the hearing, besides the said costs to be taxed upon the bill."

The jurisdiction of the Court of Chancery in the matter of costs has been supposed by an eminent writer on the subject, MR. BEAMES, to be derived from the recently repealed statute, 17 Ric. 2, c. 6 [rep. by Civil Procedure Acts Repeal Act, 1879], which enacts that

"forasmuch as people be compelled to come before the King's Council, or in the Chancery by writs grounded upon untrue suggestions, that the Chancellor for the time being, presently after such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him which is so troubled unduly, as afore is said."

It may be that costs are included under the word "damages." But it will be observed, as has indeed been long ago pointed out by COKE (4 Inst. 83), that the

A jurisdiction thus given only arose after proof of the untruth of the allegations, and, therefore, could be exercised only on or after the hearing of the cause. It cannot, therefore, be the foundation of the jurisdiction to award costs in all stages of the suit, and for the insufficiency as well as the untruth of the matters alleged.

The records of the Court of Chancery during the last century show that, in numerous cases, it has exercised the right of giving costs between attorney and client, or, to use the more recent language of the cases, between solicitor and client. Such costs were awarded in *A.-G. v. Haberdashers' Co.* (5) and *Currie v. Pye* (6) to an heir-at-law made a party to a suit relative to a charity; in *Ex parte Thorp* (7) to creditors of a bankrupt who, as petitioners, applied in bankruptcy to set aside a commission fraudulently sued out to clear the bankrupt from his debts; in *Dungey v. Angove* (8) to a landlord made defendant by a tenant to a bill of interpleader, which had been brought by the tenant in collusion with a stranger; in *Ex parte Simpson* (9) and numerous other cases, on the ground of scandal; in *Edenborough v. Archbishop of Canterbury* (10) to the Attorney-General, and also to the Archbishop of Canterbury and the Bishop of London, where the plaintiff sought to restrain the induction of a particular person; in *Palmer v. Walesby* (11) against the next friend to a person in whose name a bill had been filed by this next friend falsely alleging him to be of unsound mind. In none of the cases which we have consulted has the court stated any limitation of its jurisdiction to award costs as between solicitor and client, though various circumstances have been stated as influencing the discretion of the court—in some cases to vindicate the honour and justice of the court, and in *Palmer v. Walesby* (11) on the ground of the right of the applicant to indemnity, the reason assigned by KAY, J., for awarding them in the present case.

The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the lords justices in *Mordue v. Palmer* (1). In the course of a Chancery suit, a reference was made to arbitration, which ordered that the costs should be in the discretion of the arbitrator. He awarded them as between solicitor and client, and the Court of Appeal held that, as the reference was in Chancery, the arbitrator had power so to do. MELLISH, L.J., said (6 Ch. App. at p. 32):

“The common law courts have no power to give costs between solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with courts of equity; and I, therefore, think that, when a reference as to costs is made by a court of equity, the court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit.”

It was argued that in *Cockburn v. Edwards* (2) a different view was taken by the Court of Appeal, but the point then only arose indirectly, and the point does not appear to have been argued. If, therefore, there is any discrepancy between this case and *Mordue v. Palmer* (1), we think that the decision in the latter case must prevail, not only as more express, but as being in accordance with the earlier authorities.

From this consideration of the earlier authorities, we conclude that there was inherent in the Court of Chancery, at the time of its abolition, a general and discretionary power to award costs as between solicitor and client to a successful party, as and when the justice of the case might so require, that KAY, J., therefore, had jurisdiction to make the order which he pronounced, and, consequently, that this appeal fails. As the nature of the suit was one of equitable jurisdiction, the question whether the judges of the High Court have any power to award costs as between solicitor and client in matters of common law jurisdiction does not arise, and on it we express no opinion.

Appeal dismissed.

Solicitors: *T. Blair; G. M. Jameson.*

[Reported by FRANK EVANS, Esq., Barrister-at-Law.]

MACDOUGALL v. KNIGHT

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), April 16, 17, 1890]

[Reported 25 Q.B.D. 1; 59 L.J.Q.B. 517; 63 L.T. 43; 54 J.P. 788;
38 W.R. 553; 6 T.L.R. 276]

Estoppel—Res judicata—Libel—Second action brought for libel in same document, but in different passages.

Libel—Action—Estoppel—Res judicata—Second action brought for libel in same document, but in different passages.

The defendant published a pamphlet purporting to be a fair and accurate report of a judgment delivered in an action brought by the plaintiff against him. The judgment contained passages reflecting on the plaintiff's conduct, but the pamphlet did not refer to the evidence on which the judgment was based. The plaintiff brought a libel action against the defendant in respect of certain passages in the pamphlet, but the jury found that the pamphlet was a fair and accurate report of the judgment, published bona fide and without malice, and judgment was given for the defendant. The plaintiff brought a second action in respect of the same pamphlet, but relying on different passages in the judgment which he had not set out in his statement of claim in the former action.

Held: as both actions were between the same parties and related to the publication of the same document and as the same issues arose in both, a plea of *res judicata* must succeed, and the action should also be stayed as being frivolous and vexatious.

Per Curiam: Even if the plaintiff could split up his cause of action and rely on different passages in the document, such a course would be an abuse of the process of the court and the action would also be stayed.

Notes: Applied: *Stephenson v. Garnett*, [1898] 1 Q.B. 677. Considered: *Workington Harbour and Dock Board v. Trade Indemnity Co.*, [1937] 3 All E.R. 139; *Wright v. Bennett*, [1948] 1 All E.R. 227. Referred to: *Ord v. Ord*, [1923] All E.R.Rep. 206; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255.

As to *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 21 DIGEST (Repl.) 279 et seq.

Cases referred to:

- (1) *Macdougall v. Knight* (1886), 17 Q.B.D. 636; 55 L.J.Q.B. 464; 55 L.T. 274; 51 J.P. 38, C.A.; on appeal (1889), 14 App. Cas. 194; 58 L.J.Q.B. 537; 60 L.T. 762; 53 J.P. 691; 38 W.R. 44; 5 T.L.R. 390, H.L.; 32 Digest 138, 1698.
- (2) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 1 Digest (Repl.) 16, 123.
- (3) *Lewis v. Levy* (1858), E.B. & E. 537; 27 L.J.Q.B. 282; 31 L.T.O.S. 194; 4 Jur.N.S. 970; 6 W.R. 629; 120 E.R. 610; 32 Digest 136, 1667.
- (4) *Reichel v. Magrath* (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159; 54 J.P. 196, H.L.; Digest (Pleading) 84, 701.
- (5) *Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 32 Digest 128, 1597.

Also referred to in argument:

Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801, H.L.; 21 Digest (Repl.) 286, 558.

Metropolitan Bank v. Pooley (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, 613.

Willis v. Earl Beauchamp (1886), ante p. 515; 11 P.D. 59; 55 L.J.P. 17; 54 L.T. 185; 34 W.R. 357; 2 T.L.R. 270, C.A.; 32 Digest 402, 809.

- A** *Darley Main Colliery Co. v. Mitchell* (1886), ante p. 449, 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 1 Digest (Repl.) 15, 122.
- Laurance v. Lord Norreys* (1888), 39 Ch.D. 213; 59 L.T. 703; 4 T.L.R. 620; affirmed (1890), post p. 858; 15 App. Cas. 210; 59 L.J.Ch. 681; 62 L.T. 706; 54 J.P. 708; 38 W.R. 753; 6 T.L.R. 285, H.L.; 32 Digest 529, 1836.
- B** *Milissich v. Lloyds* (1877), 46 L.J.Q.B. 404; 36 L.T. 423; 13 Cox, C.C. 575; sub nom. *Melissich v. Lloyd's*, 25 W.R. 353, C.A.; 32 Digest 140, 1717.
- Ross v. Jacques* (1841), 8 M. & W. 135; 9 Dowl. 737; 10 L.J.Ex. 306; sub nom. *Jacques v. Ross*, 5 Jur. 345; Digest (Practice) 907, 4480.
- Carter v. James* (1844), 2 Dow. & L. 236; 13 M. & W. 137; 13 L.J.Ex. 373; 3 L.T.O.S. 183; 8 Jur. 912; 153 E.R. 57; 21 Digest (Repl.) 238, 283.
- C** *Langmead v. Maple* (1865), 18 C.B.N.S. 255; 5 New Rep. 277; 12 L.T. 143; 13 W.R. 469; 144 E.R. 441; sub nom. *Longmead v. Maples*, 11 Jur.N.S. 177; 21 Digest (Repl.) 282, 539.
- Earl of Bandon v. Becher* (1835), 3 Cl. & Fin. 479; 9 Bli.N.S. 532; 6 E.R. 1517, H.L.; 21 Digest (Repl.) 307, 679.

D **Appeal** by the defendant from an order of the Queen's Bench Division (LORD COLERIDGE, C.J., and MATHEW, J.) giving the plaintiff liberty to proceed with an action for libel on payment by the plaintiff of the costs of a former action.

In 1884, NORTH, J., delivered judgment in favour of the present defendant in an action brought in the Chancery Division by the present plaintiff. The defendant published and circulated among his friends a pamphlet containing a report of this judgment, in which were several passages reflecting on the conduct of the plaintiff.

E The pamphlet contained no report of any of the evidence on which the judgment was founded. An action for libel was thereupon brought by the plaintiff, and was tried before HUDDLESTON, B., and a jury. The jury found the pamphlet was a fair, accurate, and honest report of the judgment, that it was published bona fide, with the honest intention of making known the facts of the case, and in reasonable self-defence, and that it was published without malice. Judgment was given for the defendant, and an application for a new trial was dismissed both by the Court of Appeal and by the House of Lords, though on different grounds. The plaintiff immediately brought the present action for libel for the publication of the same pamphlet as before, but set out in his claim some defamatory statements in the pamphlet which he had not set out in his claim in the previous action. An application by the defendant to dismiss the action as frivolous and vexatious was allowed

G by the master and the judge at chambers. The Divisional Court (LORD COLERIDGE, C.J., and MATHEW, J.) made an order allowing the plaintiff to proceed with the action on payment of the costs incurred in the former action. The defendant appealed.

Sir Edward Clarke and Blake Odgers for the defendant.

Oswald for the plaintiff.

H **LORD ESHER, M.R.**—In this case the plaintiff has brought an action against the defendant for libel, the libel being the publication by the defendant of a document purporting to be an accurate report of a judgment delivered by NORTH, J., in an action between the same parties, in which he cast some reflections on the conduct of the plaintiff. Upon this action being brought the defendant took out a summons to have it stayed as being frivolous and vexatious, and the ground of this

I application was that a previous action had been brought by the plaintiff against the defendant for a libel in publishing the very same report, and if this action were allowed to go on, a plea of *res judicata* must be put on the record, and there is no doubt that under the circumstances it must be successful.

The defendant says, that to allow this action to go on must obviously lead to no result favourable to the plaintiff but must only cause unnecessary vexation to the defendant and be a waste both of time and money; and if that be true the action is plainly frivolous and vexatious within the technical meaning of the words, and

therefore it is the duty of the court to stay it. The defendant further says that, even if the plea of *res judicata* could not be maintained, yet on another ground, the action is frivolous and vexatious. His reason is, that the former action was brought for libel in the publication of the report of the judgment of NORTH, J., and in that action the plaintiff stated that the libel was contained in certain sentences in the judgment, whereas now he says that the present action is not for the same libel, and, instead of relying on the particular defamations he relied on before, he has now put in his claim other items of defamation different to those on which the former action was based. In other words, the plaintiff says he has the right, in bringing an action for libel on a document, to pick out certain defamatory items and omit others, and having obtained judgment on these he may afterwards pick out some other defamatory items in the same document and bring a fresh action on them. Even if that be so, says the defendant, it is an abuse of the process of the court, and the plaintiff cannot be allowed to do such a thing.

I will consider this first irrespective of anything that was said in the House of Lords when the other action was before it: *Macdougall v. Knight* (1). That action was brought in respect of the publication of a report of a judgment delivered by NORTH, J., in an action before him, but the defendant had not published any of the evidence on which the judgment was founded; he did not purport to publish all the proceedings of the trial, but merely an accurate report of the judgment by itself. Under these circumstances what were the questions in issue before the court in that trial? I take the law on this point to be what was held by the court after full deliberation in *Lewis v. Levy* (3); that the publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit; and this is true, although what is thus published purports to be and is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report of that part, and published without malice. That is the law laid down and acted on in *Lewis v. Levy* (3) and approved of in this court in the former action between the present plaintiff and defendant: *Macdougall v. Knight* (1). If that is the law, what was the question which arose in that action? The first was, was the pamphlet in fact a fair accurate and honest report of the judgment of NORTH, J.? If it was, the publication was privileged unless there was malice; even though it was accurate, if published maliciously the privilege ceased. The second was, whether the report was published without malice. It is impossible to give an exact definition of what malice is; but as an instance I may mention that, if a person professes to give an entire report of proceedings, and really gives only a partial report, that would be strong evidence of malice. So, too, if he was to publish an accurate report in order to gratify his anger—though accurate, the publication would be from a malicious motive. Evidence of malice may be of a hundred different kinds. The actual question left to the jury by the learned judge was:

“Was the pamphlet published by the defendants bona fide, and with the honest intention of making known the true facts of the case, and in order to protect their reputation, and in reasonable self-defence?”

To both these questions the jury answered “Yes.” The second question merely seems to me to be an elaborate question as to whether there was malice, and to be exactly the same as the third question which the learned judge left to the jury, which was, in express terms, whether there was malice or not, and to which they answered “No.” Those were the only questions left to the jury in the first action.

Let us come now to the present action. It is for libel, for publishing a report of a judgment delivered by NORTH, J., containing defamatory statements about the plaintiff. What are the questions to be tried in this case? The first is, Is the pamphlet a fair honest and accurate report of the judgment? That is the same question as was put in the first action. The second question would be properly

A put in the same terms as the second question in the first action. If so how is it possible to say but that the subject-matter of the second action is the same as in the first action, and that the plea of *res judicata* must be an answer to the plaintiff's claim.

It is suggested that the cause of action is not the same, because, though the document is the same, the defamation is said to consist in different sentences to those which were complained of in the first action, and in support of this view *Brunsdon v. Humphrey* (2) is relied on. In that case there were two separate legal rights of the plaintiff that were infringed, one a right of personal protection, the other to have his property protected from injury. Those are absolutely distinct rights, and the jury cannot, in dealing with one case, consider the damages in the other; the two cases involve different rights, and the measure of damages is different in the two cases of injury. That case does not apply here at all, and I think that LORD COLERIDGE, C.J., has misapprehended it. It does not lay down that if a man is injured in two parts of his body he can bring two actions for the two injuries; he can only bring one action, and the damages in that action will be assessed for all his personal injuries. The case is no authority for saying that you can bring successive actions by picking out different statements in one document.

D the cause of action in that case would be the same. The former action was between the same parties, for the publication of the same document as is relied on in this action, and the issues in the two actions are the same, and on that view a plea of *res judicata* must be successful.

I will now consider the case with reference to what was said in the former action in the House of Lords. The first thing to remark is, that the decision of this court as to privilege was not overruled. I will go a little further and say that no member of the House expressed any definite opinion on any point of law. Two learned lords refused to express an opinion, and intimated a desire that it should not be taken that they had expressed any opinion. They both expressed a doubt, but I do not quite understand what their doubt was about. It may be said that what they were considering was this—where an alleged libel is a report of what has taken place in a court of justice, and it is only a report of the judgment or summing up of the judge without more, even though it purport to be no more than that, the jury may be asked whether the report gives an accurate account of the evidence on which the judgment was founded, or whether it omits an important bit of evidence which might show that the conclusions in the judgment were not warranted by the facts. If they thought that the question whether the occasion was privileged depended not merely on the report being a fair and accurate account of what had taken place, but also whether any evidence was omitted which might enable a reader to say that the strictures of the judge were not borne out by the evidence, I can only hope that when they hear the point argued their doubts may be removed. Such a law would lead to much manifest impropriety and inconvenience, to such arguments as whether a judge has treated the evidence before him properly.

H Courts of law are open to the public, and the ground for privilege is that the publication of what has taken place in a court of law is a means of putting the public in the same position as if they had been actually present in court. There would be another practical difficulty, as to what the reporter would have to do. If he reports a judgment which is afterwards alleged to be libellous is he to plead that what the judge said was correct? He purports merely to say what the judge said, and that he has done. It would be indecent to put on the reporter the onus of proving that the judge's judgment was true. That question is one for the Court of Appeal. The results of the suggested rule are so enormous and so contrary to every ruling of every court which has dealt with this subject that I cannot yield to a mere doubt, even though it be expressed in the House of Lords.

I think a plea of *res judicata* must succeed here, and that therefore the action should be stayed. But, even if the plaintiff could split up his cause of action, such a course would be vexatious, and either way the appeal must be allowed and the action stayed.

FRY, L.J.—I approach the decision of this case with great anxiety, on account of the observations of the Lord Chancellor and LORD BRAMWELL. I do not wish to interfere unduly with the discretion of the Divisional Court, and I am anxious not to shut the doors of the court improperly to a suitor; but nevertheless, after consideration, I agree with the conclusion arrived at by the Master of the Rolls. The application is that this action be stayed, and the ground shortly is that, either a plea of *res judicata* must succeed, or else that the proceedings are frivolous and vexatious, and an abuse of the process of the court. In my opinion the defendant is right in both these contentions.

Upon the first ground *Reichel v. Magrath* (4) is in point. In that case the House of Lords decided that it was within the jurisdiction of a court of justice to prevent a defeated litigant raising the very same question which the court had decided in another action. The question in the present case turns on whether the cause of action is the same as in the previous action. Both actions are for libel contained in one pamphlet, and therefore I conclude the cause of the two actions is one. In my opinion it is impossible that two actions should be properly brought in respect of the same libel. It would be monstrous to allow a plaintiff to select one passage in the libel for one action, another passage for a second action, and so on. The whole publication would be before the jury in each case, and it would be impossible for them in each case to separate the damages due to the particular part of the libel relied on in that case from the damages arising from other parts of the libel. I think therefore that a plea of *res judicata* would succeed, and that we are bound to stay the action. But suppose it failed, even then I do not hesitate to say that such successive actions would be an abuse of the process of the court, and so, *quacunque* via the application should succeed, and the action be stayed.

There I might leave the case were it not for the great public importance of another question raised in it. In view of this I feel bound to say that I adhere to the decision of this court when the former action of *Macdougall v. Knight* (1) was before them that a fair and accurate report of the judgment in an action, published bona fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. I am aware that two members of the House of Lords have said that they must not be taken to accept that view; but such expressions, however weighty and however much entitled to respect, do not overrule the law as laid down in this court. We are bound by our former decision, and I should like to say that no argument used in the present case has shaken my opinion as to the correctness of that decision. BOWEN, L.J., put the point very shortly and clearly when he said:

"I am satisfied myself that the judgment of a judge of the land is in itself an act of such a public and distinct character as to make it to the interest of the commonwealth that they should know it in toto; and, provided it is either given verbatim correctly, or correctly summarised, it seems to me that the public policy requires that to be the law, and I have no hesitation in saying that I believe that to be the law at the present day."

In coming to that conclusion, we are arriving at a decision convenient to the public Press, and to Her Majesty's subjects generally. It appears to me that it would be to put an undue fetter on the Press to hold that the publication of a judgment is not privileged unless the judgment fairly summarises the evidence. The judgments of courts of law must be presumed to be fair, accurate, and adequate, and it would be improper to put on the defendant the onus of proving them to be so.

I desire to refer to two other matters. The first is that, in arriving at the conclusion we have come to, we are hardly differing from the Divisional Court, as I regret to say the case was not fully argued out there for the defendant. The other is that our view is in agreement with the decision in *Allbutt v. General Council of Medical Education and Registration* (5). If, as was there held, the publication of the minutes of the council containing a report of their proceedings without the

A evidence on which they acted was privileged, it appears impossible to say that the publication in this case of the judgment of NORTH, J., was not also privileged. The appeal must be allowed.

B **LOPES, L.J.**—I agree with the judgments that have been delivered, but as the case is of great importance, I will shortly express my view of it. There is no decision in the House of Lords impeaching the law laid down in this court in the former action of *Macdougall v. Knight* (1). The Lord Chancellor and LORD BRAMWELL expressed doubts about it, but LORD WATSON and LORD MACNAGHTEN did not join in the doubts. It had been laid down that a fair and accurate report of a judgment was privileged, but that it was open for the plaintiff to destroy that plea of privilege by showing malice on the part of the defendant. LORD FITZGERALD said
C that the House of Lords did not overrule that. He says (14 App. Cas. at p. 207):

D “No authority has been brought before your Lordships for the assertion that the privilege cannot exist when the publication is a part only of the proceeding. *Lewis v. Levy* (3) is directly to the contrary. Where, as in the case before NORTH, J., the trial had been completed, and the publisher, in his publication, gives only the last scene, i.e., the decision, with the judge’s reasons for that decision, he may incur considerable risks, e.g., he may exceed the limits of privilege and he leaves himself open to the imputation that he has adopted the plan of a partial publication as the vehicle of malice. In the present case the defendants are freed from those dangers by their defence, which is now to be taken as true in all its facts.”

E That is the law as laid down in this court.

F Then what would be the issues which would be left to the jury in the present action? They would be (i) Was the pamphlet a fair, accurate, and honest report of the judgment of NORTH, J., and (ii) was the defendant influenced by malice? Those questions were also put to the jury in the first action, and therefore I think a plea of *res judicata* would be good. I think *Brunsdon v. Humphrey* (2) has no application to this case.

Appeal allowed.

Solicitors: *Walter Stocken; Torr, Janeways, Gribble & Oddie*, for *Payne & Fuller*, Bath.

[*Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.*]

FALCKE v. SCOTTISH IMPERIAL INSURANCE CO.

[CHANCERY DIVISION (Kay, J.), August 3, 8, 1887]

[Reported 57 L.T. 39; 35 W.R. 794]

Judgment—Setting aside—Bill of review—Action—Competency.

The old jurisdiction of the Court of Chancery to entertain an action in the nature of a bill of review of a judgment on the ground that since the decision material evidence has been discovered is unaffected by the Judicature Acts.

Per KAY, J.: Leave is usually now obtained by summons and the proper court in which to apply is the High Court since the Court of Appeal has no original jurisdiction. The grounds for obtaining leave are the same as existed before the Judicature Acts, namely, the evidence discovered must be shown to be material, and must have been discovered since the decision, and it must be shown that it could not with reasonable diligence have been discovered before.

Notes. Considered: *Bright v. Sellar*, [1904] 1 K.B. 6. Referred to: *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596.

As to the power of the court to set aside judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 418; and for cases see 16 DIGEST (Repl.) 200.

Cases referred to in argument:

Flower v. Lloyd (1877), 6 Ch.D. 297; 46 L.J.Ch. 838; 37 L.T. 419; 28 W.R. 793, C.A.; Digest (Practice) 818, 3786.

Flower v. Lloyd (1879), 10 Ch.D. 327; 39 L.T. 613; 27 W.R. 496, C.A.; 36 Digest (Repl.) 994, 3399.

Bingham v. Dawson (1821), Jac. 243.

Hosking v. Terry (1862), 15 Moo.P.C.C. 493; 7 L.T. 52; 8 Jur.N.S. 975; 10 W.R. 884; 15 E.R. 581, P.C.; 30 Digest (Repl.) 222, 664.

Knierim v. Schmaus (1862), 7 L.T. 189; 10 W.R. 860; 8 Jur.N.S. 692.

Blake v. Foster (1823), 4 Bli. 140, n; 2 Mol. 357, n.

Tommeys v. White (1850), 3 H.L.Cas. 48; 10 E.R. 19, H.L.; 30 Digest (Repl.) 219, 624.

Cann v. Cann (1721), 1 P.Wms. 723; 24 E.R. 586, L.C.; 35 Digest 95, 46.

Harvey v. Croydon Union Rural Sanitary Authority (1884), 26 Ch.D. 249; 53 L.J.Ch. 707; 50 L.T. 291; 32 W.R. 389, C.A.; 28 Digest (Repl.) 917, 1503.

Re St. Nazaire Co. (1879), 12 Ch.D. 88; 41 L.T. 110; 27 W.R. 854, C.A.; 16 Digest (Repl.) 200, 892.

Webb v. Webb (1819), 3 Swan. 658.

Summons taken out on behalf of the defendant Emanuel Emanuel, asking that, notwithstanding the orders made upon the summons issued in this action by the applicant and the plaintiff, he might be at liberty to commence an action against the plaintiff in the nature of a bill of review grounded upon new matter discovered after the making of the said orders.

The orders were made on cross-summonses issued by Mrs. Falcke, the widow and executrix of James Falcke, and Emanuel, in the action *Falcke v. Scottish Imperial Insurance Co.*, whereby they claimed the balance of the proceeds of a policy of assurance. Emanuel had bought the equity of redemption in the policy for £50 from one Davis, and in 1883 paid a premium of £1,211 19s. 2d. BACON, V.-C., ordered the premium to be repaid to Emanuel, and the balance to be paid to the plaintiff as executrix of James Falcke, the mortgagee. The Court of Appeal reversed the decision of BACON, V.-C. (*Falcke v. Scottish Imperial Insurance Co.*, 34 Ch.D. 234), mainly on the ground that Davis had no authority to contract on behalf of James Falcke for the sale of his interest, and it was not proved that

A Falcke had ever asked Emanuel to pay the premium, nor that he was aware of its being paid, nor that he had any knowledge of the transaction; they therefore ordered the whole of the balance to be paid to the plaintiff Mrs. Falcke. On Dec. 22, 1886, Emanuel appealed to the House of Lords. On Feb. 14, 1887, the parties came to a compromise, Emanuel withdrawing the appeal. In April, 1887, Emanuel obtained the following letter from the trustee in bankruptcy of Davis:

B "To Mr. Davis.—I hereby request and authorise you at any time to release any of the property comprised in the security which I hold of Mr. Emanuel's upon your being satisfied with the remainder of the security.—Dated the — day of May, 1878.—(Signed) James Falcke."

C This, Emanuel alleged, was Davis's authority to contract on behalf of Falcke for the sale of his interest in the policy.

Solomon for the defendant.

Bonsey for the plaintiff.

KAY, J.—Several points have been raised in this case. It was said that the old jurisdiction of the Court of Chancery to allow a bill of review is now abolished. D The proposition is startling, and there is no authority in support of it, and, in my opinion, it is not the law. The old jurisdiction to entertain an action in the nature of a bill of review was unaffected by the Judicature Acts, though the leave to bring such an action is now more usually obtained by summons instead of the long petition, which was formerly necessary. The grounds, however, for obtaining the leave are precisely the same as existed before the Acts, and leave may be E obtained on any of the grounds mentioned in LORD REDESDALE's well-known treatise on PLEADING, so that leave to bring an action in the nature of a bill of review may be obtained just as before the Judicature Acts. Nothing in the Judicature Acts has been called to my attention which alters the law and practice of this division of the court in this respect.

F In this case leave to bring an action in the nature of a bill of review is sought because since the decision of the Court of Appeal material evidence is alleged to have been found; but such leave is not given unless, first, the evidence is material; secondly, that it has been discovered since the decision; and, thirdly, could not with reasonable diligence have been discovered before. I am stating from memory what I believe to be the settled practice of the Court of Chancery in such a matter. I had doubts whether, as the decision was made since the Judicature Acts, the G application should not have been made to the Court of Appeal. No authority could be found, and on consideration I came to the conclusion that it was not the practice to make the application to the Court of Appeal. The decision of the Court of Appeal is enrolled as a decision of the High Court, and the application to institute an action in the nature of a bill of review is part of the original jurisdiction of the High Court. The Court of Appeal has no original jurisdiction of that kind. H The proper court to apply to is the High Court; the right application is to the High Court to exercise its original jurisdiction; there is no reason why the application should be to the Appeal Court. I have no doubt that this is not a proper application.

I From the shorthand notes of the proceedings of the Court of Appeal I gather that due diligence had not been used to discover fresh evidence as to authority. Emanuel did not exhaust every effort, did not exercise that due diligence which is requisite to obtain leave to bring an action in the nature of a bill of review. It is necessary to prove that the fresh evidence is material, and not only that it has been discovered since the judgment, but that it could not with due diligence have been discovered sooner. But I do not base my judgment upon this; the terms of the newly-discovered letter of February, 1878, are:

"I hereby request and authorise you at any time to release any of the property comprised in the security which I hold of Mr. Emanuel's upon your being satisfied with the remainder of the security."

That is not an authority to sell, besides which the letter did not relate to this security. Emanuel had not mortgaged the property at the date of the letter, and was not in possession of the policy, there are no grounds for the application, and it must be dismissed with costs.

Solicitors: *Harper & Battcock; Longbourne & Stevens.*

[Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.]

BANK OF TORONTO AND OTHERS v. LAMBE

[PRIVY COUNCIL (Lord Hobhouse, Lord Macnaghten, Sir Barnes Peacock, Sir Richard Baggallay and Sir Richard Couch), June 10, 11, 22, 29, July 9, 1887]

[Reported 12 App. Cas. 575; 56 L.J.P.C. 87; 57 L.T. 377;
3 T.L.R. 742]

Canada—Dominion and provincial legislation—Power of provincial legislature to impose taxation—British North America Act, 1867 (30 & 31 Vict., c. 3), s. 91 and s. 92.

Sections 91 and 92 of the British North America Act, 1867, prescribed the distribution of legislative powers between the Dominion Parliament of Canada and the provincial legislatures. Section 91 gave exclusive legislative authority to the Dominion Parliament in respect of, inter alia (class 2), "the regulation of trade and commerce," (class 3) "the raising of money by any mode or system of taxation," and (class 15) "banking, incorporation of banks, and the issue of paper money." Section 92 set out certain classes of subjects in respect of which the provincial legislatures had exclusive power to make laws including (class 2) "direct taxation within the province, in order to the raising of a revenue for provincial purposes," and (class 16) "generally, all matters of a merely local or private nature in the province."

In 1882, the Quebec legislature passed a statute which provided that every bank carrying on its business in the province, every insurance company accepting risks and transacting business in the province, and every incorporated company carrying on any labour, trade, or business in the province, and certain other specified companies, should annually pay the taxes imposed upon them by the provincial legislature. In the case of banks the tax varied according to the paid-up capital and the number of offices or places of business. A bank kept its capital at its principal place of business, which was outside the province of Quebec, but it had an agency within the province, funds being transmitted from the principal office to the agency to enable it to carry on business. The bank objected to paying tax to the province under the statute of 1882 on the grounds that the statute was ultra vires as not being within the powers of the provincial legislature and being in contravention of the powers expressly reserved to the Parliament of Canada.

Held: the statute was not ultra vires and the bank was liable to pay tax to the provincial legislature for the following reasons: (i) because this was direct taxation and fell within class 2 of s. 92 of the British North America Act, 1867; (ii) the fact that the bank was not domiciled or even resident within the province was irrelevant since class 2 of s. 92 of the Act of 1867 gives power to the provincial legislature to tax anyone found within the province by direct taxation; and (iii) as this was direct taxation within the

- A province to raise revenue for provincial purposes, that subject fell wholly within the jurisdiction of the provincial legislature and class 3 of s. 91 of the Act of 1867 did not restrict s. 92 of that Act:

Citizens Insurance Co. of Canada v. Parsons (1) (1881), 7 App. Cas. 96, applied.

- B Per the Judicial Committee: The provincial legislatures had no inherent powers of legislating. The British North America Act, 1867, exhausted the whole range of legislative power, and whatever was not thereby given to the provincial legislatures rested with the Parliament of Canada.

- Notes.** Considered: *Crawford v. Duffield* (1888), 5 Man.R. 123; *R. v. McDougall* (1889), 22 N.S.R. 469, 498; *Pigeon v. Recorder's Court* (1890), 17 S.C.R. 504.
- C Followed: *A.-G. for British Columbia v. City of Victoria* (1890), 2 B.C.R. 3. Considered: *Stephens v. McArthur* (1891), 19 S.C.R. 466; *R. v. Ronan* (1891), 23 N.S.R. 458; *Quirt v. R.* (1891), 19 S.C.R. 522. Applied: *Poole v. City of Victoria* (1892), 2 B.C.R. 274. Considered: *Thomas v. Haliburton* (1893), 26 N.S.R. 76. Followed: *Fortier v. Lamb* (1894), 25 S.C.R. 428. Applied: *R. v. Coscowitz* (1895), 4 B.C.R. 135; *Huson v. South Norwich* (1895), 24 S.C.R. 161; *Heneker v. Bank of Montreal* (1895), 7 Que.S.C. 262; *Re Yorkshire Guarantee Co.* (1895), 4 B.C.R. 265, 274. Considered: *Re Small Debts Act* (1896), 5 B.C.R. 262; *St. Louis v. R.* (1896), 25 S.C.R. 678. Followed: *Halifax v. Jones* (1896), 28 N.S.R. 459; *Brewers and Maltsters' Association v. A.-G.*, [1897] A.C. 231. Considered: *Edgar v. Central Bank* (1899), 15 O.A.R. 193; *English v. O'Neill* (1899), 4 Terr.L.R. 77; *McGowan v. Hudson's Bay Co.* (1900), 5 Terr.L.R. 155; *Re Liquor Act* (1901), 13 Man.R. 304. Followed: *Great North West Telegraph Co. v. Fortier* (1903), 12 Que.K.B. 412. Considered: *Stark v. Schuster* (1904), 14 Man.R. 685, 699. Applied: *R. v. Massey-Harris Co.* (1905), 6 Terr.L.R. 128. Considered: *R. v. Hill* (1907), 15 O.L.R. 406; *International Text Book Co. v. Brown* (1907), 13 O.L.R. 644; *Lovitt v. R.* (1910), 43 S.C.R. 126; *Cotton v. R.*, [1914] A.C. 176. Applied: *Treasury of Ontario v. Canadian Life Assurance Co.* (1915), 22 D.L.R. Followed: *McLeod v. Windsor* (1922), 52 O.L.R. 562. Applied: *Clarke v. Moose Jaw*, [1923] 2 D.L.R. 216; *Smith v. A.-G. for Ontario*, [1924] S.C.R. 331. Considered: *Halifax Corp. v. Fairbanks' Estate*, [1927] All E.R.Rep. 601; *R. v. Caledonian Collieries*, [1928] A.C. 358; *Erie Beach Co. v. A.-G. for Ontario* (1929), 46 T.L.R. 33. Applied: *A.-G. for British Columbia v. Kingcome Navigation Co.*, [1933] 3 W.W.R. 353; *Forbes v. A.-G. for Manitoba*, [1937] 1 All E.R. 249; *Re Alberta Legislation*, [1938] 4 D.L.R. 433. Considered: *Reference Re Power to Disallow Legislation*, [1938] S.C.R. 71. Distinguished: *A.-G. (Alta.) v. A.-G. (Can.)*, [1938] 3 W.W.R. 337. Considered: *A.-G. for Alberta v. A.-G. for Canada*, [1939] A.C. 117; *International Harvester Co. v. A.-G. for Saskatchewan*, [1940] 2 W.W.R. 49. Applied: *Re Tolton Manufacturing Co., Ltd.*, [1940] 3 D.L.R. 383. Considered: *International Harvester Co. v. Provincial Tax Commn.*, [1941] S.C.R. 325; *Atlantic Smoke Shops, Ltd. v. A.-G. (N.B.)*, [1941] 1 D.L.R. 416. Applied: *Kerr v. Sup. of Income Tax*, [1942] S.C.R. 435; *References by Governor-General in Council*, [1943] 3 S.C.R. 560. Considered: *Re Flavell Estate*, [1943] 1 D.L.R. 756; *Procureur General (Can.) v. Procureur General (Que.)*, [1943] K.B. 543; *Beauport v. Que. R.L. and P. Co.*, [1945] S.C.R. 16; *Greenlees v. A.-G. (Can.)*, [1945] 2 D.L.R. 641, 808. Considered: *Parsons v. Procureur General (Que.)*, 70 Que.K.B. 101.
- I Referred to: *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Workmen's Compensation Board v. Canadian Pacific Rail. Co.*, [1920] A.C. 184; *Great West Saddlery Co. v. R.*, [1921] All E.R.Rep. 605; *Burland v. R.*, *Alleyn v. Barthe*, [1922] 1 A.C. 215; *Caron v. R.*, [1924] A.C. 999; *A.-G. for Manitoba v. A.-G. for Canada*, [1925] All E.R.Rep. 410; *A.-G. for British Columbia v. Canadian Pacific Rail. Co.*, [1927] A.C. 934; *A.-G. for Manitoba v. A.-G. for Canada*, [1929] A.C. 260; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd.*, [1933] A.C. 168; *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] 2 All E.R. 393; *A.-G. of Canada v. A.-G. of Quebec*, [1947] A.C. 33.

As to the distribution of powers between the Parliament of Canada and the provincial legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 494 et seq.; and for cases see 8 DIGEST (Repl.) 705 et seq. For the British North America Act, 1867, ss. 91, 92, see 6 HALSBURY'S STATUTES (2nd Edn.) 920 et seq.

Cases referred to:

- (1) *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; 51 L.J.P.C. 11; 45 L.T. 721, P.C.; 8 Digest (Repl.) 727, 227.
- (2) *A.-G. for Quebec v. Queen Insurance Co.* (1878), 3 App. Cas. 1090; 38 L.T. 897, P.C.; 8 Digest (Repl.) 723, 203.
- (3) *A.-G. for Quebec v. Reed* (1884), 10 App. Cas. 141; 54 L.J.P.C. 12; 52 L.T. 393; 33 W.R. 618, P.C.; 8 Digest (Repl.) 723, 204.
- (4) *Severn v. R.* (1878), 2 S.C.R. 70; 1 Cart. 414; 8 Digest (Repl.) 750, *755.

Also referred to in argument:

- Hodge v. R.* (1883), 9 App. Cas. 117; 53 L.J.P.C. 1; 50 L.T. 301, P.C., 8 Digest (Repl.) 703, 113.
- Cesena Sulphur Co. v. Nicholson* (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 25 W.R. 71; 1 Tax Cas. 88, 88; 28 Digest (Repl.) 252, 1113.
- Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501, C.A.; 28 Digest (Repl.) 204, 858.
- Sulley v. A.-G.* (1860), 5 H. & N. 711; 29 L.J.Ex. 464; 2 L.T. 439; 24 J.P. 676; 6 Jur.N.S. 1018; 8 W.R. 472; 2 Tax Cas. 149, n.; 157 E.R. 1364, Ex. Ch.; 28 Digest (Repl.) 274, 1218.
- A.-G. v. Alexander* (1874), L.R. 10 Exch. 20; 44 L.J.Ex. 3; 31 L.T. 694; 23 W.R. 255; 28 Digest (Repl.) 258, 1140.
- Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; 51 L.J.P.C. 26; 46 L.T. 1, P.C.; 8 Digest (Repl.) 750, 288.
- Hylton v. United States*, 3 Dallas, 171.
- Veazie Bank v. Fenno*, 8 Wallace, 534.
- Osbourn v. United States Bank*, 9 Wheaton, 738.
- Railroad Co. v. Peniston*, 18 Wallace, 5.
- Pacific Insurance Co. v. Soule*, 7 Wallace, 433; 1 Kent's Commentaries, 405.

Appeal by four appellants, the Bank of Toronto, the Merchants' Bank of Canada, the Canadian Bank of Commerce, and the North British Mercantile Insurance Co., against an order of the majority of the Court of Queen's Bench for the province of Quebec, Lower Canada (RAMSAY, TESSIER and BABY, JJ., DORION, C.J., and CROSS, J., dissenting) reversing decisions of the Superior Court in actions by the taxing officer for the province of Quebec for taxes due by virtue of the provincial statute of 1882. As all four appeals involved the same points they were all heard together.

Kerr, Q.C. (of the Canadian Bar), and *K. Digby* for the Bank of Toronto.

Cohen, Q.C., and *W. W. Kerr* for the Merchants' Bank of Canada.

Blake, Q.C. (of the Canadian Bar), and *Jeune* for the Canadian Bank of Commerce.

Kerr, Q.C. (of the Canadian Bar), and *W. W. Kerr* for the North British Mercantile Insurance Co.

Geoffrion, Q.C. (of the Canadian Bar), and *McLeod Fullarton* for the respondent.

LORD HOBHOUSE.—These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the Parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary courts of law, who must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes.

- A A number of incorporated companies are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first. In the year 1882 the Quebec legislature passed a statute entitled "An Act to impose certain direct taxes on certain commercial corporations." It is thereby enacted that every bank carrying on the business of banking in this province; every insurance company accepting risks and transacting the business of insurance in this province; every incorporated company carrying on any labour, trade, or business in this province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business.
- B
- C The appellant bank was incorporated in the year 1855 by an Act of the then Parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than
- D the amount belonging to other persons and the amount disposable elsewhere. The bank resists payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposes it. RAINVILLE, J., sitting in the superior court, took that view, and dismissed an action brought by the government officer, who is the respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.
- E

The principal grounds on which the superior court rested its judgment were as follows: That the tax is an indirect one; that it is not imposed within the limits of the province; that the Parliament has exclusive power to regulate banks; that the provincial legislature can tax only that which exists by their authority or is

- F introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the Parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is also a matter of a merely local or private nature in the province, and so falls within class 16 of the matters of provincial legislation. It has not been contended at the Bar that the provincial
- G legislature can tax only that which exists on their authority or permission. When the appellants' counsel were proceeding to argue that the tax did not fall within class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add, very ably, at the Bar.

- To ascertain whether or not the tax is lawfully imposed, it will be best to follow
- H the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of s. 92, of the Federation Act, viz., "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in s. 91 or in the other parts of the Act, so to cut down the full meaning of the words of s. 92 that they shall not cover this tax? First, is the tax a direct tax? For the argu-
- I ment of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, MR. FAWCETT, who, after giving

his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration counsel for the appellants chose the definition of JOHN STUART MILL as the one he would prefer to abide by. That definition is as follows :

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. . . . The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that MILL adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the Bar. Their Lordships have not thought it necessary to examine MILL's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature. Their Lordships then take MILL's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

Whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a custom's duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the

A bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of s. 92, of the Federation Act.

There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In *A.-G. for Quebec v. Queen Insurance Co.* (2), the disputed tax was imposed under cover of a licence to be taken out by insurers. But nothing was to be paid directly on the licence, nor was any penalty imposed upon failure to take one. The price of the licence was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with a view of bringing it under class 9 of s. 92, which relates to licences. In *A.-G. for Quebec v. Reed* (3) the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn v. R.* (4) the tax in question was one for licences which by a law of the legislature of Ontario were required to be taken for dealing in liquors. The supreme court held the law to be ultra vires, mainly on the grounds that such licences did not fall within class 9 of s. 92, and that they were in conflict with the powers of Parliament under class 2 of s. 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a licence duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto Corporation, having its domicile there, and having its capital placed there; that the tax is on the capital of the bank; that it must, therefore, fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of s. 92, does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, nor to leave the amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have the means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for, as it does not carry the taxation out of the province, it is for the legislature and not for the courts of law to judge of its expediency.

Then is there anything in s. 91 which operates to restrict the meaning above ascribed to s. 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of

illustration in *Citizens Insurance Co. of Canada v. Parsons* (1). Their Lordships there said (7 App. Cas. at p. 108):

"So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in s. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by s. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one."

Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz. the regulation of trade and commerce; and within class 15, viz. banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in *Severn's Case* (4) it was the view of the supreme court that they operated to invalidate the licence duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parson's Case* (1), and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case* (1), they would be straining them to their widest conceivable extent.

Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by MARSHALL, C.J. Everyone would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution MARSHALL, C.J., found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to

A the provincial legislatures under s. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under s. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated

B provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is, whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the

C range which otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned judges of the lower courts, which have been strongly objected to at the bar. Great importance has been attached to French authorities who lay down that the impôt des patentes, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. It has been suggested that the provincial legislatures

D possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondent's counsel, and, therefore, possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their

E present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rest with the Parliament. The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And

F they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other banks. The insurance company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the banks. The cases have been treated as substantially identical in the courts below, and their Lordships will take the same course with respect to all of them. The appellants in each case must pay the costs of the appeal.

H Solicitors: *Ingle, Cooper & Holmes; Hewlett & Preston; Robinson, Preston & Stow; Hollams, Son & Coward; Simpson, Hammond & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

MACFARLANE v. LISTER

[COURT OF APPEAL (Cotton and Lopes, L.JJ.), November 11, 16, 1887]

[Reported 37 Ch.D. 88; 57 L.J.Ch. 92; 58 L.T. 201;
4 T.L.R. 106]

Solicitor—Charging order—Property recovered or preserved—Letter from client requesting first moneys received to be paid to mortgagee—Right as against mortgage to fund in court—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

Solicitor—London agent—Not solicitor employed by client—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

Solicitor—Charging order—Solicitor acting for both mortgagor and mortgagee—Right to charge—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

On Oct. 21, 1872, the plaintiff executed a mortgage of a dock, and in 1875 country solicitors and their London agents acted for him in an action for redemption. In 1876 a docks company gave notice of compulsory acquisition under their statutory powers of the plaintiff's dock subject to the mortgage. On July 5, 1877, the plaintiff's action was stood over for accounts to be made, but no certificate was ever issued. Before the price for the dock was ascertained by negotiation, the plaintiff, on Jan. 11, 1878, executed a mortgage to D. of his interest in the dock, and the country solicitors acted for both parties to the mortgage. On the same day the plaintiff wrote a letter, addressed to both the country solicitors and their London agents, directing them to pay D.'s debt out of the first money that should come to their hands from the dock company, and this letter was sent by the country solicitors to D. with the mortgage deed. The price of the dock was fixed by arbitration in 1882, and in 1884 an arrangement was come to and the docks company paid a specified sum into court to meet the plaintiff's claim to the equity of redemption of the first mortgage. The division of the money was carried into effect by an order, dated April 2, 1887, made in the action, all further proceedings being stayed. A balance remained after paying off the first mortgage and both the country solicitors and their London agents applied for a statutory charge on the balance.

Held: (i) the London agent of a country solicitor was not the "solicitor . . . employed" (i.e. by the client) within s. 28 of the Solicitors Act, 1860, and could not as against the client obtain a statutory charge on property recovered or preserved: where there was both a country solicitor and a London agent the country solicitor only could obtain a charge under the section; (ii) a solicitor who acted for both mortgagor and mortgagee in the same transaction was not thereby deprived of his right to obtain a charge for his costs under s. 28; (iii) the plaintiff's letter was a direction to the solicitors that the money was to be applied first in paying D. and by sending this letter to D. the solicitors were bound by that direction, and could not, therefore, set up their own claim in priority, and their charge must be postponed to the mortgage of D.

Notes. Section 28, of the Solicitors Act, 1860, has been replaced by s. 72 of the Solicitors Act, 1957; see 37 HALSBURY'S STATUTES (2nd Edn.) 1116. Under s. 18 (5) of the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 104), s. 72, in conjunction with s. 88 (2), of the Solicitors Act, 1957, applies as if an arbitration were a proceeding in the High Court, and that court may make orders and declarations accordingly.

Referred to: *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434; *Re Walker, Meredith v. Walker* (1893), 68 L.T. 517; *Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72.

- A** As to statutory jurisdiction to make charging orders when a solicitor has been employed to prosecute or defend any suit, and as to relation between London agent and country solicitors' client, see 36 HALSBURY'S LAWS (3rd Edn.) 184 and 214; and for cases see 42 DIGEST 300 and 390 et seq.

Case referred to:

- B** (1) *Re Snell* (1877), 6 Ch.D. 105; 46 L.J.Ch. 627; 37 L.T. 350; 25 W.R. 823; 42 Digest 268, 3024.

Also referred to in argument:

- Emden v. Carte* (1881), 19 Ch.D. 311; 51 L.J.Ch. 371; 45 L.T. 328; 30 W.R. 17, C.A.; 42 Digest 298, 3315.
Ex parte Thompson (1860), 3 L.T. 317; 42 Digest 297, 3309.
C *Heinrich v. Sutton, Re Fiddey* (1871), 6 Ch. App. 865; 25 L.T. 643; 19 W.R. 1075; 42 Digest 299, 3330.
Jones v. Frost, Re Fiddey (1872), 7 Ch. App. 773; 42 L.J.Ch. 47; 27 L.T. 465; 20 W.R. 1025; 42 Digest 294, 3287.
Haymes v. Cooper, Cooper v. Jenkins (1864), 33 Beav. 431; 3 New Rep. 627; 33 L.J.Ch. 488; 10 L.T. 87; 10 Jur.N.S. 303; 12 W.R. 539; 55 E.R. 435; 42 Digest 289, 3242.
D *Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch.D. 942; 48 L.J.Ch. 508; 41 L.T. 270; 27 W.R. 834; 42 Digest 298, 3319.
Pilcher v. Arden, Re Brook (1877), 7 Ch.D. 318; 47 L.J.Ch. 479; 38 L.T. 111; 26 W.R. 273, C.A.; 42 Digest 300, 3338.
Greer v. Young (1883), 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224; 31 W.R. 930, C.A.; 42 Digest 292, 3267.
E

Appeal by Dryden, mortgagee under a mortgage of Jan. 11, 1887, from an order of STIRLING, J., in chambers in so far as it declared that the respondents, the country solicitors and their London agents, were entitled to a charge on a fund in court in priority to the mortgagees of the fund.

- F** The respondents, Messrs. Evans & Williams and Messrs. Peacock & Goddard, country solicitors and their London agents were applicants in a summons in the action and in the matter of the Milford Docks Co. asking for a declaration that they, as solicitors employed in the prosecution and defence of the action and in proceedings in the matter, were entitled to a charge on the funds in court for their taxed costs, charges and expenses of, or in reference to, the action and matter as such solicitors, the ground of the application being that such funds had been recovered or preserved by them within s. 28 of the Solicitors Act, 1860. They also applied for taxation of the costs and payment of the taxed costs out of the funds in court. The summons was served on Dryden, the surviving mortgagee under the mortgage of Jan. 11, 1878, and on the present trustees of Macfarlane's settlement. On Aug. 1, 1887, STIRLING, J., made an order in chambers whereby, after expressing that the applicants were entitled in priority to the mortgage of Jan. 11, 1878, made a declaration in the terms of the summons and directed taxation and payment as asked.
G
H

- The plaintiff and J. G. Lister on Oct. 21, 1872, executed a mortgage of a dock and some adjoining lands at and near Milford Haven, to secure £3,000. This mortgage afterwards became vested in John Lister, who entered into possession of the mortgaged property. In 1875 the plaintiff brought an action for redemption against John Lister and Buck, who was the trustee in bankruptcy of J. G. Lister; and in this action Messrs. Evans & Williams, of Haverfordwest, acted as solicitors for the plaintiff, and Messrs. Peacock & Goddard as their London agents. John Lister delivered a defence and counterclaim, by which he claimed foreclosure, or, in case of redemption, a declaration of his title to two-thirds of the property. On July 5, 1877, an order was made for taking the usual accounts against John Lister as mortgagee in possession, the rest of the action being ordered to stand over till the certificate was made. No certificate was ever made.
I

In 1876 the Milford Docks Co. had given notice of their intention to take the dock and the adjoining lands compulsorily under their statutory powers. Negotiations as to the price proved abortive, and the value was not ascertained till 1882. On Jan. 11, 1878, the plaintiff executed a mortgage to Dryden and Gerard (who were the trustees of his marriage settlement) of all his interest in the mortgaged property, to secure £400 advanced to him out of the trust funds. Mr. Evans (of the firm of Messrs. Evans & Williams) acted as solicitor for both parties in the matter of this mortgage. On the same day the plaintiff wrote a letter, addressed to Messrs. Evans & Williams, and to Messrs. Peacock & Goddard, as follows:

"I hereby irrevocably authorise and request you, out of the first moneys that shall come to your hands from the Milford Docks Co. in respect of the Milford and Hakin property belonging to myself and Mr. John George Lister, to pay to my settlement trustees, Messrs. A. E. Dryden & T. Gerard, the sum of £400, and all other moneys (if any) which shall be due on a certain indenture of mortgage, of even date herewith, and made between myself of the one part and themselves of the other part."

On the completion of the mortgage Evans sent this letter to Messrs. Dryden & Gerard along with the mortgage deed.

In 1880 J. G. Lister's bankruptcy was annulled, Buck was discharged from the action, and J. G. Lister was made a party to it. In 1882 the price to be paid by the dock company was ascertained by arbitration. After considerable delay an arrangement ultimately was come to in 1884, under which the company were to pay £600 for costs, pay John Lister's executors £5,000 in respect of his mortgage debt, and pay £2,000 into court to meet the claims of the plaintiff and J. G. Lister as owners of the equity of redemption, and any further sum that might be found due to John Lister's executors. In these arbitration proceedings Messrs. Peacock & Goddard acted as the solicitors of the plaintiff directly, and not as agents for Messrs. Evans & Williams.

The company having paid the £2,000 into court in the matter of their Act, an arrangement as to the division of the money was carried into effect by an order of April 2, 1887, made in the action and in the matter of the Milford Docks Company, by which £1,400 was ordered to be paid to Ann Lister and J. G. Lister (the executors of John Lister) in discharge of their claims as executors, and of the claim of J. G. Lister in his own right; and the remaining £600 was ordered to be carried over to the credit of the action, "Account of the share of the plaintiff, W. H. Macfarlane, in property sold to Milford Docks Company." All further proceedings in the action were stayed. In July, 1887, Messrs. Evans & Williams and Messrs. Peacock & Goddard applied by summons to charge the balance of the funds in court; to tax for taxation of their costs and for payment of the taxed costs out of the funds in court. On Aug. 1, 1887, STIRLING, J., made an order in chambers against part of which Dryden appealed.

H. M. Williams for Dryden.

Yate Lee for the solicitors.

Nov. 16, 1887. **COTTON, L.J.**, stated the facts, read the letter of Jan. 11, 1878, and continued: What is the effect of that letter? Dryden contends that it prevents the solicitors from insisting on their charge in priority to his mortgage. The respondents contended that it applied only to moneys to come to the hands of the solicitors, which the money now in court never did, and that, at all events, it could not prejudice the lien of Messrs. Peacock & Goddard, who are not shown ever to have assented to the directions contained in the letter. It is true that this money never came to the hands of Messrs. Evans & Williams; but I think they cannot be in a better position because the money is in court than they would have been if the money had come to their hands. Having sent that letter on to the mortgagees, the solicitors must be taken to have accepted the directions contained in it, and if moneys had come to their hands they would have been bound

A to apply them in paying the mortgages. "Out of the first moneys that shall come to your hands," must mean that the moneys which should come to their hands were to be applied, in the first place, in making this payment; and their acceptance of that direction, to my mind, precludes them from asserting any lien which would stand in the way of such payment.

B It is said that this cannot affect the rights of the London agents. But, in my opinion, the order, so far as it purports to give a charge to the London agents, is wrong. Section 28 of the Solicitors Act, 1860, applies only to the case of a solicitor who

"shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice."

C "Employed" must mean employed by the clients. The London agent is not the solicitor employed by the client; he is employed by the country solicitor, and where there is a country solicitor and a London agent the country solicitor is the only person to whom a charge can be given. It is said that in this case Messrs. Peacock & Goddard, the London agents, were to some extent directly employed by the plaintiff. But such employment was only in proceedings in the arbitration
D with the dock company under the Lands Clauses Act, and these are not proceedings in respect of which a charge can be given under the Act, as it refers only to proceedings in a "court of justice."

Having regard, then, to the letter to which I have referred, I am of opinion that the order is wrong so far as it gives the charge of the solicitors priority over the mortgage. It was pressed on us that, independently of this letter, the mere fact
E that Mr. Evans acted both for the mortgagor and the mortgagees would prevent his claiming a lien in priority to the mortgage, and *Re Snell* (1) was referred to. Independently of that authority, I am of opinion that the mere fact that the solicitors acted for both mortgagor and mortgagees would not prevent them from having priority in respect of a charge which did not arise in respect of that particular transaction, but was a charge arising by the general law, of which everybody must
F be taken to have notice. In *Re Snell* (1) the title deeds were in the hands of the solicitors who acted for both parties. They had a lien on the title deeds for costs due from the mortgagor, which they did not disclose to the mortgagee, and which did not depend on the general law. Their duty as solicitors for the mortgagee was to obtain the title deeds for him, and it was held that they could not insist on a right which they could only have acquired by neglecting their duty to him, unless
G they had reserved their right by express contract with him.

Re Snell (1) was entirely different from the present case. The declaration as to priority must be discharged, and there must be a declaration of our opinion that the mortgage has priority over the charge of the solicitors. As this appeal is only against part of the order, there is some difficulty in setting the order right. Probably after the mortgagees have been paid there will not be left more than
H enough to pay the costs for which a charge can properly be given. But we ought to express our opinion that there are two points in which the order goes too far. It ought only to extend to costs incurred in the action in which the money was recovered, and not to costs incurred in the arbitration, and it is wrong in so far as it purports to give a charge to the London agents.

I **LOPES, L.J.**—The question before us is, whether the solicitors of the plaintiff and their London agents have a charge on the fund in court in priority to the mortgage of the mortgagees. As regards the London agents, I think that no charge could be given to them under the Solicitors Act, 1860. In the action they were not the solicitors employed by the client within the meaning of the Act, and were, therefore, not entitled to a charge for the costs of the action. No charge could be given in respect of the costs of the arbitration, as these costs were not incurred in proceedings in a court of justice, as required by s. 28 of the Solicitors Act, 1860. As regards the costs of the country solicitors, I think the order would have been right

had it not been for the letter read by COTTON, L.J. I think that the true meaning of the words used in that letter is, that the moneys received are to go in the first place to the mortgagees. This letter was written by the plaintiff to his solicitors, and was forwarded by them to the mortgagees. In my opinion, the letter was thus adopted by the solicitors, and precludes their setting up the claim that their charge has priority over the mortgage. I may add that I quite concur in the observations on *Re Snell* (1) which have been made by COTTON, L.J.

Appeal allowed.

Solicitors: *W. Reed; Peacock & Goddard*, for *Eaton, Evans & Williams*, Haverfordwest.

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

PROUDFOOT v. HART

[COURT OF APPEAL (Lord Esher, M.R., and Lopes, L.J.), April 30, 1890]

[Reported 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171;
55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305]

Landlord and Tenant—Repair—Liability of tenant—Covenant to keep and leave premises in “good tenantable repair”—Extent of liability—Painting and papering—Premises out of repair at commencement of tenancy.

An agreement by a tenant that he will keep and leave a house in “good tenantable repair” obliges him to keep and leave it in such repair as, taking into account the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class that would be likely to want such a house. The house is not required to be in the same condition as when it was let, nor in perfect repair. Whether a tenant is bound, under such an agreement, to re-paint and re-paper the house depends on whether the paint and paper are in such a bad state that no reasonably-minded tenant, of the class likely to want to take such a house, would take it as it is. If the floor of one of the rooms is so far worn out that it cannot be repaired, the tenant under such an agreement must replace it with a new one. It is not material what state of repair the premises are in at the commencement of the tenancy, because if they are then out of repair, the tenant must put them in repair. “Good repair” means much the same thing as “tenantable repair.”

Notes. The damages recoverable for breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease are now limited by the Landlord and Tenant Act, 1927, s. 18 (1).

Considered: *Torrens v. Walker*, [1904-7] All E.R.Rep. 800; *Lurcott v. Wakely and Wheeler*, [1911-13] All E.R.Rep. 41; *Anstruther-Gough-Calthorpe v. Mc-Oscar*, [1923] All E.R.Rep. 198. Applied: *Jacquin v. Holland*, [1960] 1 All E.R. 402. Referred to: *Jacob v. Down*, [1900] 2 Ch. 156; *Wright v. Lawson* (1903), 19 T.L.R. 203; *Evans v. Shotton* (1918), 87 L.J.Ch. 527; *Citron v. Cohen* (1920), 36 T.L.R. 560; *Woodfield v. Bond*, [1922] All E.R.Rep. 742; *Hewitt v. Rowlands*, [1924] All E.R.Rep. 344; *Summers v. Salford Corporation*, [1941] 1 All E.R. 153; *Gordon v. Morgan* (1946), 175 L.T. 276; *Lloyd’s Bank Ltd. v. Lake*, [1961] 2 All E.R. 30.

A As to construction of covenants to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 578 et seq.; and for cases see 31 DIGEST (Repl.) 356-364. For the Landlord and Tenant Act, 1927, s. 18, see 13 HALSBURY'S STATUTES (2nd Edn.) 902.

Cases referred to:

- (1) *Belcher v. M'Intosh* (1839), 8 C. & P. 720; 2 Mood. & R. 186; 31 Digest (Repl.) 357, 4870.
- B** (2) *Payne v. Haine* (1847), 16 M. & W. 541; 16 L.J.Ex. 130; 8 L.T.O.S. 414; 153 E.R. 1304; sub nom. *Paine v. Hayne*, 11 J.P. 462; 31 Digest (Repl.) 359, 4895.
- (3) *Mantz v. Goring* (1838), 4 Bing.N.C. 451; 132 E.R. 861; sub nom. *Young v. Mantz*, 1 Arn. 198; 6 Scott, 277; 7 L.J.C.P. 204; 31 Digest (Repl.) 358, 4891.
- C** (4) *Stanley v. Towgood* (1836), 3 Bing.N.C. 4; 2 Hodg. 132; 3 Scott, 313; 6 L.J.C.P. 129; 132 E.R. 310; 31 Digest (Repl.) 358, 4887.
- (5) *Crawford v. Newton* (1886), 36 W.R. 54; 2 T.L.R. 877, C.A., 31 Digest (Repl.) 360, 4911.

D **Appeal** by the plaintiff from a decision of the Divisional Court (CAVE and MATHEW, JJ.), setting aside a judgment that had been entered for the plaintiff in pursuance of the direction of an official referee and sending the case back to him.

The plaintiff was the landlord and the defendant the tenant of a house in Caversham Road, Kentish Town, under a written agreement for a term of three years, expiring in November, 1888, at a rental of £55 a year. The agreement contained a clause that the tenant would

E “during the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof.”

At the expiration of the tenancy, the present action was brought by the landlord against the tenant for damages for breach of his agreement to leave the premises in good tenantable repair.

F The action was ordered to be referred to Mr. RIDLEY, one of the official referees, who awarded the plaintiff £47 8s. 3d. in respect of the cost incurred by the plaintiff after the termination of the tenancy, (i) in re-papering the walls of rooms where the paper which was upon them when the tenancy commenced had become worn out; (ii) in re-painting the internal woodwork, where the paint which was on such woodwork when the tenancy commenced had worn off; (iii) in whitewashing and cleaning the staircases and ceilings; and (iv) in replacing with a new floor a kitchen floor which had existed when the tenancy commenced; and £5 in respect of the damage caused to the plaintiff by being unable to let his house while the repairs were being executed. He directed judgment to be entered for the plaintiff for £52 8s. 3d.

G Judgment having been entered accordingly, the defendant moved in the Queen's Bench Division to set aside the award and the judgment. The Divisional Court set aside the award and the judgment, and remitted the case to the official referee with an expression of their opinion that the tenant, under such an agreement, was not bound to replace either paper or paint that was worn out, except for the purpose of preventing damage to the fabric; that he was not bound to whitewash the ceilings simply because they had become dirty from ordinary wear; and that he was not bound to put in a new floor, or to pay any proportion of the cost of putting in a new floor, if the old floor had got to such a state that repairing would be of no avail. From this judgment the plaintiff appealed.

Winch, Q.C., T. W. Chitty and Ernest Pollock for the plaintiff.
Morton Daniel for the defendant.

LORD ESHER, M.R.—In this case a question arises between landlord and tenant whether the tenant did or did not break a covenant in a lease for three years to keep and leave the premises in good tenantable repair.

The case was tried before Mr. RIDLEY, and he laid down certain principles upon which he intended to act, and upon which he did act, in making his award. The Divisional Court held that, if he acted on some of those principles, he might have come to a wrong result, and that he should, therefore, go through the figures again upon the principles which they laid down, and see if those principles altered the result. An appeal has now been brought to this court, and that appeal must be based upon the ground that the principles laid down by Mr. RIDLEY were right, and those laid down in the Divisional Court wrong. We have, therefore, to say whether we agree with Mr. RIDLEY or with the Divisional Court, or whether we think that neither was absolutely right.

The first question is as to the meaning of the words used in the covenant in question. The words of the covenant are not to "put the said premises in good tenantable repair," but to keep them so; and, therefore, the covenant does not expressly say that the tenant is to put them in repair. As far as the actual words go, the tenant is only bound to keep the premises in tenantable repair. But it has been held that, where a tenant agrees to keep premises in tenantable repair, and so deliver them up at the expiration of the tenancy, he must, in order to comply with those covenants, if they are not in tenantable repair when he takes them, put them into such repair, in the first instance, and so maintain them. The fact, therefore, that these premises were out of repair when the defendant took them has nothing to do with the question. It is not material for the purpose of ascertaining what his liability now is. In order to keep and deliver up premises in tenantable repair, the plaintiff must put them into such repair, if they are not so already.

What, then, is the meaning of "tenantable repair?" There have been numerous cases in which those words have come before the courts. In some of them, there have been definitions given of the words; others are only of assistance because they show what the courts have held not to be "tenantable repair." In *Belcher v. M'Intosh* (1) there is a direction as to the law on this subject by ALDERSON, B. The covenant there was to put the premises into "habitable repair," and so to deliver up the same. He tells the jury (2 Mood. & R. at p. 189):

"It is difficult to suggest any material difference between the term 'habitable repair' used in this agreement, and the more common expression 'tenantable repair'; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied."

That may not constitute the whole of what is meant by "tenantable repair"; but it seems to me to be, at all events, correct as far as it goes. Then he goes on to apply that to the facts of the case he is dealing with. He says (*ibid.*):

"They were old premises, and dilapidated; the agreement was not that the tenant should give the landlord new buildings at the end of his tenancy; but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes they were used for."

Then there is *Payne v. Haine* (2), in which the covenant was to keep and deliver up the premises in "good repair" which is much the same thing as "tenantable repair." In that case the question was, whether it was sufficient for the tenant to deliver up the premises merely in the same condition as when he took them, or whether he must deliver them up in good repair, although they were not in repair when the tenancy began. PARKE, B., says (10 M. & W. at p. 545):

"If, at the time of the demise, the premises were old and in bad repair, the lessee was bound to put them in good repair as old premises; for he cannot keep them in good repair without putting them into it. He might have contracted to keep them in the state in which they were at the time of the demise. This is a contract to keep the premises in good repair, as old premises; but that cannot justify the keeping them in bad repair because they happened to

A be in that state when the defendant took them. The cases all show that the age and class of the premises let, with their general condition as to repair, may be estimated, in order to measure the extent of the repairs to be done. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term."

ALDERSON, B., says (*ibid.* at p. 546):

C "A contract to 'put' premises in good repair cannot mean to furnish new ones where those demised were old, but to put and keep them in good tenantable repair, with reference to the purpose for which they are to be used."

ROLFE, B., says (*ibid.* at p. 546):

D "The term 'good repair' is to be construed with reference to the subject-matter, and must differ, as that may be a palace or a cottage; but to 'keep in good repair' pre-supposes the putting into it, and means that during the whole term the premises shall be in good repair."

In *Mantz v. Goring* (3), TINDAL, C.J., said (4 Bing.N.C. at p. 453):

E "Everyone knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises; for it is established by *Stanley v. Towgood* (4) and other cases that the same nicety of repair is not exacted for an old building as for a new one."

F What do I gather from those cases? It seems to me that they have none of them given quite as full a definition of "tenantable repair" as I think that the words import. But I gather from them that the question what state of repair the house is in at the commencement of the tenancy is not material, but that the age of the house is very material. To leave a house in tenantable repair means to leave it in a condition that will vary with the age of the house at the time that the tenant leaves it. I agree with the definition given by LOPES, L.J., in the course of the argument:

G "'Good tenantable repair' is such repair as, taking into account the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class that would be likely to want such a house."

H The age, the character, and the locality of the house must all be considered. Is it to be in the same condition as when it was let? No. Is it to be in perfect repair? No. It is to be in such a state of repair as makes it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to want it. I think that we gather up in that definition the material part of all the definitions scattered through the cases. I do not think that it is in any way contrary to *Crawford v. Newton* (5).

I I will only add a few remarks as to the judgments in the present case. The official referee said that in his view "tenantable repair" included painting, papering, and decorating. If that means anything, it means painting, papering, and decorating in all cases. If so, I think that the view of CAVE, J., was more correct than that of the official referee. The official referee's view is that the obligation is to

"repaper with similar paper to that which was on the walls before, and repaint with similar paint to that which was on the painted portion of the premises before."

MATHEW, J., quotes that passage in the course of his judgment, and says,

"That is wrong, every word of it."

CAVE, J., says (25 Q.B.D. at p. 45):

"I cannot see how in any case a man can be bound to put new paper on the walls simply because the old paper which was on at the time when he took the house, or which he has subsequently put on the walls, has become worn out."

I agree with that, qualified, as it is, by the "simply because." I should not agree that a tenant under this covenant was never bound to put new paper on the walls. The mere fact that the paper on the walls of a house in Grosvenor Square has become blacker by reason of smoke or lamps would not make it requisite for an outgoing tenant under this covenant to repair the walls. But supposing the paper was all hanging down off the walls from damp or any other cause, so that a reasonably-minded tenant of the class who take houses in Grosvenor Square would think the house unfit for his occupation, then there must be a new paper on the walls in order to put the house into tenantable repair.

Supposing there must be a new paper, must it be of the same kind as before? If the paper was of a richer description than would satisfy a reasonable tenant of the class who would want such a house, he need not put up the same sort. He must put up such a paper as would satisfy a reasonable man within the definition. The same principle applies as to painting. If the house is in decay for want of painting, of course the tenant must repaint. But his obligation is more than that. If a lessee leaves a house in Grosvenor Square with the same amount and description of painting as would be suitable for a house in Spitalfields, that is a breach of his covenant to leave the premises in tenantable repair. As to whitewashing, the ceilings must be so black that they would prevent a reasonable man taking the house, in order that it should be necessary for a tenant under this covenant to whitewash them. Take another case. Suppose that a house contains a ceiling which is a beautiful work of art, and at the expiration of a tenancy the ornaments and gilding have become defective, would the tenant under this covenant be bound to restore the ceiling? Would a reasonable man require even a house in Grosvenor Square to have an ornamental ceiling of that kind? It would be unreasonable to require it, and, therefore, the tenant would not be bound to restore or regild the ceiling. In such a case the same principle would apply as that which relieves a tenant from replacing on the walls an expensive and elaborate paper.

Then, as to the kitchen floor. If the floor has become rotten, so that the house is not in tenantable repair, the tenant must put in such a floor as will make the house tenantable. If he can repair the floor, he need not put in a new floor. If the floor is so rotten that it cannot be repaired, he must put in a new floor. If a floor is left in the house at the expiration of the tenancy in such a state that it cannot be used, the landlord may either bring an action for breach of the covenant and have the question as to how much it will cost to put the floor in repair tried; or he may himself have the floor put in repair, and then he can recover the cost of doing so, provided that what has been done is reasonable. If he does more than is reasonable, if he puts in a new floor when the old could be repaired, or an oak or marble floor in the place of a deal one, he cannot charge the tenant with the cost of it.

We have now explained more fully than the judgment of the Divisional Court did what is the meaning of such a covenant as this. If anything that we have said is inconsistent with anything that was said in the judgment in the court below, it must be taken that to that extent we disagree with the judgment. We agree with the result of that judgment that this case should go back to the official referee.

LOPES, L.J.—I am of the same opinion, and have very few words to add. The question in the present case is, what is the meaning of a contract to keep and leave premises in "good tenantable repair." I think that "good tenantable repair" is such repair as, taking into account the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of

A the class that would be likely to want such a house. I do not say that there is anything new in that definition; but it appears to me to be the result of the authorities and to be correct.

What, then, is the obligation under the contract? If the house or premises are out of repair when the tenant enters he is bound to put them in repair. That was decided by *Payne v. Haine* (2). Then during his tenancy it is clear that he must not commit waste. With regard to the kitchen floor in the present case, the tenant was bound to restore it, either by putting down a new floor or by repairing the old one. Generally speaking, the tenant would not be bound to renew the paper or paint. He would clearly not be bound to put up the same paper or paper in the same condition as there was on the walls at the commencement of his tenancy. Clearly he would not be bound to do decorative repairs. But if the paper and paint are at any time in such a condition as to cause injury to or, the decay of the premises, he would be bound to re-paper and re-paint to such an extent as to prevent that injury. If, through lapse of time, the paint has become so defective or the paper so worn out as not to be reasonably calculated to satisfy a tenant within the definition, he must make the premises reasonably fit for the occupation of such a tenant. I am of opinion that the conclusion of the learned judges in the court below, that this case should go back to the official referee, was right. The case must go back to him with this expression of our opinion as to the principles that should guide him in making his award.

Appeal dismissed.

Solicitors: *Proudfoot & Chaplin; T. R. Epps.*

[Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.]

F

THORMAN v. BURT, BOULTON & CO.

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), March 2, 1886]

[Reported 54 L.T. 349; 2 T.L.R. 367; 5 Asp.M.L.C. 563]

G Shipping—Loading—Bill of lading signed by agent of master—Short delivery—Liability of shipowner—Bills of Lading Act, 1855 (18 & 19 Vict., c. 111), ss. 1, 3.

H By the Bills of Lading Act, 1855, s. 1: "... every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass... shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." By s. 3: "Every bill of lading in the hands of... [an] endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped...."

I S. & Co. sold to the defendants sleeper blocks to be loaded at Danzig according to the custom of the port. By that custom goods were loaded on rafts, counted, and floated down to the ship. They were then re-counted and a mate's receipt given. All the sleepers mentioned in the bill of lading had been floated alongside the ship, but some had subsequently been lost from the rafts. Consequently, the bill of lading acknowledged the receipt of a larger quantity of sleepers than was in fact put on board. The bill was signed by G., the shipping broker at the port, "by authority of the captain, G., as agent." In an

action for freight and dock dues brought by the shipowner, the defendants counterclaimed for damages for short delivery.

Held: (i) s. 1 of the Bills of Lading Act, 1855, referred only to goods actually put on board the ship and did not bind the shipowner as to a greater number mentioned in the bill of lading which had not been shipped; (ii) the signature on the bill of lading was that of an agent of the master, not of the shipowner, and, therefore, the shipowner incurred no liability under s. 3 of the Act; (iii) apart from the Act, the shipowner would not be responsible for a bill of lading for goods which had never been shipped; accordingly, the shipowner was not liable for the loss of the sleepers.

Grant v. Norway (1) (1851), 10 C.B. 665, and *Jessel v. Bath* (2) (1867), L.R. 2 Exch. 267, followed.

Notes. As to bills of lading, see 35 HALSBURY'S LAWS (3rd Edn.) 328 et seq.; and for cases see 41 DIGEST 369 et seq. For the Bills of Lading Act, 1855, see 23 HALSBURY'S STATUTES (2nd Edn.) 382.

Cases referred to:

(1) *Grant v. Norway* (1851), 10 C.B. 665; 20 L.J.C.P. 93; 16 L.T.O.S. 504; 15 Jur. 296; 138 E.R. 263; 41 Digest 621, 4524.

(2) *Jessel v. Bath* (1867), L.R. 2 Exch. 267; 36 L.J.Ex. 149; 15 W.R. 1041; 41 Digest 310, 1709.

Also referred to in argument:

British Columbia Saw-Mill Co. v. Nettleship (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 3 Mar.L.C. 65; 41 Digest 556, 3820.

Fragano v. Long (1825), 4 B. & C. 219; 6 Dow. & Ry.K.B. 283; 3 L.J.O.S.K.B. 177; 107 E.R. 1040; 8 Digest (Repl.) 168, 1091.

Re Bahia and San Francisco Rail. Co. (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 297, 1871.

Brown v. Powell Duffryn Steam Coal Co. (1875), L.R. 10 C.P. 562; 44 L.J.C.P. 289; 32 L.T. 621; 23 W.R. 549; 2 Asp.M.L.C. 578; 41 Digest 381, 2271.

Appeal from a decision of GROVE, J., in an action brought by the plaintiff, the shipowner, for dock and freight dues, the defendants counterclaiming for damages for short delivery.

By a contract between Schoenberg and Domansky, of Danzig, and the defendants, Burt, Boulton, and Haywood, of London, the former sold to the latter 800 to 1,000 loads of sleeper blocks deliverable to ships at Danzig, according to the custom of the port, payment by buyer's acceptance in exchange for shipping documents. The custom of the port of Danzig in loading timber cargoes is as follows: The shipper counts the number of pieces in each raft, and they are then floated down to the ship, and again counted by the mate or someone on behalf of the ship, and a mate's receipt given for them, which receipt is handed over to the ship when bills of lading are signed. In the present case 7,497 pieces were delivered in rafts alongside the s.s. *Meredith*, belonging to the plaintiff, and a mate's receipt given for that number. This receipt was taken to the office of Ganswindt, the shipping broker, and the bill of lading was made out for the quantity named in the receipt, and was signed by the shipping broker. The bill of lading commenced as follows:

"I, Fletcher, master of the steamship called *Meredith*, which is now loading in Danzig, to sail for London, where the discharge is to take place, certify that I have received from Messrs. Schoenberg and Domansky in the hold of my said ship, 7,497 pieces,"

etc., and was signed, "By authority of the captain, Wilh. Ganswindt as agent." The number of pieces actually shipped on board and delivered to the defendants, who were the endorsees of the bill of lading, was 216 short of the 7,497 pieces, such 216 pieces being lost in some way from the rafts when alongside the ship.

This action was brought for freight and dock dues, but the only question in dispute was, whether there had been a short delivery for which the defendants

A could counterclaim. The action was tried before GROVE, J., who held that the counterclaim was not maintainable. The defendants appealed.

Bigham, Q.C., and *Armytage* for the defendants.

Cohen, Q.C. (with him *J. Edge*), for the plaintiff.

LORD ESHER, M.R.—This is an action by a shipowner for freight and dock dues. The defendants are the assignees of the bill of lading, to whom it must be taken that the property in the goods mentioned in the bill of lading has passed; and they have set up a counterclaim against the shipowner for not delivering all the goods specified in the bill of lading. The question is whether that counterclaim is maintainable. Before the Bills of Lading Act, 1855, if any injury was done to the goods, so as to affect the rights of the person to whom, by the endorsement of the bill of lading, the property had passed, he could sue in respect of such injury. If the goods were misdelivered or any other form of conversion had taken place, he could bring an action of trespass; that was by reason of his ownership of the goods. But he could not maintain an action upon the contract contained in the bill of lading. The question here is, not whether the defendants can maintain an action as owners of the goods, but whether they can sue for a breach of the contract contained in the bill of lading. By the Bills of Lading Act, 1855, s. 1:

E “Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill had been made with himself.”

The contract contained in the bill of lading refers to all goods put on board the ship. It does not bind the owner of the ship as to more goods than those put on board. If the bill of lading signed by the master contains more goods than those actually put on board, the signature is beyond the master's authority; therefore, as far as F s. 1 goes, the contract is only binding as to the goods actually put on board.

But then it is said that s. 3 of the Act gives the defendants a larger remedy. By that section,

G “Every bill of lading, in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless,”

H etc. I agree that the words “the person signing the same” do not necessarily mean the person who actually signs. If, for instance, a clerk in the shipowner's office signs per pro., the owner might be the person signing within the section. Or, if the captain had the gout and was thereby prevented from signing himself, and a servant signed for him, the captain would be the person signing. But, in the present case, the signature was not that of a mere clerk or servant but of an agent; and he was the agent of the master, not of the shipowner. Therefore, as the shipowner did not sign the bill of lading in the present case, he incurs no liability under s. 3. I have already said that s. 1 does not help the defendants, as under that I they can only sue in respect of the goods actually put on board. A number of cases seem to me to have really decided what we are deciding in the present case.

LINDLEY, L.J.—If this counterclaim is based upon the Bills of Lading Act, 1855, I am of opinion that it is not maintainable. The bill of lading is signed as follows: “By authority of the captain, Wilh. Ganswindt, as agent.” That is clearly not the signature of the shipowner, who is the person against whom this counterclaim is made. Therefore, the argument based upon s. 3 of the Bills of Lading Act falls to the ground. Section 1 merely gives the endorsee of the bill of lading the right to sue upon the contract contained in it,

Then, if we look outside the Act *Grant v. Norway* (1) settles the point. The question to be decided was an extremely difficult one before that case; but that case settled it, and, as far as I am aware, has always been acted on. The marginal note is:

"The master of a ship signing a bill of lading for goods which have never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed."

Then counsel for the defendants argues that there is a distinction between that case and this because all the goods mentioned in the bill of lading were floated alongside the ship in the present case, and were, therefore, in the custody of the ship. But that difference seems to me not to be material with reference to the question that we have to decide here. The decision of *Grove, J.*, was right, and this appeal must be dismissed.

LOPES, L.J.—The defendants in this action, who are endorsees for value of the bill of lading, seek to recover, by way of counterclaim, from the plaintiff, who is the shipowner, the difference in value between the goods delivered, which are all that were actually put on board, and the larger quantity of goods mentioned as being shipped in the bill of lading. It is perfectly clear that before the Bills of Lading Act, 1855, such an action was not maintainable. Nor is it maintainable since that Act, and *Jessel v. Bath* (2) seems to me to be a direct authority to that effect. That decides that the owner or charterer of a vessel is not bound by the signature of his agent to a bill of lading for a greater quantity than was actually shipped. The decision of the learned judge was, therefore, right, and this appeal will be dismissed.

Appeal dismissed.

Solicitors: *H. C. Cooke & Co.*, for *H. A. Adamson*, North Shields; *Wild, Browne & Wild*.

[Reported by *A. H. BITTLESTON*, Esq., Barrister-at-Law.] F

COOKE & SONS v. ESHELBY

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson and Lord FitzGerald),
November 30, December 2, 1886, March 15, 1887]

[Reported 12 App. Cas. 271; 56 L.J.Q.B. 505; 56 L.T. 673;
35 W.R. 629; 3 T.L.R. 481]

*Agent—Undisclosed principal—Contract made by agent in own name—Sale—
Action by principal to recover price of goods sold—Right by purchasers to
set off debt due to them by agent.*

Where an agent makes a contract for the sale of goods in his own name for
an undisclosed principal, and the principal sues the buyer upon the contract,
the buyer cannot avail himself of a set off due from the agent, unless in making
the contract he has been induced by the conduct of the principal to believe,
and did in fact believe, that the agent was acting on his own account.

L. & Co., a firm of brokers, sold cotton to the appellants in their own name.
while in reality they were acting for an undisclosed principal. The appellants
knew that L. & Co. dealt sometimes as brokers and sometimes as principals
on their own account, and did not inquire in which capacity they were acting
in the transaction. In an action by the principal's trustee in bankruptcy for
the price of the cotton, the appellants claimed the right to set off a debt due
to them from L. & Co. on general account.

Held: as the appellants chose to purchase without inquiry they had no right
to set off the debt due to them from L. & Co.

Per LORD WATSON: A broker who effects a sale in his own name with an
intimation, express or implied, that he is selling as an agent, does not sell the
goods as his own, and in such a case the purchaser has no reasonable grounds
for believing that the agent is the real party with whom he has contracted.

Notes. Followed: *Blackburn v. Mason* (1893), 68 L.T. 510. Applied: *Cooper v.*
Strauss (1898), 14 T.L.R. 233. Referred to: *Sheffield v. London Joint Stock Bank*;
(1888), 13 App. Cas. 333; *London Joint Stock Bank v. Simmons*, [1891-4]
All E.R.Rep. 415; *Farquharson Brothers & Co. v. King & Co.*, [1900-3]
All E.R.Rep. 120.

As to contracts made by agent, see 1 HALSBURY'S LAWS (3rd Edn.) 214 et seq.;
and for cases see 1 DIGEST (Repl.) 658 et seq.

Cases referred to:

- (1) *George v. Claggett* (1797), 7 Term Rep. 359; Peake, Add. Cas. 131; 2 Esp.
557; 101 E.R. 1019; 1 Digest (Repl.) 663, 2318.
- (2) *Baring v. Corrie* (1818), 2 B. & Ald. 137; 106 E.R. 317; 1 Digest (Repl.) 665,
2331.
- (3) *Sims v. Bond* (1833), 5 B. & Ad. 389; 2 Nev. & M.K.B. 608; 110 E.R. 834;
1 Digest (Repl.) 658, 2292.
- (4) *Semenza v. Brinsley* (1865), 18 C.B.N.S. 467; 34 L.J.C.P. 161; 12 L.T. 265;
11 Jur.N.S. 409; 13 W.R. 634; 144 E.R. 526; 1 Digest (Repl.) 664, 2323.
- (5) *Borries v. Imperial Ottoman Bank* (1873), L.R. 9 C.P. 38; 43 L.J.C.P. 3;
29 L.T. 689; 22 W.R. 92; 1 Digest (Repl.) 664, 2324.
- (6) *Fish v. Kempton* (1849), 7 C.B. 687; 18 L.J.C.P. 206; 13 L.T.O.S. 72; 13
Jur. 750; 137 E.R. 272; 1 Digest (Repl.) 667, 2342.

Also referred to in argument:

- Isberg v. Bowden* (1853), 8 Exch. 852; 22 L.J.Ex. 322; 1 C.L.R. 722; 155 E.R.
1599; sub nom. *Dowden v. Isby*, 1 W.R. 392; 1 Digest (Repl.) 664, 2321.
- Dresser v. Norwood* (1864), 14 C.B.N.S. 574; 32 L.J.C.P. 201; 23 Jur.N.S. 23;
11 W.R. 624; on appeal 17 C.B.N.S. 466; 4 New Rep. 376; 34 L.J.C.P. 48;
11 L.T. 111; 10 Jur.N.S. 851; 12 W.R. 1030; 1 Digest (Repl.) 664, 2322.
- Rabone v. Williams* (1785), 7 Term Rep. 360, n.; 101 E.R. 1020; 1 Digest (Repl.)
666, 2333.

- Stacey, Ross, etc. v. Decy* (1789), 2 Esp. 469, n.; sub nom. *Stacey, Ross, etc. v. Decy*, 7 Term Rep. 361, n.; 101 E.R. 1021, N.P.; 36 Digest (Repl.) 481, 512.
- Carr v. Hinchcliff* (1825), 4 B. & C. 547; 7 Dow. & Ry. K.B. 42; 4 L.J.O.S.K.B. 5; 107 E.R. 1164; 1 Digest (Repl.) 666, 2335.
- Purchell v. Salter* (1841), 1 Q.B. 197; 9 Dowl. 517; 1 Gal. & Dav. 682; 10 L.J.Q.B. 81; 5 Jur. 502; 113 E.R. 1105; on appeal, 1 Q.B. 209, Ex. Ch.; 1 Digest (Repl.) 666, 2337.
- Moore v. Clementson* (1809), 2 Camp. 22; 1 Digest (Repl.) 666, 2338.
- Turner v. Thomas* (1871), L.R. 6 C.P. 610; 40 L.J.C.P. 271; 24 L.T. 879; 19 W.R. 1170; 1 Digest (Repl.) 664, 2319.
- Coates v. Lewes* (1808), 1 Camp. 444; 1 Digest (Repl.) 418, 769.
- Tucker v. Tucker* (1833), 4 B. & Ad. 745; 1 Nev. & M.K.B. 477; 2 L.J.K.B. 143; 110 E.R. 636; 24 Digest (Repl.) 802, 7919.
- Browning v. Provincial Insurance Co. of Canada* (1873), L.R. 5 P.C. 263; 28 L.T. 853; 21 W.R. 587; 2 Asp.M.L.C. 35, P.C.; 1 Digest (Repl.) 658, 2294.
- Mildred, Goyeneche & Co. v. Maspons* (1883), 8 App. Cas. 874; 53 L.J.Q.B. 33; 49 L.T. 685; 32 W.R. 125; 5 Asp.M.L.C. 182, H.L.; 1 Digest (Repl.) 393, 548.
- Gordon v. Ellis* (1846), 2 C.B. 821; 3 Dow. & L. 803; 15 L.J.C.P. 178; 7 L.T.O.S. 85; 10 Jur. 359; 135 E.R. 1167; 36 Digest (Repl.) 513, 774.
- Wilde v. Gibson* (1848), 1 H.L.Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 1 Digest (Repl.) 708, 2586.
- Re Henley, Ex parte Dixon* (1876), 4 Ch.D. 133; 46 L.J.Bey. 20; 35 L.T. 644; 25 W.R. 105, C.A.; 1 Digest (Repl.) 667, 2344.
- Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; 43 L.J.Ch. 269; 22 W.R. 194, H.L.; 3 Digest (Repl.) 338, 1082.
- Farmeloe v. Bain* (1876), 1 C.P.D. 445; 45 L.J.Q.B. 264; 34 L.T. 324; 21 Digest (Repl.) 406, 1295.
- Armstrong v. Stokes* (1872), L.R. 7 Q.B. 598; 41 L.J.Q.B. 253; 26 L.T. 872; 21 W.R. 52; 1 Digest (Repl.) 677, 2399.
- Irvine & Co. v. Watson & Sons* (1880), 5 Q.B.D. 414; 49 L.J.Q.B. 531; 42 L.T. 800, C.A.; 1 Digest (Repl.) 678, 2403.

Appeal from a decision of the Court of Appeal (SIR BALIOL BRETT, M.R., LINDLEY and BOWEN, L.J.J.), reversing a decision of BAGGALLAY, L.J., in favour of the defendants, the present appellants, in a case tried before him without a jury at the Liverpool Assizes, in February, 1884.

The action was brought by the respondent as trustee in the liquidation of one Maximos, to recover the sum of £680, the price of cotton sold by the appellants, Cooke & Son, to Maximos. The contract was for future deliveries, and was made in the Liverpool Cotton Market through a firm of brokers, Livesey & Co., who made the contract in their own names, but were acting in reality for Maximos, as undisclosed principal. Livesey & Co. suspended payment before the contract matured, and Cooke & Sons claimed a right to set off against the respondent's claim on the contract a balance due from Livesey & Co. to them upon their general account.

It appeared that Livesey & Co. sometimes dealt on their own account, and sometimes acted as brokers; but the appellants said that in making this contract they made no inquiry, and had no belief on the subject, one way or the other, as to whether Livesey & Co. were acting as principals themselves, or as agents for an undisclosed principal. The facts and evidence, so far as is material, appear more fully in the opinions of their Lordships.

Kennedy, Q.C., and Carver for the appellants.

French, Q.C., and Synnott for the respondent.

Their Lordships took time for consideration.

A Mar. 15, 1887. The following opinions were read.

LORD HALSBURY, L.C.—In this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The brokers were known by the appellants, the merchants with whom these contracts were made, to be brokers, and it was known that their practice was to sell in their own names in transactions in which they were acting only as brokers. It was also known that they were in the habit of buying for themselves. The appellants with commendable candour admit that they are unable to say that they believed the brokers to be principals, although they knew that they might be either one or the other. They say that they dealt with the brokers as principals, but at the same time they admit that they had no belief, either one way or the other, whether they were dealing with principals or brokers.

It appears to me that the principle upon which this case must be decided has been so long established that in such a state of facts as I have recited the legal results cannot be doubtful. The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both those propositions—namely, first, the permission of the real principal to the agent to assume his character, and with reference to the fact whether those dealing with the supposed principal have in fact acted upon the belief induced by the real principal's conduct, various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great variety of judges for something more than a century.

The cases are all collected in the notes to *George v. Clagett* (1) (2 Smith, L.C. (8th Edn.), 118). In *Baring v. Corrie* (2), in 1818, LORD TENTERDEN, then ABBOTT, C.J., had before him a very similar case to that which is now before your Lordships; and although in that case the court had to infer what we have here proved by the candid admission of the party, the principle upon which the case was decided is precisely that which appears to me to govern the case now before your Lordships. LORD TENTERDEN says of the persons who were in that case insisting that they had a right to treat the brokers as principals (2 B. & Ald. at p. 144):

“They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in the transaction they acted as brokers or not, but they made no inquiry.”

And BAYLEY, J., says (*ibid.* at p. 147):

“When Coles & Co. stood at least in an equivocal situation the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I, therefore, cannot think that the defendants believed when they bought the goods that Coles & Co. sold them on their own account, and, if so, they can have no defence for the present action.”

I am, therefore, of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce, and did not in fact induce, that belief; and I now move your Lordships to affirm the judgment of the Court of Appeal and to dismiss the appeal with costs.

LORD WATSON.—Livesey, Sons & Co., cotton brokers and members of the Liverpool Cotton Association, in April and June, 1883, sold two parcels of cotton for future delivery to the appellants, who were members of the same association.

These sales were in reality made on account of one N. C. Maximos, but, in accordance with his instructions, they were effected by Livesey, Sons & Co. in their own name and without any mention of a principal. Livesey, Sons & Co. suspended payment on July 20, 1883, at which date they owed the appellants a balance on general account. On the same day Maximos gave written notice to the appellants that both sales had been made by Livesey, Sons & Co. as his agents. The present action was brought by Maximos, and is now persisted in by the trustee in his liquidation for recovery of the sums due by the appellants in respect of these two purchases. There is no dispute as to the amount of the claim, the only defence pleaded by the appellants being that they are entitled to set off that amount against the balance admittedly due to them from Livesey, Sons & Co.

The facts which have a material bearing upon the appellants' defence are these. According to the practice of the Liverpool Cotton Market, with which the appellants were familiar, brokers in the position of Livesey, Sons & Co., buy and sell both for themselves and for principals, and in the latter case they transact sometimes in their own name without disclosing their agency, and at other times in the name of their principal. In their answer to an interrogatory by the plaintiff touching their belief that Livesey, Sons & Co. were acting on behalf of principals in the two transactions in question the appellants say :

"We had no belief upon the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as principals."

That is a very candid statement, but I do not think any other answer could have been honestly made by persons who at the time of the transactions were cognisant of the practice followed by members of the Liverpool Cotton Association. A sale by a broker in his own name to persons having that knowledge does not convey to them an assurance that he is selling on his own account; on the contrary, it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot when the real principal comes forward allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal, and not as an agent, in order to secure a right of set off he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or, notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent, and should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent.

It was argued for the appellants that in all cases where a broker having authority to that effect sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account. That was said to be the rule established by *George v. Clagett* (1), *Sims v. Bond* (3), and subsequent cases. It is clear that Livesey, Sons & Co. were not mere brokers or middlemen, but were agents within the meaning of these authorities; and if the argument of the appellants were well founded, they would be entitled to prevail in this appeal, because in that case their right of set off had arisen before July 20, 1883, when they first had notice that Maximos was the principal.

I do not think it necessary to enter into a minute examination of the authorities which were fully discussed in the argument addressed to us. *George v. Clagett* (1) has been commented upon, and its principle explained in many subsequent decisions, and notably in *Baring v. Corrie* (2), *Semenza v. Brinsley* (4), and *Borries v. Imperial Ottoman Bank* (5). These decisions appear to me to establish conclusively that the right of a purchaser to treat an agent as the real contracting party until his principal is disclosed rests upon the doctrine of estoppel. But in

A order to raise an estoppel against the principal it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party, by the conduct, or by the authority, express or implied, of the principal. The rule, thus explained, is intelligible and just. It would be inconsistent with fair dealing that a latent principal should by his own acts or omission lead a purchaser to rely upon a right of set off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection. I, therefore, agree with the conclusion of the learned judges of the Court of Appeal and with the reasoning upon which it is founded. A broker who effects a sale in his own name with an intimation, expressed or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

D **LORD FITZGERALD.**—The supposed importance of this case in its bearings upon the operations of the Liverpool Cotton Market appears to render it rather a duty that each of us should deliver his own opinion. But when we reach a correct appreciation of the facts, it seems to me that all difficulty disappears as to the application of the principle upon which it ought to be decided. Although my noble and learned friends have concisely and accurately stated their views of the facts, I ask your Lordships' permission to advert to some parts of the evidence somewhat more in detail.

E The third paragraph of the defence alleges that "the defendants believed that Livesey & Co. made the contracts as principals," which must be interpreted to mean that they so believed at the time that the contracts were entered into. This essential averment has not been proved, and has been disproved. LORD WATSON has already called attention to an answer given by the appellants, which seems to become more pointed when we refer to the actual interrogatories in reply to which that answer was given. The fourth interrogatory was:

G "Is it not a fact that in the transactions mentioned in the statement of claim, the defendants [the present appellants] believed that Livesey & Co. were acting as brokers on behalf of principals?"

The fifth interrogatory was:

"Did the defendants believe that in such transactions Livesey & Co. were speculating and dealing on their own account as principals?"

To which the defendants answered:

H "To the fourth and fifth interrogatories, that we had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals";

and it appears on the notes of the judge at the trial that to some similar question

I Mr. Cooke, in his examination, answered: "I had no belief in the matter."

It is quite true that Messrs. Cooke had not at the time of the contract any actual knowledge that Livesey had a principal; but it is equally clear that they purposely abstained from obtaining information from Livesey on the subject. Messrs. Cooke relied on a custom in the Liverpool market that, where the principal was undisclosed at the time of the contract, he would only intervene and claim on the contract provided his doing so "was not to the detriment of the broker of the other contracting party"; or, to put it in the exact words of a question and answer at the trial—counsel for the appellants:

"Then, my Lord, I will put this question. In the arrival market, where one of the parties on the face of the contract fails, is there any custom which governs the right of undisclosed principals to claim upon the contract made in the name of the party who has failed?"

Answer:

"He can only claim subject to the right of the other party to the contract to take into account whatever differences there may be on other outstanding contracts."

The special custom alleged to prevail in the Liverpool arrival market was not established in proof.

The disclosure at the time of the contract that there was an undisclosed principal would not only have been very undesirable information to Cooke & Co., but would have prevented the contract being entered into, for in the case of the failure of Livesey & Co., Messrs. Cooke could not (I am giving the language used in the course of the evidence) have "squared their books," that is, have applied the money due on the contracts to Maximos to discharge the liability of Livesey & Co. Mr. Tobin, one of the principal witnesses for the defendants, explains the objects to be achieved very clearly:

"If I have a number of transactions with a broker I treat that broker as the dealer. He is called 'broker' technically, but practically he is the dealer or contracting party with me. I know nobody else in the transaction. I have bought from him certain cotton, and I have sold to him certain cotton. I know how my account stands. If an undisclosed principal can come forward and claim on a certain portion of the contracts, those that are in his favour, and saddle me with the rest, my position is entirely altered."

Mr. Tobin also says that, unless there was such a rule as he had stated in a previous answer, it would be impossible to carry on business in the Liverpool cotton arrival market. He means of course that there would be difficulties in the way of carrying on such business in the manner in which it is carried on in that market. Whether that may or may not be so I do not know, nor shall I venture to speculate whether such a result would prove to be a mercantile calamity. We must not alter the law to suit the views or the convenience of the Liverpool Cotton Market.

The case at one time seemed to present a novel aspect which it might have been difficult for the respondent to encounter. It was alleged that Maximos authorised Livesey & Co. to contract in their own names, and also prohibited them from disclosing his name as principal, and this seemed to be close on the confines of an express authority to contract in their own names as principals, and as if owners of the cotton. I put the case to counsel for the appellants during the argument, but he did not seem to attribute any weight to it, and properly so, for, on examining the evidence carefully, it falls short of the allegation, and does not appear to have been relied on in the Court of Appeal, or in the court below.

The ascertained facts appear to stand thus: Livesey & Co. were extensive cotton brokers on the Liverpool cotton arrival market. They also dealt in other arrivals on their own account as principals. Their position was well known to Cooke & Co. Maximos employed Livesey & Co. to sell for him the particular lots of cotton, and they did so, the contracts which they entered into, though in their own names, being in law contracts for and on behalf of Maximos. He also "authorised them not to give his name," which may be read as meaning not to give his name either in the contract notes or in answer to inquiries, his special object seeming to be to avoid the jealousies or solicitations of other brokers. He did not prohibit them from giving his name, nor did he give them any right to sell in their own names as principals, or as if they were the owners of the goods, and he did not arm them with the indicia of property, if any such existed. Cooke & Sons, having at their hand the fullest means of information, abstained from making any inquiry as to whether Livesey & Co. were acting as brokers for a principal or on their own

A account as principals and owners, and they say they "had no belief on the subject."

Such being the facts, I do not propose to criticise the numerous cases to which *George v. Clagett* (1) gave rise, or to enter on the consideration whether the headnote to that case is misleading. The headnote frequently is misleading if you read it alone, and do not take the trouble to read the case. It seems to me that the judgment of Sir BALIOL BRETT, M.R., in the Court of Appeal is quite correct, and is supported by a number of authorities, including *Fish v. Kempton* (6), *Borries v. Imperial Ottoman Bank* (5), and the judgment of WILLES, J., in *Semenza v. Brinsley* (4). I concur in adopting at once the decision and the reasons of the Court of Appeal.

I have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel in pais involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests, and it seems to me to be sufficient to say in the present case that *Maximos* did not in any way wilfully or otherwise mislead the appellants, or induce them to believe that *Livesey & Co.* were the owners of the goods, or authorised to sell them as their own, or practise any imposition on them. The appellants were not in any way misled.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Harvey, Alsop & Stevens*, Liverpool; *Andrew, Wood & Glasier*, for *Yates, Stananought & Johnson*, Liverpool.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

LISTER & CO. v. STUBBS

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), May 3, 5, 1890]

[Reported 45 Ch.D. 1; 59 L.J.Ch. 570; 63 L.T. 75; 38 W.R. 548;
6 T.L.R. 317]

Agent—Commission—Secret commission—Investment of money in land and other securities—Right of principal to follow money so invested.

The defendant, a foreman employed by the plaintiffs, was in the habit of receiving a secret commission on all orders placed by him as the plaintiffs' agent with a certain firm. The sums so received, which amounted to a considerable sum over the years, was invested by him partly in land and houses, partly in other investments. In an action brought by the plaintiffs against the defendant to recover the commission paid to him, the plaintiffs claimed to be entitled to follow the money into the investments which represented it, and moved for an injunction to restrain the defendant from dealing with the land and houses, and an order that he might be ordered to pay into court the other investments and cash.

Held: although a debt was due to the plaintiffs in consequence of the commission received by the defendant while acting as their agent, the relationship between them with regard to it was one of debtor and creditor, not one of trustee and cestui que trust; the plaintiffs could not, therefore, follow the money into the investments, and the motion was refused.

Notes. Considered: *The Ponjola* (1895), 73 L.T. 512. Distinguished: *Re Monat, Kingston Cotton Mills Co. v. Monat*, [1899] 1 Ch. 831. Considered: *Powell and Thomas v. Jones*, [1905] 1 K.B. 11; *Wilson's and Furness-Leyland*

Line v. British and Continental Shipping Co. (1907), 23 T.L.R. 397. Applied: *A. A.-G. v. Goddard* (1929), 98 L.J.K.B. 743. Distinguished: *Re Nanwa Gold Mines, Ltd.*, *Ballantyne v. Nanwa Gold Mines, Ltd.*, [1955] 3 All E.R. 219. Referred to: *Salford Corporation v. Lever*, [1891] 1 Q.B. 168; *Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360; *Re North Australian Territory Co., Archer's Case*, [1891-4] All E.R.Rep. 150; *Re Sale Hotel and Botanical Gardens, Ex parte Hesketh* (1898), 78 L.T. 368; *Stearns v. Village Main Reef Gold Mining Co.* (1905), 10 Com. Cas. 89; *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378; *Re Reading's Petition of Right*, [1949] 2 All E.R. 68.

As to receipt by agent of secret profits and bribes, see 1 HALSBURY'S LAWS (3rd Edn.) 192 et seq.; and for cases see 1 DIGEST (Repl.) 545 et seq.

Cases referred to:

- (1) *Metropolitan Bank v. Heiron* (1880), 5 Ex.D. 319; 43 L.T. 676; 29 W.R. 370, C.A.; 1 Digest (Repl.) 548, 1713.
- (2) *Re Canadian Oil Works Corpn., Hay's Case* (1875), 10 Ch. App. 593; 44 L.J.Ch. 721; 33 L.T. 466; 24 W.R. 191; 20 Digest (Repl.) 256, 46.

Also referred to in argument:

Morison v. Thompson (1874), L.R. 9 Q.B. 480; 43 L.J.Q.B. 215; 30 L.T. 869; 38 J.P. 695; 22 W.R. 859; 1 Digest (Repl.) 548, 1712.

Freeman v. Cox (1878), 8 Ch.D. 148; 47 L.J.Ch. 560; 26 W.R. 689; 24 Digest (Repl.) 761, 7505.

Dunn v. Campbell (1879), cited in 27 Ch.D. at p. 254.

Wanklyn v. Wilson (1887), 35 Ch.D. 180; 56 L.J.Ch. 209; 56 L.T. 52; 35 W.R. 332; 3 T.L.R. 277; 36 Digest (Repl.) 584, 1423.

Porrett v. White (1885), 31 Ch.D. 52; 55 L.J.Ch. 79; 53 L.T. 514; 34 W.R. 65, C.A.; 22 Digest (Repl.) 132, 1159.

Appeal from a decision of STIRLING, J., in a motion for an injunction to restrain the defendant from dealing with certain real property, and an order to secure by payment into court or otherwise certain other property.

The defendant was employed as a foreman by the plaintiffs, a firm of silk-spinners and dyers, and ordered dye stuffs on behalf of the plaintiffs from certain firms, including Varley & Co. In consideration of orders placed with them, Varley & Co. paid the defendant a secret commission. The defendant invested a large part of the money so received in land, houses and other investments, a portion of it remaining in his hands as cash.

The plaintiffs, discovering that the commission had been received, commenced an action against the defendant, claiming to be entitled to follow the money into the investments representing it. They then moved for an interlocutory injunction to restrain the defendant from parting or dealing with the land or houses purchased by him, and that he might be ordered to pay a certain balance in his hands into court. STIRLING, J., refused the motion and the plaintiffs appealed.

Crackanthorpe, Q.C., *Graham Hastings, Q.C.*, and *Ashton Cross* for the plaintiffs. *Cozens-Hardy* and *J. G. Wood*, for the defendant, were not called on to argue.

COTTON, L.J.—This is a motion by way of appeal from STIRLING, J., for an injunction to restrain the defendant from dealing with certain real property, and an order to secure by payment into court or otherwise certain other property. I believe part of it is a money balance and part of it is money which is invested in some way or other. The case here is that the defendant was in the confidential employ of the plaintiffs, and that he made a corrupt bargain with persons who supplied the company with dye stuffs. According to the statement here, which was not answered, that was a manifestly corrupt bargain. But does that make the sum, which the defendant received in pursuance of that bargain between the parties the money of the plaintiffs?

I think I took a correct view in my judgment in *Metropolitan Bank v. Heiron* (1), which was referred to by STIRLING, J., namely, that money received as this

A was received is not the money of the plaintiffs so as to make the defendant a trustee of that money for the plaintiffs, but that it is money acquired in such a way that, according to all rules applicable to such a case, the plaintiffs, when they bring the action to a hearing, can get an order as against the defendant to pay that money to them. That is to say there is a debt due to the plaintiffs in consequence of the action of the defendant, but the money which he has received in pursuance of the corrupt bargain is not the money of the plaintiffs. It is not possible to treat that money as still the property of the plaintiffs which was handed over by the plaintiffs to Varley for the purpose of paying a debt assumed to be due on the contract between the plaintiffs and Varley. When the facts are found out the plaintiffs have the opportunity of setting aside the bargain altogether and of returning the stuff, and I will not say they could not, without setting aside the contract, sue Varley for this sum which he fraudulently agreed to hand over to the defendant, and which he did so hand over. But, in my opinion, it cannot be said that this sum which, under the corrupt bargain, was paid by Varley to Stubbs, remains the money of the plaintiffs before any such judgment or decree is made. I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant **D** has been ordered to give a security till the debt has been established by the judgment or decree. The plaintiff might apply, if so advised, for an immediate order under R.S.C., Ord. 14, and then, if the defendant applied to defend, he could only do so on such terms as the judge might think reasonable. This is not the course which has been taken here, and, in my opinion, however corrupt the bargain was, we cannot hold that in this case the money is the money of the plaintiffs.

E A case was cited to us which was very different, in which there was a judgment of JAMES, L.J., namely, *Re Canadian Oil Works Corpn., Hay's Case* (2). There Hay himself was a director of the plaintiff company, and he had drawn cheques which purported to be in order to pay for certain property to be bought by the company, but in fact one of those cheques was not drawn for any such purpose, but was drawn for the purpose of being paid to Hay to enable him to pay for his shares. That is a very different thing. There Hay, the director of the company, had received the money ostensibly for a particular purpose, but he did apply it, and knew it was intended to be applied, to an entirely different purpose which was, as against the plaintiff company, fraudulent. That being so, the judges were quite right in holding that that cheque was still to be considered the money of the company, and, therefore, that the mere payment of that cheque in discharge of the calls on the shares was nothing but merely paying the company with its own money the claim which the company had, and therefore that Hay was still liable to pay it. That is entirely different, in my opinion, from the case which is here before us. Therefore, I think this first point cannot avail the plaintiffs.

Then there is said to be a second point, namely that there is such an admission by the defendant that this sum of money is due that we ought to order it into court. Why? As security for the debt which *prima facie* the plaintiffs will make out is due to them? As I have said, there is no case at all for anything of that sort being done, unless it is done as a condition of allowing the debtor to defend. But that is not the case here.

Then there were a number of cases quoted which were cases where a trustee was held liable to pay into court a sum of money which *prima facie* was due from him not as a debtor but as a trustee to the *cestui que trust*. If the first point is wrong, in my opinion those cases will not in any way help the plaintiffs here, because they all depend on the money being money held by a trustee for the plaintiff. The only question really discussed in those cases, was whether there was a sufficient admission to enable the court to deal in that way with the trustee, and to order him to pay the money into court. But in the present case, if this is not the money of the plaintiffs, we should be simply ordering the defendant to pay into court a sum of money which he has, because there is a *prima facie* case against the defendant that at the hearing it will be established he owes the money to the

plaintiffs. In my opinion that would be introducing an entirely wrong principle. I will not go through the cases that have been cited to us by counsel for the plaintiffs, but it would be wrong to order the defendant to give the security asked for by the plaintiffs, even though we might think it was highly just under the circumstances of the present case so to do. In my opinion, the appeal fails, A

LINDLEY, L.J.—If we were to accede to this application I do not think the defendant, Stubbs, could complain; but the question is, whether we can do it properly, having regard to the rules by which we are governed. I am clearly of opinion that we cannot. It is a temptation to us to stretch the law to an extent which would, in my judgment, entail very alarming consequences indeed. What is the real state of the case as between Lister & Co., Varley, and Stubbs? The plaintiffs, Lister & Co. buy goods off Varley at certain prices, and pay for them. The ownership of the goods, of course, is in Lister & Co.; the ownership of the money is in Varley. So far there is no difficulty about it. Varley enters into an agreement with Stubbs who orders the goods to give Stubbs a commission. What is the legal position between Varley and Stubbs? Varley owes Stubbs the money. Stubbs can recover it from Varley, I suppose, by action; but counsel for the plaintiffs has asked us to stretch that, and to say that Varley is Stubbs' agent in getting it. That appears to me to be a mistake. The relation between Varley and Stubbs is that of debtor and creditor, Varley pays Stubbs. Then comes the question as between Lister & Co. and Stubbs. Can Stubbs keep the money without accounting for it? Obviously not. I apprehend that he must account for the money, or is liable to account for it, the moment he gets it. It is an obligation to pay and account to the company with or without interest, as the case may be; I say nothing at all about that. But it is a relation of debtor and creditor; it is not the relation of trustee and cestuis que trust. We are asked to hold that it is the latter, which would involve consequences which I confess startle me. One consequence, of course, would be that if Stubbs were to become bankrupt this property into which the money has gone would be withdrawn from the mass of his creditors, and handed over bodily to Lister & Co. Can that be right? Another consequence would be that, if counsel for the plaintiffs are right, this company can compel Stubbs to account to them, not only for the money with interest, but for all the profits which he had made by embarking in trade with it. Can that be right? It appears to me that those consequences show there is some flaw in the argument. If by logical reasoning from the premises conclusions are arrived at which are opposed to good sense it is necessary to go back and look at the premises and see if they are sound. I am satisfied they are not sound in this case, the unsoundness consisting in confounding ownership with obligation. It appears to me, therefore, that the view taken of this case by STIRLING, J., was correct; and that we should be doing what I conceive to be very great mischief if we were to stretch the principle to the extent to which we are asked to stretch it, tempting as it is as between the plaintiffs and the defendant Stubbs. I think that the appeal ought to be dismissed. B C D E F G H

Appeal dismissed.

BOWEN, L.J.—I am of the same opinion. I do not think I need add anything to what has been said.

Solicitors: *Speckthly, Mumford & Landon* for *Mumford & Johnson*, Bradford; *W. & J. Flower & Nusssey* for *Berry, Robertson & Scott*, Bradford. I

[Reported by A. J. SPENCER, ESQ., Barrister-at-Law.]

A

NATIONAL BANK v. SILKE

[COURT OF APPEAL (Lindley, Bowen and Fry, L.JJ.), December 9, 10, 1890]

[Reported [1891] 1 Q.B. 435; 60 L.J.Q.B. 199; 63 L.T. 787;

39 W.R. 361; 7 T.L.R. 156]

B

Bill of Exchange—"Words prohibiting transfer"—Validity of bill between parties—Need for prohibition to be expressed distinctly—*Bills of Exchange Act, 1882* (45 & 46 Vict., 61), s. 8.

By the Bills of Exchange Act, 1882, s. 8 (1): "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable."

C

The defendant drew a cheque on his bank payable to M. and crossed "Account of M., National Bank." M. endorsed the cheque and sent it to the plaintiffs, the National Bank, directing them to credit his account with the money. The plaintiffs did so and allowed him to draw money on account before they had received it. On presentation at the defendant's bank the cheque was dishonoured, the defendant having given directions that it was not to be paid on the ground that it had been obtained by false pretences. The plaintiffs applied to M. to refund the sum they had advanced to him, and on his failure so to do brought an action against the defendant for the amount due.

D

Held: the words "account of M., National Bank" on the cheque were not "words prohibiting transfer" within the meaning of the Bills of Exchange Act, 1882; as the cheque was, therefore, negotiable and had been sent to the plaintiffs to be credited to M.'s account and he had drawn on it, the plaintiffs were bona fide holders of the cheque for value in due course and could sue the defendant for the amount.

E

Per LINDLEY, L.J.: Those who intend that a cheque drawn to order or to bearer shall not be negotiable must say so distinctly and unmistakably, for it is of the utmost importance that such cheques shall not be embarrassing documents.

F

Notes. Considered: *Gordon v. London City and Midland Bank, Gordon v. Capital and Counties Bank* (1900), 83 L.T. 762. Not Followed: *Hibernian Bank, Ltd. v. Gysin and Hanson*, [1938] 2 All E.R. 575. Considered: *Hibernian Bank, Ltd. v. Gysin and Hanson* [1939] 1 All E.R. 166. Referred to: *Sutters v. Briggs*, [1922] 1 A.C. 1.

G

As to negotiability of bills of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 161 et seq.; and for cases see 6 DIGEST (Repl.) 414 et seq. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505 et seq.

Case referred to:

H

(1) *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; 50 L.T. 457, H.L.; 6 Digest (Repl.) 109, 818.

Also referred to in argument:

Bellamy v. Marjoribanks (1852), 7 Exch. 389; 21 L.J.Ex. 70; 18 L.T.O.S. 277; 16 Jur. 106; 155 E.R. 999; 6 Digest (Repl.) 414, 2929.

I

Smith v. Union Bank of London (1875), 1 Q.B.D. 31; 45 L.J.Q.B. 149; 33 L.T. 557; 24 W.R. 194, C.A.; 3 Digest (Repl.) 266, 764.

Decroix Verley et Cie v. Meyer & Co. (1890), 25 Q.B.D. 343; 59 L.J.Q.B. 538; 63 L.T. 414; 39 W.R. 2, C.A.; affirmed sub nom. *Meyer & Co. v. De Croix, Verley et Cie*, [1891-4] All E.R.Rep. 927; [1891] A.C. 520; 61 L.J.Q.B. 205; 65 L.T. 653; 40 W.R. 513; 7 T.L.R. 729, H.L.; 6 Digest (Repl.) 60, 537.

Crouch v. Crédit Foncier of England (1873), L.R. 8 Q.B. 374; 42 L.J.Q.B. 183; 29 L.T. 259; 21 W.R. 946; 6 Digest (Repl.) 417, 2948.

Appeal from the decision of DAY, J., in an action brought to recover the sum of £450, being the amount of a cheque drawn by the defendant upon the Alliance Bank, and endorsed to the plaintiffs. A

The defendant had agreed to advance a sum of £450 to a Mr. J. F. Moriarty, upon certain conditions as to security, and in pursuance of this arrangement gave him the cheque in question. The cheque was drawn upon the Camden Town branch of the Alliance Bank, and was payable to the order of J. F. Moriarty, Esq., and was crossed thus: "Account of J. F. Moriarty, Esq., National Bank, Dublin." Moriarty, on receiving the cheque sent it by post to the National Bank Dublin, who were his bankers, in a letter in which he told them to "credit" his account with the £450. The bank did so at once, before they knew whether the cheque would be honoured, and sent Moriarty an acknowledgment of the receipt of the cheque as "for your credit." On the day Moriarty sent the cheque to the bank his account was £6 overdrawn. He immediately drew upon his account and thus received the greater part of the value of the cheque before it had been paid to the bank. The bank sent the cheque on to London, and on its being presented by their Camden Town branch to the Camden Town branch of the Alliance Bank for payment, payment was refused by the direction of the drawer, which had been given in the meantime. The reason for this direction was, that Moriarty had not fulfilled the condition as to security upon which the advance had been made to him. The National Bank then applied to Moriarty to refund to them the sum which they had advanced upon the faith of the cheque being honoured, and, as he failed to do so, they brought an action against the drawer of the cheque. DAY, J., gave judgment for the plaintiffs. The defendant appealed. B

By the Bills of Exchange Act, 1882, s. 8: C

"(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. D

(2) A negotiable bill may be payable either to order or to bearer. E

(3) A bill is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. F

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. . . ."

Crump, Q.C., and *Willes Chitty* for the defendant. G

Sidney Woolf, Q.C., and *Houghton*, for the plaintiffs, were not called on to argue.

LINDLEY, L.J.—The question in this case is whether the National Bank is entitled to sue the defendant upon a cheque drawn in this particular form. It has been contended that the bank cannot maintain this action because they have no right to sue upon the cheque at all; that it was not a transferable or negotiable instrument, and consequently no one can sue upon it but Moriarty himself. It must be remembered that the Bills of Exchange Act, 1882, which governs this question, contains special provisions relating to cheques. I am not satisfied that a cheque payable to order or bearer can be made not negotiable in any mode, except that which is expressly pointed out in ss. 77 and 81 of the Act, that is, by writing the words "not negotiable" across it; but it is not necessary to decide this point now. But I think that those who intended that a cheque drawn to order or to bearer shall not be negotiable must say so distinctly and unmistakably, for it is of the utmost importance that such cheques shall not be embarrassing documents. But, assuming (without deciding the point) that s. 73 of the Act of 1882 makes s. 8 apply to cheques, and that it is possible to draw a cheque payable to order or bearer and at the same time to add words to it restricting its transferability, I am clear that those words must be so plain that they cannot be mistaken. Ambiguous words will not do. A cheque drawn to order or bearer must not be made a H I

- A** puzzle. The words used in the present case, "Account of J. F. Moriarty," certainly do not "prohibit transfer" of the cheque. Do they "indicate an intention that it should not be transferable?" I think not. The utmost they can amount to is a direction to the National Bank to place the amount of the cheque to the credit of the particular person's account. Any other construction would be utterly inconsistent with the nature of a document which was made payable to order or bearer.
- B** The only other question was, whether the bank were holders of the cheque in due course and for value. The answer is plain. The cheque was not sent to them merely for collection. The intention was that they should place the amount to the credit of Moriarty in order that he might draw upon it, and he did so. I think the argument that the bank were merely his agents to collect the amount is untenable. The bank are bona fide holders of the cheque for value in due course, and this
- C** appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion, and will add nothing on the first point. As to the second point, whether or not the National Bank are holders for value in due course, it is plain from the discussion in the House of Lords in *M'Lean v. Clydesdale Banking Co.* (1), and indeed it was plain enough to commercial men before, that when a cheque is sent to a bank to be placed to the credit of a particular customer, and that bank places the amount to his credit, and allows him to draw upon it, they are holders of the cheque for value and in due course.

- D**
- FRY, L.J.**—I concur, and I will add only a few words on the first point. I am far from certain that s. 8 of the Bills of Exchange Act, 1882, was not intended to
- E** classify bills of exchange under the following heads: viz., in sub-s. (1) bills which were not negotiable, in sub-s. (2) bills which were negotiable; these being divided into bills payable to bearer and bills payable to order by sub-ss. (3) and (4); and that a bill payable to order must always be a negotiable bill, and cannot be made otherwise. But, assuming that a bill payable to order can be made not negotiable, still I am clearly of opinion that the words used here do not render the cheque
- F** not negotiable. Much clearer words must be used to countervail the use of the words "to the order." I think the decision of the learned judge in the court below was correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Tatham & Lousada; Norris & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.J.J.), June 24, 25, 1890]

[Reported 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503;
6 T.L.R. 393]

Conflict of Laws—Contract—Contract made, and to be performed, in England—Proper law.

The defendant company, which was domiciled in France, entered into contracts to buy copper from the plaintiffs, an English firm. The contracts were made in England and were to be performed in England. The defendant company was later declared to be in "judicial liquidation" by a decree of a French tribunal, and it was claimed that under French law this was a complete discharge of the defendant's obligation to pay the purchase price of the goods. In an action by the plaintiffs against the defendant company for damages for non-acceptance of the copper,

Held: as the contracts were made in England and were to be performed in England, English law was the law to be applied in determining whether the contracts were discharged, and, accordingly, the French liquidation, even if a complete discharge by French law, would provide no defence to an action in England, notwithstanding that the defendant company was domiciled in France.

Smith v. Buchanan (1) (1800), 1 East 6, applied.

Dictum of LORD BLACKBURN in *Bartley v. Hodges* (2) (1861), 1 B. & S. 375, explained and applied.

Notes. Considered: *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A.C. 349; *Taylor v. Holland*, [1902] 1 K.B. 676; *Re Vocalion (Foreign), Ltd.*, [1932] All E.R.Rep. 519; *British and French Trust Corp. v. New Brunswick Rail. Co.*, [1937] 4 All E.R. 516. Applied: *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1957] 3 All E.R. 641. Referred to: *Cooke v. Charles A. Vogeler Co.*, [1900-3] All E.R.Rep. 660; *Re Nelson, Ex parte Dare and Dolphin*, [1918] 1 K.B. 459; *National Bank of Greece and Athens v. Metliss*, [1957] 3 All E.R. 608; *Adams v. National Bank of Greece*, [1960] 2 All E.R. 421.

As to the proper law of a contract, see 7 HALSBURY'S LAWS (3rd Edn.) 72-78; as to discharge of a contract under foreign law, see *ibid.* 82; as to discharge of bankruptcy and conflict of laws, see *ibid.* 50, 83, and 2 HALSBURY'S LAWS (3rd Edn.) 340-541; as to foreign companies, see 6 HALSBURY'S LAWS (3rd Edn.) 834-845. For cases see 11 DIGEST (Repl.) 422-426; 446-447.

Cases referred to:

- (1) *Smith v. Buchanan* (1800), 1 East, 6; 102 E.R. 3; 4 Digest (Repl.) 645, 5738.
- (2) *Bartley v. Hodges* (1861), 1 B. & S. 375; 30 L.J.Q.B. 352; 4 L.T. 445; 9 W.R. 693; 121 E.R. 754; 4 Digest (Repl.) 644, 5730.
- (3) *Phillips v. Allan* (1828), 8 B. & C. 477; 2 Man. & Ry.K.B. 576; 7 L.J.O.S.K.B. 2; 108 E.R. 1120; 4 Digest (Repl.) 642, 5709.
- (4) *Edwards v. Ronald* (1830), 1 Knapp, 259; 12 E.R. 317, P.C.; 4 Digest (Repl.) 643, 5713.
- (5) *Quelin v. Moisson* (1828), 1 Knapp, 265; 12 E.R. 320, P.C.; 5 Digest (Repl.) 1077, 8683.

Also referred to in argument:

- Solomons v. Ross* (1764), 1 Hy. Bl. 131, n.; 126 E.R. 79; 5 Digest (Repl.) 870, 7305.
- Sill v. Worswick* (1791), 1 Hy. Bl. 665; 126 E.R. 379; 5 Digest (Repl.) 871, 7309.

- A** *Re Morton, Ex parte Robertson* (1875), L.R. 20 Eq. 733; 44 L.J.Bey. 99; 32 L.T. 697; 23 W.R. 906; 4 Digest (Repl.) 48, 412.
Ellis v. M'Henry (1871), L.R. 6 C.P. 228; 40 L.J.C.P. 109; 23 L.T. 861; 19 W.R. 503; 4 Digest (Repl.) 643, 5714.
Re Davidson's Settlement Trusts (1873), L.R. 15 Eq. 383; 42 L.J.Ch. 347; 21 W.R. 454; 37 J.P. 484; 5 Digest (Repl.) 746, 6445.
- B** *Phosphate Sewage Co. v. Lawson & Son's Trustee* (1878), 5 R. (Ct. of Sess.) 1125; 4 Digest (Repl.) 51, *175.
Re Artola Hermanos, Ex parte André Châle (1890), 24 Q.B.D. 640; 59 L.J.Q.B. 254; 62 L.T. 781, C.A.; 4 Digest (Repl.) 49, 416.
Gillman v. Lockwood, 4 Wall. 409.
Baldwin v. Hale, 1 Wall. 223.
- C** *Quin v. Keeffe* (1795), 2 Hy. Bl. 553; 126 E.R. 698; 4 Digest (Repl.) 644, 5727.
Lewis v. Owen (1821), 4 B. & Ald. 654; 106 E.R. 1076; 4 Digest (Repl.) 643, 5720.
Ogden v. Sanders, 12 Wheaton, 213, 366.

D **Appeal** by the defendants, La Société Industrielle et Commerciale des Métaux, from a decision of STEPHEN, J., awarding the plaintiffs, Messrs. Anthony Gibbs & Sons, damages of £40,736 19s. 1d. for the non-acceptance by the defendants of quantities of copper which the defendants had agreed to purchase.

The action was brought by the plaintiffs merchants in London, against the defendants, a French company, for damages for breaches of several contracts entered into with them in November, 1888, and subsequently for the sale to them of several quantities of copper, which the defendants had failed to accept. The course of business observed between the parties was as follows: The plaintiffs had agents, Messrs. Henry Bath & Sons, who were metal brokers in London, and whose agents in Paris again were the firm of Dupin and Ehret. Dupin and Ehret were also agents for the defendant company, of which M. Secretan was chairman and managing director, and they from time to time obtained a limit price from him, which they communicated to Messrs. Bath & Sons, who in turn transmitted the limit to their principals, the plaintiffs. The plaintiffs then agreeing to supply the copper without these limits, the contracts were drawn up by Messrs. Bath & Sons, as bought and sold notes, in the following form:

"No. 16,141.

Contract C.

Adopted March 31, 1887.

Arrival Chili Bar Copper.

Henry Bath & Sons, 53, New Broad Street, London, E.C.

Nov. 26, 1888.

La Société Industrielle et Commerciale
des Métaux, Paris.

H We have this day $\left\{ \begin{array}{l} \text{bought} \\ \text{sold} \end{array} \right\}$ for you from our principals, Messrs. Anthony Gibbs and Sons, subject to the rules and regulations of the London Metal Exchange endorsed hereon, about 50 (fifty) tons more or less of Chili bar copper of a minimum of 93 per cent. produce, and advised from Chili as of the following brands, good ordinary brands, to be shipped per steamer expected to sail from Valparaiso about . . . expected to arrive at Liverpool Jan. 19, 1889, and to be delivered in warehouse there at £78 10s. (seventy-eight pounds ten shillings) per ton, for 96 per cent. of firm copper.

I

Payment shall be made in cash in London, against warrants, less 2½ per cent. discount within fourteen days of the day of sampling . . . Any disputes in this contract shall be settled by arbitration according to rule 2.

Cartage ½ per cent.

J. DUPIN and EHRET,
(Signed) HENRY BATH & SONS."

The rules of the London Metal Exchange were endorsed on the back (no question turned upon their construction). There was a provision that, if the sellers failed to deliver on the prompt day, the buyers might buy in the market against them on that day, and if the buyers failed to take delivery on the prompt day the sellers might sell against them in the market. The bought note was sent to Dupin and Ehret, in Paris, by Bath & Sons, together with a "confirmation note," to be signed by the defendant company on receipt by them of the bought note, and which note was thereupon returned to Bath & Sons. The following is a copy of a specimen of the confirmation note:

"La Société Industrielle et Commerciale des Métaux.
Paris, Nov. 27, 1888.

Messrs. Henry Bath & Sons, 53, New Broad Street, London, E.C.

Gentlemen,—We have received your contract No. 16, 140-41, dated Nov. 26, for the purchase of 150 (one hundred and fifty) tons of Chili bar copper, to arrive, and beg to confirm the same hereby.—Yours truly,

SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX,
P. Proc. de l'Administrateur Directeur.

C. Niredville."

All the contracts were in the same form, and the same course of business was followed in respect to each of them. The defendants made default in taking delivery under the contracts sued upon, and on April 15, 1889, the defendants were declared judicially in liquidation by the Tribunal de Commerce in France.

The position then was this. The business of the company was suspended, and the company declared dissolved by the decree of the tribunal, which named an official liquidator, and conferred on him extended powers as such liquidator, both for the "réglement" of its rights and the rights of interested parties, and the administration of assets. By the French law of Mar. 21, 1889, articles 569 and 574 of the French Code were rendered applicable to such cases, and the effect was that under that law all creditors who held contracts to sell goods to the defendants were bound either to deliver the goods to the liquidator and prove in the liquidation for the price, or, if they chose to retain the goods, to relinquish their claim for damages. The breaches in respect of which some £19,760 were claimed occurred before the decree on April 15, 1889, and the plaintiffs in respect of that sum were entitled to prove by French law, and in fact had proved under the liquidation. But in respect of the remainder of the damages claimed the breaches did not arise until after the date of the decree, and the liquidator consequently declined to admit plaintiffs' proofs for them unless they also made delivery of the goods to him, which the plaintiffs declined to do. The plaintiffs then commenced the present action for damages for non-acceptance of the copper. STEPHEN, J., gave judgment for the plaintiffs. The defendants appealed.

W. R. Kennedy, Q.C., and *H. Tindal Atkinson* for the defendants.

R. T. Reid, Q.C., and *R. S. Wright* for the plaintiffs.

LORD ESHER, M.R.—In this case the defendants, a French company, the Société des Métaux, wished to purchase metal from the plaintiffs, Messrs. Gibbs & Sons, and through an agent in Paris of a firm of London metal brokers entered into negotiations with the plaintiffs for that purpose, and by those brokers the contracts were made in London in the ordinary way by the drawing up of bought and sold notes, which, on the face of them, expressed the contracts to be subject to the rules of the London Metal Exchange. One of three notes the brokers sent to the plaintiffs, the other to the defendants, and both were retained by the respective parties. The principals adopted the notes, and by them, therefore, the contract was made.

These contracts were for the delivery of copper in England; they were made in London and were subject to the rules of the London Metal Exchange, and it

A appears to me, therefore, that they were English contracts. Consequently, the defendants were bound to accept the metal, but they did not do so, and, according to English law, that fact gave a right of action against them to the plaintiffs, the measure of damages being the difference between the contract prices and the price at the time of sale. But the defendants are a French company, domiciled in France, and being subject to the law of France, have had a judgment declaring
B them to be in "judicial liquidation" pronounced against them by the Tribunal of Commerce of the Seine. And this judgment, it is asserted by the defendants, discharged them from the contracts and from all liability under them in more than one way. First, they say, because it dissolved the French company, and, therefore, the contracts. Secondly, because the plaintiffs, by their agents, went to France and offered proofs of their claim before the French tribunal, and that the
C defendants were by French law thereby discharged from their liability in respect of it. Thirdly, it is said, as to part of the claim, that by the law of France, if a company is in liquidation and is bound to a creditor by such contracts as these are, that is to say, for the acceptance of goods at a date subsequent to the judgment of liquidation, then the creditor cannot prove for damages unless he elects to deliver the goods to the liquidator and prove for the original price; if he does not
D do so, then the contract is void. And fourthly, the defendants raise this further point: they say that judgment ought not to have been pronounced, but that the judge ought to have stayed the proceedings before giving judgment, or that, if he gave judgment, he ought on so doing to have stayed the proceedings generally.

The plaintiffs answer to these contentions that, in the first place, there can be by French law no discharge in France until by final judgment in the bankruptcy,
E which has not been given. And that, in the second, even were such judgment given so as to be a discharge of the defendants from their obligations by French law, yet such discharge would be no answer to an action in this country upon an English contract. The question, therefore, that we have to decide is, whether the defendants have made any answer to the plaintiffs' action in this country according to the law of England. It is clear, under two heads of law, that these contracts
F were English contracts—first, because they were made here; secondly, because they were to be performed here. What is the rule as to what law governs a contract? It is that the contract is governed by the law of the country where the contract is either made, or so far to be performed that it must be considered to be a contract of such country. The law of that country is to be applied to it in every respect in which it is applicable to it as a contract. I put it in this way to exclude
G any matters of procedure which do not affect the contract qua contract, but relate only to the procedure of the court in which litigation may take place upon it. The laws of procedure are the laws of the country in which the action is brought; the law which governs the contract is the law of the country to which the contract belongs. If, therefore, there is any law of the country to which the contract belongs which discharges it, then such a law affects the contract and will
H be applied. The law of England says this: that if a person be sued in England on a contract made in a foreign country, and facts have arisen in that country which by the law of that country would be a discharge, then that law applies, and he will be discharged from liability in this country.

But although, it is now said, the contract is not governed by the laws of another country, yet if the defendant is domiciled in such other country and is discharged
I from liability under it by the laws of such country, he is discharged here. That, it seems to me, does not come within the principle I have laid down, for that law is not the law of this country to which the contract belongs, nor is it one by which the parties have agreed to be bound. As LORD KENYON observed, in *Smith v. Buchanan* (1), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have never given any consent express or implied. Therefore, the contention is outside the principle which we recognise as governing these matters. Consequently, in this case, even if there were a discharge of the defendants' obligations by the law of France, yet I should say that it did not bind

the plaintiff who is entitled to sue upon an English contract. Further, if the contract were made in another country than France, the domicile of the defendants in France would not have made it a French contract. A

I think that is enough. But I am of opinion that it is not made out that this company was dissolved by the law of France. I am not sure that a creditor would discharge a debtor by merely electing at a particular stage not to deliver. I should think he might repent and offer to deliver. I am not satisfied that anything short of final judgment would be a discharge. But it is not necessary to decide that. B
I base my judgment upon this, that even if the defendants were discharged from liability by the law of France, yet the fact that France was the country of their domicile does not discharge them from liability upon their English contracts. I think so on principle, and I think so upon the authority of decided cases.

LORD KENYON, in *Smith v. Buchanan* (1) thought that the defendant's domicile was quite apart from the question, and put it on principle that the law of the country to which the contract belonged was the governing law. C

It was suggested that in *Bartley v. Hodges* (2) LORD BLACKBURN doubted the generality of the doctrine, and intimated that a discharge in the country of the defendant's domicile would be recognised in English courts. I do not attach the greatest importance to what he said during the argument. I think he was then criticising the plea; but I think he meant to adopt the judgment of LORD KENYON as received by the text writers on the subject. In the course of his judgment he said this (1 B. & S. at p. 380): D

"The law on this subject is laid down in STORY'S CONFLICT OF LAWS (5th Edn.), s. 342. Having stated in previous sections that the discharge of a contract by the law of the place where it was made or to be performed will be a discharge everywhere, he goes on to say: 'The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country. Thus it has been held in England that a discharge of a contract made there under an insolvent Act of the State of Maryland is no bar to a suit upon the contract in the courts of England.' For this he cites *Smith v. Buchanan* (1), and proceeds: 'In America the same doctrine has obtained the fullest sanction.' In addition to that, we have the same doctrine pretty distinctly laid down and acted upon in *Phillips v. Allan* (3)." E

I think this shows that LORD BLACKBURN adopted the proposition laid down by LORD KENYON and agreed with it entirely. F

Then I come to *Edwards v. Ronald* (4) and *Quelin v. Moisson* (5). With regard to the former, that was an action in the courts of Calcutta, and the Privy Council held that the Act of the Imperial Parliament relied upon was binding as such upon the court of Calcutta. So that will not help us. *Quelin v. Moisson* (5) was a peculiar case. A bankrupt at Nantes had made a promissory note in favour of a Frenchwoman at Nantes. He was then a discharged bankrupt I think, and the payee had proved. By some means she endorsed this promissory note, and eventually, perhaps not honestly, it was endorsed to someone in Jersey. Promissory notes give rise to many contracts. There is first the contract by the maker with the payee. If the payee endorses it over, that makes a contract between him and the endorsee; if a subsequent endorsee sues the maker or acceptor, he sues on the contract he makes with them. But if the second endorsee sues the first endorsee it is a different contract; i.e., one between themselves, and if that be made in another country it must be governed by the law of the country to which the contract belongs. I have referred to this by way of example. Even assuming everything in favour of the defendants, a perfect discharge by French law cannot avail them in England. G

With regard to the suggested stay of proceedings, if the judgment is right, there can be no possible ground for a stay; if the judgment is wrong, no stay is wanted. It is unnecessary to go into the question as to what the judge ought to have done H

I

A as to this before judgment, or on what grounds he could stay after, whether for the purpose of appeal or not. For the reasons I have given I think that the judgment of STEPHEN, J., was right, and must be affirmed.

B LINDLEY, L.J.—The first point to be borne in mind is, that these contracts are English; they are made and to be performed in England. It was contended that they were French because of the letter of confirmation. But I do not take that view; in point of fact, they merely notified and acknowledged, and at the utmost ratified, the contract already made, and treating it so could not make it a French contract.

C The defence to the action in this country is, that this is a French company being wound-up in France and by French law, and that the plaintiffs cannot recover except under the bankruptcy proceedings. It is true that the company is domiciled in France, and I will assume for the moment that the liquidation proceedings are equivalent to bankruptcy. But even if they got their discharge, I think that would be no defence here. I think there has been a misconception as to the meaning of LORD BLACKBURN in *Bartley v. Hodges* (2), which I read as an adoption of LORD KENYON's judgment in *Smith v. Buchanan* (1). This may have arisen from the use by him of the expression "domiciled." I do not think he meant it to be inferred by that what has been suggested, and Mr. WESTLAKE and Mr. FOOTE, both of whom D have considered the point in their books on PRIVATE INTERNATIONAL LAW, are agreed that if he did his view was erroneous. I cannot on principle see any reason for saying that the domicile of the person has anything to do with it.

E But then it is said the proceedings ought to have been stayed. Why? I cannot conceive any reason why they should before judgment. Why should a plaintiff in England on an English contract be prevented from obtaining his rights? And whoever heard of anyone asking for a stay of execution after judgment except for the purpose of appealing? If there is no property of the debtor, the judgment creditor will not get it. If any property not belonging to the debtor is taken, it can be protected by interpleader proceedings. I think the appeal fails, and that the judgment must be affirmed. F

G LOPES, L.J.—Assuming a discharge under the French bankruptcy I think that such a discharge cannot operate as a bar in England because of the defendant's domicile in France. That is the result of LORD KENYON's judgment in *Smith v. Buchanan* (1), and as I read LORD BLACKBURN in *Bartley v. Hodges* (2) he adopts the opinions both of LORD KENYON and STORY. The result is, that in a case like this the question of domicile is unimportant, and I can see no ground for a stay of execution. Consequently I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Johnson, Budd & Johnson; Murray, Hutchins & Stirling.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

Re OLIVER. NEWBALD v. BECKITT

[CHANCERY DIVISION (Chitty, J.), March 18, 1890]

[Reported 62 L.T. 533]

Will—Condition—Devisee under obligation to pay legacies to legatees—Charge on property in respect of legacies.

A testator by his will gave his real estate at C. and his residuary real estate to his nephew, "he also paying thereout the following legacies; that is to say, the legacy or sum of £1,000 to my trustees to be held by them upon the trusts hereinafter declared concerning the same; the like legacy or sum of £1,000 to the four daughters of my late niece Mary Holroyd in equal shares; and the legacy or sum of £200 to my niece Sarah Woodruff, to whom I give and bequeath the same respectively." The testator directed that such legacies should be paid at the end of six months after the death of his sister, and he directed his trustees to stand possessed of the sum of £1,000 thereinbefore directed to be paid to them and "charged on my C. estate," upon certain trusts.

Held: on the proper construction of the will, the testator's nephew was not a trustee of the C. estate for the benefit of the legatees, but he was the owner of it subject to a charge in respect of the legacies, and, therefore, he was not liable to account for the back rents and profits thereof.

Notes. Referred to: *Re Lester, Lester v. Lester*, [1942] 1 All E.R. 646.

As to conditional gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 1114 et seq.; and for cases see 44 DIGEST 439.

Cases referred to in argument:

Wright v. Wilkin (1862), 2 B. & S. 259; 31 L.J.Q.B. 196; 6 L.T. 221; 9 Jur.N.S. 715; 10 W.R. 403; 121 E.R. 1070, Ex. Ch.; 44 Digest 439, 2654.

A.-G. v. Wax Chandlers' Co. (Master, Wardens, etc.) (1873), L.R. 6 H.L. 1; 42 L.J.Ch. 425; 28 L.T. 681; 37 J.P. 532; 21 W.R. 361, H.L.; 8 Digest (Repl.) 434, 1241.

Garfitt v. Allen, Allen v. Longstaffe (1887), 37 Ch.D. 48; 57 L.J.Ch. 420; 57 L.T. 848; 36 W.R. 413; 35 Digest 399, 1407.

Adjourned Summons taken out in an administration action in respect of the estate of John Oliver, deceased, asking for an order that John Beckitt, the testator's nephew, might, in his account of the rents and profits of the testator's real estate, be charged with an occupation rent in respect of so much of the real estate situate at North and South Collingham as was in his possession or occupation at the date of the testator's decease, for the period between that date and the date of the completion of the sale of the real estate on Oct. 11, 1889.

John Oliver, by his will dated Aug. 26, 1879, gave various specific and general bequests and certain annuities, among which was to his sister Mary Glew an annuity or clear yearly sum of £52 to be paid to her during her life as in the will mentioned, and the testator charged the same annuity upon his estate at Barnby-in-the-Willows. The will contained the following provisions:

"I give my said message, land, hereditaments, and premises in North and South Collingham aforesaid, and my said residuary real estate, unto my said nephew John Beckitt, his heirs and assigns for ever, he also paying thereout the following legacies, that is to say: The legacy or sum of £1,000 to my trustees to be held by them upon the trusts hereinafter declared concerning the same. The like legacy or sum of £1,000 to the four daughters of my late niece Mary Holroyd in equal shares. And the legacy or sum of £200 to my niece Sarah Woodruff, to whom I give and bequeath the same respectively. And I direct that such last-mentioned legacies shall be paid at the end of six calendar months after the death of my said sister Mary Glew. And I

- A direct that, in the event of the death of any or either of them my said nieces or grand-nieces before their said legacies shall become payable leaving lawful issue, the issue of her or them so dying shall be entitled to her or their deceased parent's legacy, if more than one, equally, and in case any one or more of them, my said nieces, or grand-nieces, shall die as aforesaid, without leaving lawful issue, then I direct that the legacy of her or them so dying shall go and be divided equally amongst the survivors of my said nieces and grand-nieces, and the issue, if any, of any one or more of them who may be then dead, such issue to take their parent's share, if more than one, equally. I direct my trustees to stand possessed of the said sum of £1,000 hereinbefore directed to be paid to them and charged on my Collingham estate, upon trust to invest the same in their own names in or upon any of the parliamentary stocks or public funds of Great Britain, or at interest on Government or real security in England or Wales, or on the bonds, debentures, debenture stock, or other securities of any railway or other public company or corporation incorporated by Royal charter or by Act of Parliament, and carrying on business or situate in Great Britain, and paying a dividend or dividing a profit, with full power to alter and vary such stocks, funds, and securities into or for other investments of a like nature as often as occasion shall require; and upon further trust to pay the interest, dividends, and annual proceeds of the said sum of £1,000 or the investments thereof to my niece Elizabeth Elston, daughter of my said sister Mary Glew, during her life, for her sole and separate use, free from the debts, control, or engagements of her present or any future husband, and without power of alienation or anticipation. And upon the death of my said niece Elizabeth Elston, I give the said sum of £1,000 or the investments thereof unto her child or children, and if more than one, in equal shares."

Mary Glew died on Jan. 23, 1884, in the lifetime of the testator. The testator died on Jan. 16, 1887. After the death of the testator, John Beckitt was in possession and receipt of the rents and profits of that part of the real estate of the testator which was situate at North and South Collingham. An action was brought for the administration of the real and personal estate of the testator, and an order was made therein for the sale of the North and South Collingham property. The summons was adjourned into court, and now came on to be heard with the further consideration of the action.

Begg for the plaintiff.

- G *Romer, Q.C., and Macnaghten; Whitehorne, Q.C., and E. Ford; Grosvenor Woods and A. L. Ellis; for the several defendants.*

- H **CHITTY, J.**—This question relates to the testator's real estate at North Collingham and South Collingham, and the question is this: Is the testator's nephew, John Beckitt, liable to account for the rents and profits of that estate which he received between the date of the testator's death and the completion of the sale of the property under an order of the court. That question depends upon whether, on the true construction of the testator's will, John Beckitt is a trustee of the property for the legatees, or whether he is the owner of the property subject to a charge in respect of the legacies. In the latter case the legatees would not be entitled to call upon John Beckitt to account for the back rents and profits received by him. On behalf of the legatees it is contended that the testator's nephew is a trustee for them, and that everything he received he must account for.

I This is a conveyancer's will; that is to say, the will is in a form generally used by conveyancers. The reason why I make that observation will appear when I state the terms of the will. The testator gives his messuage, land, hereditaments, and premises in North and South Collingham, and his residuary real estate, to his nephew, John Beckitt, "he also paying thereout the following legacies." Then three legacies of £1,000, £1,000, and £200, respectively are specified. The first £1,000 legacy is to go to his trustees, to be held by them upon the trusts thereinafter declared concerning the same. The second £1,000 legacy is to go to the

four daughters of the testator's niece, Mary Holroyd, in equal shares; and the A
£200 legacy is to go to his niece, Sarah Woodruff. Then the testator directs that
all three legacies shall be paid at the end of six calendar months after the death
of his sister, Mary Glew, who is an annuitant under his will. Then he declares
the trusts of the first £1,000 legacy. He does it in this way:

"I direct my trustees to stand possessed of the said sum of £1,000, hereinbefore B
directed to be paid to them and charged on my Collingham estate."

Then certain trusts are declared, which I need not now read. The words "he C
paying thereout the following legacies" are prima facie words of condition, and in
this case the condition is a condition subsequent. That is shown by the direction
that the legacies shall be paid at the end of six calendar months after the death
of the annuitant, the testator's sister, Mary Glew. Consequently, John Beckitt,
who is immediately entitled to the benefit of the devise, does not have to pay the
legacies until six months after the death of the testator's sister. Therefore, he
would enter into receipt of the rents and profits of the property for six months
before he would be bound to pay the legacies.

There is a well-known rule of construction that a devise upon condition that D
the devisee makes certain payments within a given time will, as a general rule,
be construed as a trust and not as a condition, because, if construed as a condition,
the only person who takes advantage of the condition being unperformed, when the
devise is by will, is the testator's own heir.

"The right of entry for breach of a condition subsequent could not be reserved E
in favour of a stranger, but only of the grantor or his heirs: and the effect of
entry by him, or them, after breach, was to defeat altogether the estate which
had before passed to the grantee; so that the grantor or his heirs were in as of
their former seisin."

That is a passage of familiar law which is to be found in STEPHEN'S COMMENTARIES F
(9th Edn.), vol. 1, p. 299. If it was held that the devise must be construed as
importing a condition and nothing else, the person entitled to receive the payments
would lose the payments, because, if the payments were not made within a given
time, the heir of the testator would enter and take the estate, and take it free.
It was to get over that objection that it has been said that generally the right
construction is to hold that the devise creates a trust and not a condition. It has
been termed a trust without any particular regard to the language, a legal effect
being given so as to enable the person entitled to get the payments. It is upon
that class of cases, to which I have referred only in general terms, that the argu- G
ment has been based that here the devise is not a condition, and is therefore a
trust. But it is equally plain, for ordinary purposes, that the effect of the devise
is to create a charge, and not a trust.

I proceed to consider whether it is a trust or a charge. On the face of the will, H
when the testator intends to create a trust, he knows how to do it. [HIS LORDSHIP
discussed the provisions of the will, and continued:] The testator imposes a trust
upon one of the persons who takes beneficially, and if the matter stood there
I should find some difficulty in deciding that this was a charge and not a trust.
But the testator is entitled to explain his own meaning, and he says in so many
words, in a subsequent part of his will, that the trustees shall stand possessed of
the £1,000 which he has "charged on my Collingham estate." I see no reason to
say that the testator does not know the meaning of his own will. On the contrary, I
I think that the testator has shown that he is well acquainted with what he has
done before. Therefore, upon the true construction of this will, I think that the
legacies constitute a charge and only a charge. Unquestionably a difficulty arises
on that part of the will where the testator says, "he also paying thereout the
following legacies." But there are the subsequent words by which he explains that
they are a charge. Those words "he paying thereout" are only words upon
which it turns whether there is a charge or a trust. But the testator has given,
in respect of those words, a "dictionary" explaining their effect. These legacies

A are consequently simply a charge on the North and South Collingham estate, as I am satisfied, looking at the will as a whole. I hold, therefore, that the devisee is not liable to account for the back rents and profits.

B Solicitors: *Collyer-Bristow, Russell & Hill*, for *Newbald, Larken & Toynbee*, Newark; *R. G. Marsden & Wilson*, for *Evelyn & Falkner*, Newark; *Lee, Ockesley & Everington*, for *J. and A. Bright*, Nottingham; *Torr, Janeways, Gribble & Oddie*, for *Wells & Hind*, Nottingham.

[Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.]

LANGWORTHY v. LANGWORTHY

D [COURT OF APPEAL (Cotton, Bowen and Fry, L.J.J.), March 3, 1886]

[Reported 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 34 W.R. 356;
2 T.L.R. 373]

Nullity—Maintenance—Child—Power of court to insert provision in decree absolute.

E *Nullity—Decree—Decree absolute—Power of court to postpone.*

The respondent was granted a decree nisi of nullity on the ground that his marriage with the petitioner was void. Custody of the child of the parties was granted to the petitioner and leave was granted so as to enable a further application in respect of the maintenance of the child to be made. The respondent applied after the period of six months provided for in the order had elapsed for the decree to be made absolute, but the judge refused the application, and postponed the making of the decree absolute until terms for the provision for the child could be ascertained and inserted in the final decree.

F **Held:** (i) s. 7 of the Matrimonial Causes Act, 1860, did not entitle the successful party in a suit to have a decree nisi made absolute after the expiry of the statutory period provided no cause was shown, but merely contained a prohibition against making the decree absolute before the statutory period had elapsed, and, therefore, the court had a discretion to postpone making the decree absolute; (ii) by virtue of s. 35 of the Matrimonial Causes Act, 1857, the court had power to make provision in the decree absolute for the maintenance of a child of a void marriage.

G **Notes.** The Matrimonial Causes Acts, 1857, 1859 and 1860, have been repealed. For s. 35 of the 1857 Act and s. 4 of the 1859 Act see now s. 26 of the Matrimonial Causes Act, 1950, and for s. 7 of the 1860 Act see now ss. 10, 11 and 12 of the Act of 1950.

H Considered: *Colquitt v. Colquitt*, [1948] P. 19; *Harrison v. Harrison*, [1951] 2 All E.R. 346. Referred to: *Foder v. Foder*, [1894] P. 307; *Millard v. Millard & Addis*, [1945] 2 All E.R. 525; *Galloway v. Galloway*, [1955] 3 All E.R. 429; *Bryant v. Bryant*, [1955] 2 All E.R. 116.

I As to suspension of a decree absolute, see 12 HALSBURY'S LAWS (3rd Edn.) 408; and for cases see 27 DIGEST (Repl.) 689. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

(1) *Watton v. Watton* (1866), L.R. 1 P. & D. 227; 35 L.J.P. & M. 95; 14 L.T. 742; 15 W.R. 288; 27 Digest (Repl.) 685, 6544.

(2) *Latham v. Latham* (1861), 2 Sw. & Tr. 299; 30 L.J.P.M. & A. 163; 9 W.R. 680; 27 Digest (Repl.) 497, 4383.

Also referred to in argument :

Bradley v. Bradley (1878), 3 P.D. 47; 47 L.J.P. 53; 39 L.T. 203; 26 W.R. 831; 27 Digest (Repl.) 634, 5948.

Sidney v. Sidney (1866), L.R. 1 P. & D. 78, 13 L.T. 682; affirmed (1867), 36 L.J.P. & M. 73; 15 W.R. 1094, H.L.; 27 Digest (Repl.) 618, 5773.

Patterson v. Patterson and Graham (1870), L.R. 2 P. & D. 192; 40 L.J.P. & M. 4; 23 L.T. 631; 19 W.R. 233; 27 Digest (Repl.) 688, 6591.

Stoate v. Stoate (1861), 2 Sw. & Tr. 384; 30 L.J.P. & M. 173; 5 L.T. 138; 164 E.R. 1045; 27 Digest (Repl.) 581, 5405.

Prole v. Soady (1868), 3 Ch. App. 220; 37 L.J.Ch. 246; 32 J.P. 279; 16 W.R. 445; 27 Digest (Repl.) 690, 6609.

Palmer v. Palmer (1865), 4 Sw. & Tr. 143; 34 L.J.P.M. & A. 110; 164 E.R. 1471; 27 Digest (Repl.) 688, 6582.

Appeal from an order of BUTT, J., by the respondent who applied for a decree nisi for nullity of marriage which had been made in his favour to be made absolute.

On July 7, 1884, SIR JAMES HANNEN, P., dismissed a petition for a decree for the restitution of conjugal rights brought by Mrs. Langworthy, and granted a decree nisi for nullity in favour of Mr. Langworthy who, by his answer, alleged that there had never been any lawful marriage between him and the petitioner and sought a decree of nullity. His Lordship made a declaration that a marriage solemnised in January, 1883, at Antwerp, between the petitioner and the respondent,

"be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason that such marriage was not celebrated in accordance with law,"

unless cause should be shown within six months why the decree should not be made absolute. The decree was declared to be without prejudice to any right of the petitioner to alimony or maintenance, and directed that the infant child of the parties should remain in the petitioner's custody until further order "and gave leave for further application" to be made. The last words were inserted in the order by the learned President to provide for an application as to the custody or maintenance of the child.

On Feb. 2, 1886, Mr. Langworthy moved before BUTT, J., to have the decree nisi made absolute, but the learned judge refused to do so until provision for the child of the marriage had been made and could be inserted in the final decree.

By s. 35 of the Matrimonial Causes Act, 1857 [repealed] :

"In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

By s. 7 of the Matrimonial Causes Act, 1860 [repealed] :

"Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty . . . to show cause why the said decree should not be made absolute . . ."

Inderwick, Q.C., and *Middleton* for the respondent.

Bayford, Q.C., and *Rose-Innes* for the petitioner.

COTTON, L.J.—In this case, BUTT, J., refused to make absolute a decree nisi for annulling the marriage of the parties, although six months had expired after the making of the decree nisi, on the ground that he had power to make a proper

- A provision for the child born during the cohabitation, and that the decree ought not to be made absolute until proper provision was made. It is said that by the Matrimonial Causes Act, 1859, the court has the power of making such a provision after the decree has been made absolute. No doubt it would be within the judge's discretion to adopt that course; but, in my opinion, he had a discretion to adopt the other course, and make the provision in the decree absolute. Originally all
- B decrees were made absolute at first; but, by the Matrimonial Causes Act, 1860, it was provided, to avoid collusion, that there should at first be a decree nisi, and that it should not be made absolute until a certain time had elapsed, and then only by order of the judge. It is said that, by s. 7 of the Act of 1860, after the expiration of the allotted time, the party who has obtained the decree nisi has an absolute right to have it made absolute. It would be very strange if the judge had no
- C discretion after the expiration of the time, though the decree could only be made absolute by his order. In my opinion, the section gives no right to the party to have his decree nisi made absolute, but only contains a prohibition against making the decree absolute before a certain time has elapsed. The Act directs what is to be done when the Queen's Proctor intervenes; but it does not say that, if no cause is shown, the decree shall be made absolute.
- D By s. 35 of the Act of 1857 the court has power to make a provision for the maintenance of the children in the final decree. If, when the allotted time has elapsed, and the court has power to make the decree absolute, and thinks it ought to be made, there are not sufficient materials before the judge to enable him to make the provision, he has a discretion to order the matter to stand over until he has the materials before him upon which he can decide as to the provision.
- E Does the power extend to enable the judge to order maintenance in a case like this? The wording of the section is intentionally framed to meet the case of nullity of marriage, and, therefore, the child of the two persons whose marriage is the subject of the proceedings is within the Act. It follows that, though the court could have made the order subsequently, the judge had the power to postpone making the decree absolute, and I think sufficient reason existed here for
- F making the provision for maintenance in the final decree. *Watton v. Watton* (1) and *Latham v. Latham* (2) show that that view has already been acted on by the courts. I think BUTT, J., was right.

BOWEN, L.J.—I am of the same opinion. The decree absolute is not a mere matter of form; but the court retains its control till after the decree is made absolute. It is the reason of the thing that this should be so—if not, this child might

G be left out in the cold—but I also think it follows from s. 7 of the Act of 1860.

FRY, L.J.—I am also of the same opinion. I think the conclusion at which BUTT, J., has arrived flows from the very words of s. 35 of the Act of 1857. The words of that section alone give the court jurisdiction, and cast a judicial duty on the court. In this case BUTT, J., in effect, said he thought it would be right

H to introduce a provision for the child into the final decree, and therefore postponed the making of it, acting within his duty and competence. It is said that the effect of s. 4 of the Act of 1859, is that it was competent to him to make the provision after the final decree; but he had power to do it in the decree itself. The child is clearly one for whom provision may be made, and, in my opinion, the appeal must be dismissed.

I

Appeal dismissed.

Solicitors: *Birchams & Co.; Lumley & Lumley.*

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

Re MARRETT. CHALMERS v. WINGFIELD

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), June 17, 18, 20, 22, 1887]

[Reported 36 Ch.D. 400; 57 L.T. 896; 36 W.R. 344; 3 T.L.R. 707]

Domicil—Change of domicil—Abandonment of domicil of choice—Necessity of abandonment animo et facto.

Where a domicil of choice has been acquired it is not sufficient, in order to lose it and revive the domicil of origin, that the person shall form an intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently.

The testator was born in India, his father being English. He entered the service of the Nizam of Hyderabad and in 1868 was pensioned for his long services. He left India in 1870, having sold most of his property there, but returned the same year. In 1871 he left India and went to Germany, where he eventually bought a house in which he lived. In 1874 he made his will in Germany in English form. He returned to India in 1874 for the purpose of winding-up his affairs and settling questions regarding his pension. He sold all his remaining property there and returned to Germany where he lived until his death in 1876. There was evidence to show that the testator went to Germany with the intention of permanently residing there, but there was also evidence that he had expressed an intention to reside in England, had looked for a house there, and had expressed dissatisfaction with his German house and a wish to reside elsewhere.

Held: as the testator had acquired a German domicil of choice by going there with an intention of permanently residing there, no subsequent fluctuations of opinion, unaccompanied by actual change of residence, could change that domicil.

Notes. Considered: *Abdallah v. Richards* (1888), 4 T.L.R. 622; *Faye v. I.R. Comrs.* (1961), 40 Tax Cas. 103. Referred to: *Fleming v. Horniman*, [1928] All E.R.Rep. 498; *Re Evans, National Provincial Bank, Ltd. v. Evans* (1947), 177 L.T. 585.

As to domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 14 et seq.; and for cases see 11 DIGEST (Repl.) 326 et seq.

Case referred to:

(1) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, 39.

Also referred to in argument:

Whicker v. Hume (1858), 7 H.L.Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 4 Jur.N.S. 933; 6 W.R. 813; 11 E.R. 50, H.L.; 11 Digest (Repl.) 336, 86.

Moorhouse v. Lord (1863), 10 H.L.Cas. 272; 1 New Rep. 555; 32 L.J.Ch. 295; 8 L.T. 212; 9 Jur.N.S. 677; 11 W.R. 637; 11 E.R. 1030, H.L.; 11 Digest (Repl.) 332, 56.

Udny v. Udny (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 327, 22.

The Lauderdale Peerage (1885), 10 App. Cas. 692, H.L.; 11 Digest (Repl.) 333, 66.

De Mora v. Concha (1885), 29 Ch.D. 268; 54 L.J.Ch. 532; 52 L.T. 282; 33 W.R. 846; affirmed sub nom. *Concha v. Concha* (1886), 11 App. Cas. 541; 56 L.J.Ch. 257; 55 L.T. 522; 35 W.R. 477, H.L.; 11 Digest (Repl.) 395, 515.

Re Patience, Patience v. Main (1885), 29 Ch.D. 976; 54 L.J.Ch. 897; 52 L.T. 687; 33 W.R. 500; 1 T.L.R. 375; 11 Digest (Repl.) 340, 112.

Jopp v. Wood (1865), 4 De G.J. & Sm. 616; 5 New Rep. 422; 34 L.J.Ch. 212; 12 L.T. 41; 11 Jur.N.S. 212; 13 W.R. 481; 46 E.R. 1057; 11 Digest (Repl.) 326, 21.

- A** *A.-G. v. Pottinger* (1861), 6 H. & N. 733; 30 L.J.Ex. 284; 4 L.T. 368; 7 Jur.N.S. 470; 9 W.R. 578; 158 E.R. 303; 11 Digest (Repl.) 359, 275.
Re Steer (1858), 3 H. & N. 594; 28 L.J.Ex. 22; 32 L.T.O.S. 130; 157 E.R. 606; 11 Digest (Repl.) 335, 78.
Brown v. Smith (1852), 15 Beav. 444; 21 L.J.Ch. 356; 51 E.R. 609; 11 Digest (Repl.) 340, 114.
- B** *Douglas v. Douglas, Douglas v. Webster* (1871), L.R. 12 Eq. 617; 41 L.J.Ch. 74; 25 L.T. 530; 20 W.R. 55; 11 Digest (Repl.) 333, 60.
Re Raffanel (1863), 3 Sw. & Tr. 49; 1 New Rep. 569; 32 L.J.P.M. & A. 203; 8 L.T. 211; 9 Jur.N.S. 386; 11 W.R. 549; 164 E.R. 1190; 11 Digest (Repl.) 353, 221.

Appeal from a decision of STIRLING, J., in an administration action.

- C** On June 2, 1881, judgment was given in the action by which the usual accounts were directed, and an inquiry where the testator was domiciled at the time of making his will. The testator was born in India about the year 1813, his father being an English officer in the East India Co. service, which service the testator afterwards entered. While young he married at Madras a Dutch woman who died about 1869. In 1854 he entered the service of the Nizam of Hyderabad as chief
- D** engineer. In 1868 he was pensioned by the government of India for his long services. He did not leave India until 1870, when he came over to England in May and returned to India in October of the same year, spending about a month in Germany and Switzerland. He was possessed of considerable house property in India, a great part of which he sold in 1870. In the spring of 1871 he left India for fifteen months, and went at once to Darmstadt, where he at first lived in
- E** an hotel, then in private lodgings for about a year, and in 1873 he purchased a house in which he lived and in which he made extensive improvements. On July 31, 1874, he made his will at Wiesbaden in English form, describing himself as late of Hyderabad, and "at present of Bessungen, Hesse Darmstadt." He did not return to India until the end of 1874, when he went there for the purpose of winding-up his affairs, and settling with the Nizam's government about his retiring
- F** pension. He then disposed of all his remaining property in India, and resigned his appointment under the Nizam, who granted him a retiring pension. He left India in the same year, and in April, 1875, returned to Darmstadt, where he resided till the date of his death in January, 1876.

It was not disputed that the testator left India without any intention of returning there, and the court was of opinion that there was sufficient evidence to show that he went to Darmstadt with the intention of permanently residing there. It appeared, however, that the testator, during visits to England in 1871, 1872, 1873, and 1874, had expressed an intention of coming to reside in England, and had looked out for a house there, which he could purchase, and that from time to time he had expressed dissatisfaction with his residence in Darmstadt, and a wish to reside elsewhere.

- H** The Chief Clerk having found that the testator was domiciled in Hesse Darmstadt at the date of his will, and thenceforth down to his death, the plaintiff took out a summons asking that the certificate might be varied. The summons came before STIRLING, J., on Jan. 27, 1887, and he held that the testator had acquired a German domicile at the time of making his will, and that, if he ever had any intention of abandoning that domicile, he failed to carry it into effect. From that decision the
- I** plaintiff appealed.

Pearson, Q.C., and *Carson* for the plaintiff.

Hastings, Q.C., and *Farwell* for the defendant.

COTTON, L.J.—This is an appeal on the question what was the domicile of the testator at the time of his death, and at the time of making his will. Those are two distinct periods, and must be dealt with separately. The facts are not brought before us very satisfactorily, and we have only affidavit evidence, and very little of the correspondence which must have passed between this gentleman and his

friends and members of his family is before us, but we must decide as best we can upon the evidence as it stands. It is an admitted fact that the testator's domicile of origin was Anglo-Indian. The question is, whether he had, before either of these two periods, acquired a domicile of choice, and whether he retained the domicile of choice at either of those two periods. A

The law, as I understand it, is that the domicile of origin clings to a man unless he has acquired a domicile of choice by residence in another place with an intention of making it his permanent place of residence. If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but, in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it with the intention of leaving it permanently. B
Unless he has done that, unless he has left it both *animo et facto*, the domicile of choice remains. C
It may be lost *animo et facto*, and if lost, then the domicile of origin, there being no other domicile, revives and attaches again; but the mere fact that a man, when he has once acquired a domicile of choice, begins to doubt whether he has done right or wrong, whether it would not have been better for him not to have taken up his residence in that country, does not destroy the effect of the residence taken up with the intention of permanently residing there. D
The fluctuations of a man's mind during his residence in a particular place are important in considering whether he ever during his residence there had a settled intention to make it his permanent residence; but, if we arrive at the conclusion that he had, the subsequent fluctuations do not, in my opinion, if unaccompanied by change of residence, destroy the effect of the residence with intention permanently to reside there. E

LORD WESTBURY, in *Bell v. Kennedy* (1), which is a remarkable case, says this (L.R. 1 Sc. & Div. at p. 321):

"The true inquiry, therefore, is: Had he this settled purpose the moment he left Jamaica, or in the course of the voyage, of taking up a fixed and settled abode in Scotland?"

To gain a new domicile the testator must have resided in the country with a fixed and settled purpose to make a permanent residence there; but if subsequent fluctuations of intention are to be taken into account, it would be almost impossible ever to determine whether a domicile of choice was acquired. *Bell v. Kennedy* (1) was a very curious case, because, although the gentleman went to Scotland, and did in fact reside there with his mother-in-law, his letters and conduct showed that he had not at all made up his mind whether he should buy an estate to live on in Scotland, or whether he should buy an estate in England for the same purpose. The point in that case was the death of the wife, when there was a dissolution of the community of goods which was effected by the marriage, and up to that time, on the evidence, he had a very doubtful state of mind as to whether he should fix himself in England or Scotland. Having stated what I understand to be the law applicable to the case, I will proceed to consider the facts. [His LORDSHIP then considered the facts, and held that the testator had taken up his residence in Germany with the settled intention of permanently residing there, and had acquired a German domicile which he had never made up his mind to abandon.] In my opinion the finding, that at the time of his will and at the time of his death the testator was domiciled at Darmstadt in Germany, is correct. F
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H
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BOWEN, L.J.—On the law, as it has been stated by the lord justice, I have little to add. We are considering a case of change of domicile, and the question we have to determine is, whether the domicile of origin can be shown to be abandoned and a domicile of choice substituted for it. When a man takes up his residence in a new country, the problem which has to be solved is, whether there has been such a fixed and settled intention permanently to reside in the new country as, concurring with the actual residence there, amounts to an adoption of a domicile

- A** of choice instead of the domicile of origin. That being the inquiry, the various fluctuations in the man's intentions about a permanent residence which take place after the residence in the new country has been taken up, are very material as throwing light on the question, whether there has been at any time that fixed and settled intention of residence in the new country which is a necessary element to the idea of domicile. But when once you have arrived at the conclusion that
- B** there has been a fixed and settled intention of permanently residing in a new place coupled with an actual residence in that new place, then the change of domicile is effected, and change of domicile once effected will not be undone by mere subsequent fluctuations of opinion on the part of the settlor, as to whether his choice of the new residence has been wise, or by expressions which lead one to think that he entertained vague and floating ideas of going to reside elsewhere.
- C** As to the evidence before us, I agree with the lord justice that, as it stands, the true conclusion is that to which he has come. I do not propose to examine the evidence in detail, as I entertain considerable doubt whether we know the whole truth. I have a surmise that there must be substantial evidence in existence which has not been laid before us. The evidence has been taken on affidavit without cross-examination, and the affidavits of some of the most material witnesses are,
- D** to my mind, very vague and general. Again, I think there must be a great deal of correspondence in existence which has not been shown to us, and no discovery of documents has been made from which we can guess what even is the correspondence in the possession of the parties. Although I agree with the conclusion to which the lord justice has come on the evidence before us, I entertain some doubt arising from the imperfect character of the evidence.
- E** **FRY, L.J.**—I am of the same opinion, and I shall endeavour to be short in stating the conclusions I have arrived at. [HIS LORDSHIP then, without making any remarks as to the law applicable to the case, considered the evidence, and said that all the facts which were clearly established showed the intention of the testator to make Germany his permanent home, and that the only evidence which was of any weight against that conclusion was not sufficient to countervail the cogent evidence
- F** that from 1870 downwards the testator intended that Germany should be his home, and that he gave effect to that intention by purchasing his house in Germany.]

Solicitors: *H. W. Chatterton; F. Romer.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re WILLIS. Ex Parte KENNEDY

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), June 8, 23, 1888]

[Reported 21 Q.B.D. 384; 57 L.J.Q.B. 634; 59 L.T. 749;
36 W.R. 793; 4 T.L.R. 637; 5 Morr. 189]

Bill of Sale—Registration—Need of registration—Mortgage—Attornment clause—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 6.

The mortgagor was in possession as tenant by attornment under an attornment clause in the mortgage deed. On Sept. 24, 1885, a bankruptcy petition was presented against him, and on Nov. 7, 1885, the mortgagee distrained for arrears of rent. On Nov. 25, 1885, a receiving order was made against the mortgagor, and he was adjudicated bankrupt in January, 1886. The trustee in bankruptcy claimed to be entitled to the sum realised by the distress, contending that the attornment clause was void as against him under s. 6 of the Bills of Sale Act, 1878, for non-registration.

Held: an attornment clause in a mortgage deed, so far as it conferred a power of distress was a bill of sale within s. 6 of the Bills of Sale Act, 1878; the proviso to that section applied only where the mortgagee, having entered into possession of the mortgaged premises, subsequently leased them to the mortgagor, and not where the mortgage deed created the lease; accordingly, the attornment clause, not having been registered as a bill of sale, was void as against the trustee in bankruptcy who was entitled to repayment of the sum realised by the distress.

Notes. Under s. 189 (1) of the Law of Property Act, 1925, a power of distress given by way of indemnity against rent payable in respect of land is not and shall never have been deemed a bill of sale; see 20 HALSBURY'S STATUTES (2nd Edn.) 801.

Considered: *Mumford v. Collier* (1890), 25 Q.B.D. 279; *Green v. Marsh*, [1892] 2 Q.B. 330; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co., Ltd.*, [1895-9] All E.R.Rep. 530. Referred to: *Stevens v. Marston* (1890), 60 L.J.Q.B. 192.

As to effect of bankruptcy on persons possessing right of distress, see 2 HALSBURY'S LAWS (2nd Edn.) 569, 570; and for cases see 5 DIGEST (Repl.) 1032 et seq. As to instruments with power of distress, see 3 HALSBURY'S LAWS (3rd Edn.) 267; and for cases see 7 DIGEST (Repl.) 26. As to express powers to distrain, see 12 HALSBURY'S LAWS (3rd Edn.) 88; and for cases see 18 DIGEST (Repl.) 271. For s. 6 of the Bills of Sale Act, 1878, see 2 HALSBURY'S STATUTES (2nd Edn.) 563.

Case referred to:

(1) *Hall v. Comfort* (1886), 18 Q.B.D. 11; 56 L.J.Q.B. 185; 55 L.T. 550; 35 W.R. 48; 7 Digest (Repl.) 26, 123.

Also referred to in argument:

Batchelder v. Yates (1888), 38 Ch.D. 112; 57 L.J.Ch. 697; 59 L.T. 47; 36 W.R. 563; 4 T.L.R. 388, C.A.; 7 Digest (Repl.) 24, 110.

Re Thompson, Ex parte Williams (1877), 7 Ch.D. 138; 47 L.J.Bey. 26; 37 L.T. 764; 26 W.R. 274, C.A.; 5 Digest (Repl.) 1032, 8342.

Re Stockton Iron Furnace Co. (1879), 10 Ch.D. 335; 48 L.J.Ch. 417; 40 L.T. 19; 27 W.R. 433, C.A.; 5 Digest (Repl.) 1028, 8317.

Re Bowes, Ex parte Jackson (1880), 14 Ch.D. 725; 43 L.T. 272; 29 W.R. 253, C.A.; 5 Digest (Repl.) 1032, 8343.

Re Knight, Ex parte Voisey (1882), 21 Ch.D. 442; 52 L.J.Ch. 121; 47 L.T. 362; 31 W.R. 19, C.A.; 5 Digest (Repl.) 1032, 8344.

Appeal by the mortgagee from an order of CAVE, J., directing payment to the trustee in bankruptcy of the proceeds of a sale under a distress levied by the mort-

A gagee on premises in the occupation of the bankrupt under an attornment clause in a mortgage deed.

By deed, dated Jan. 28, 1884, the bankrupt E. W. Willis, mortgaged the premises known as Willis's Rooms, King Street, St. James', to the Baroness Willoughby d'Eresby, by way of demise to secure the repayment of £20,000. By the deed it was provided that the mortgagee, or the persons claiming title under her, might at any time without any further consent on the part of the mortgagor or any other person, demise, or enter into any agreement to demise, the premises or any part thereof on any terms she or they might think fit, provided that such powers should not be exercised until such time as she or they were by law empowered to sell. It was further witnessed that:

C "For the same consideration . . . F. W. Willis doth hereby attorn and become tenant from quarter to quarter to the said Baroness, in respect of the . . . premises, at a yearly rent of £2,000 by equal quarterly payments, the first payment to be made on the first day of the month next after any interest hereby secured shall have become in arrear; but all money received by the Baroness for rent due under the attornment hereinbefore contained shall be accepted in the first place in or towards satisfaction of the interest then in arrear."

D Provided that the attornment should not make it compulsory on the Baroness to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent encumbrancer for any rent that she might have recovered under such attornment; provided also that the Baroness might at any time after she was by law empowered to sell, without any notice, enter upon and take possession of the premises, and determine the last-mentioned tenancy.

E On Sept. 24, 1885, a bankruptcy petition was presented against the mortgagor, F. W. Willis, on Nov. 25, 1885, a receiving order was made against him, and on Jan. 26, 1886, he was adjudicated bankrupt. In the meantime, on Nov. 7, 1885, the Baroness, the mortgagee, distrained for rent in arrear, and, subsequently, Kennedy, the trustee in bankruptcy applied for an order that the Baroness, the mortgagee, should repay to him the sum realised by the distress, on the ground that the attornment clause was void against him under s. 6 of the Bills of Sale Act, 1878, because it had not been registered as a bill of sale.

F By s. 6 of the Bills of Sale Act, 1878:

G "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise, for the purposes of such security only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power of distress. Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant, at a fair and reasonable rent."

H The order asked for having been made by CAVE, J., the mortgagee appealed.

I *French, Q.C.*, and *R. O. B. Lane* for the mortgagee.
Cooper Willis, Q.C., and *Houghton* for the trustee in bankruptcy.

Cur. adv. vult.

June 23, 1889. **LINDLEY, L.J.**, stated the facts, and that it was accepted that £2,000 was a fair rent, and continued: The question raised is whether the trustee in bankruptcy or the mortgagee is entitled to the sums realised by the distress or levied by the mortgagee for arrears of rent under the attornment clause in the mortgage deed. The proviso that the mortgagee should not be accountable to a

second mortgagee for any rent that might have been recovered under the attornment is not a common clause, and must have been put in to prevent any doubt as to whether the attornment clause rendered the mortgagee in possession liable for rents which she might have received; but I do not think that this clause really affects the question before us. The attornment clause certainly created the relation of landlord and tenant between the mortgagee and mortgagor, and the question is, what is the effect of this. Upon this point s. 6 of the Bills of Sale Act, 1878, is very material. Neither this section nor any other in the Bills of Sale Act apply to ordinary leases. I make this remark because it was suggested in *Hall v. Comfort* (1) that, if this section applies to mortgages, it must apply also to all leases.

Section 6 is confined to attornments and powers of distress given by way of security for money advanced; and in *Hall v. Comfort* (1) it was said by MANISTY, J. (18 Q.B.D. at p. 15), that this did not apply to attornments unless followed by an express power of distress. But it seems to me the question cannot depend upon the following of an attornment clause by an express power of distress. The true meaning I think is that every attornment by way of security for money is struck at, and also contracts whereby a power of distress is given. The draftsman was evidently aware that mortgages may either have an attornment clause or else an express power to the mortgagee to enter and distrain, though the latter is not so common nowadays, as it is not so favourable to the mortgagee as an attornment clause in which a power of distress is implied. This section applies to both, and both are bills of sale under the first part of the section.

But then comes a proviso which is very puzzling indeed. [HIS LORDSHIP read the proviso to s. 6, and continued:] How can it affect any mortgage unless it contain an attornment clause or a power of distress referred to before? Does the proviso protect an attornment clause at a fair rent which is not preceded by the mortgagee taking possession? Assuming that the effect of the attornment clause is to put the mortgagee into possession, it gave possession at the time of the attornment and not before. I cannot think that this proviso was intended to protect a deed which is both a mortgage and a lease, and by virtue of that lease constitutes the mortgagee a mortgagee in possession. No construction will give effect to the word "mortgage" in the earlier part and "being in possession" in the latter part of the proviso.

In this state of doubt we must look at the general object of the Bills of Sale Acts. They were aimed at rendering it compulsory on money lenders to register their securities. If this were fully carried out commerce would be very much hampered, and therefore a number of exceptions were introduced; and there is nothing to show that the legislature meant to interfere between landlord and tenant, though obviously by this power of distress a landlord has the goods and chattels of his tenant as a security for rent in arrear. The legislature was aiming at lending money on the security of chattels, and their aim was extended to an attornment in a mortgage, but they except from it a demise by a mortgagee in possession. It is impossible to bring within the proviso any case except one in which the mortgagee has been in possession, and being in possession has demised to the mortgagor at a fair and reasonable rent. The decision of CAVE, J., is correct, and the trustee must prevail.

LOPES, L.J.—I entirely agree with the judgment and reasons of CAVE, J. The case depends on the construction of s. 6 of the Bills of Sale Act, 1878. To my mind the words in the earlier part of the section exactly describe the attornment clause in this deed, and if there were nothing more in the section I should add nothing. But there is a proviso to the section, and the question arises whether it takes this case out of the earlier part of the section. I think it does not. The benefit of the proviso is limited to cases where the mortgagee being in possession has demised to the mortgagor. I think this means that there must be an actual possession by the mortgagee, and a subsequent demise to the mortgagor. The

- A effect of this protection is doubtless very limited, because actual possession is seldom taken by a mortgagee and followed by a subsequent demise to the mortgagor. I believe, however, that the legislature intended the protection to be very limited, because they sought by this section to strike at and practically invalidate attornment clauses so far as they confer powers of distress, and thus to prevent an evasion of the Bills of Sale Act which had previously been most successfully effected by such clauses. I do not say that the proviso is as clear as it might be, but I have no doubt that it means what I have stated. The mortgagee, therefore, is not within the proviso, and the decision of CAVE, J., must be maintained.

LORD ESHER, M.R., said he had great doubts, but would not deliver any judgment to interfere with that of LINDLEY, L.J.

C

Appeal dismissed.

Solicitors: *Travers Smith & Braithwaite; Blewitt & Tyler.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

D

MILLS AND OTHERS v. ARMSTRONG AND ANOTHER. THE BERNINA

E

[HOUSE OF LORDS (Lord Herschell, Lord Bramwell, Lord Watson and Lord Macnaghten), December 8, 9, 1887, February 24, 1888]

[*Reported* 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212;
36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257]

F

Ship—Collision—Negligence—Contributory negligence—Identity of plaintiff with person in control of vehicle—Death of persons in ship—Collision due to negligence of master and crew.

A passenger in, and a member of the crew (who was not on duty) of, a ship were killed in a collision with another ship. The collision was caused by the negligence of the masters and crew of both ships, but the deceased persons were not responsible for that negligence. In actions under the Fatal Accidents Act, 1846, by their personal representatives against the owners of the other ship,

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Held: the deceased persons were not identified with the negligence of those navigating the ship in which they were travelling, and, therefore, their personal representatives were entitled to recover damages under the Act.

H

Thorogood v. Bryan (1) (1849), 8 C.B. 115, overruled.

Notes. The common law rule that contributory negligence was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provided for the apportionment of loss according to their share in the responsibility for the damage: see 17 HALSBURY'S STATUTES (2nd Edn.) 12.

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Applied: *Mathews v. London Street Tram Co.* (1888), 58 L.J.Q.B. 12. Considered: *The Orwell* (1888), 13 P.D. 80. Applied: *The Harvest Home*, [1904] P. 409. Considered: *The Circe*, [1906] P.1; *S.S. Tongariro v. S.S. Drumlanrig*, *The Drumlanrig*, [1911] A.C. 16; *S.S. Devonshire v. Barge Leslie*, [1912] A.C. 634; *The Koursk*, [1924] P. 140; *Oliver v. Birmingham and Midland Motor Omnibus Co., Ltd.*, [1932] All E.R.Rep. 820; *Grant v. Sun Shipping Co.*, [1948] 2 All E.R. 238. Referred to: *The Sara* (1887), 12 P.D. 158; *Page v. Metropolitan Rail. Co.*, *Heard v. Same* (1887), 4 T.L.R. 103; *Secretary of State for India v. Hewett* (1888), 5 T.L.R. 152; *The Englishman and The Australia*, [1894] P. 239; *The Munster*

(1896), 12 T.L.R. 264; *Davidson v. Hill*, [1900-3] All E.R.Rep. 997; *The Frankland*, [1901] P. 161; *Reynolds v. Tilling* (1903), 19 T.L.R. 539; *The Duc D'Aumale* (No. 2), [1904] P. 60; *The General Havelock*, [1906] P. 3, n.; *The Hero*, [1911] P. 128; *The Seacombe, The Devonshire*, [1912] P. 21; *Harrowing S.S. Co. v. Thomas*, [1913] 2 K.B. 171; *Admiralty Comrs. v. S.S. Amerika, The Amerika*, [1916-17] All E.R.Rep. 177; *Berg v. Rotterdamsche Lloyd* (1918), 34 T.L.R. 272; *Ellerman Lines v. Grayson*, [1919] 2 K.B. 514; *Anchor Line (Henderson) v. Dundee Harbour Trustees, Ellerman Lines v. Same, Thomson, Shepherd v. Same* (1922), 38 T.L.R. 299; *The Molière*, [1925] P. 27; *The Vectis*, [1929] P. 204.

As to liability see 28 HALSBURY'S LAWS (3rd Edn.) 91, 35 HALSBURY'S LAWS (3rd Edn.) 545, 693, 701, 717; and for cases see 36 DIGEST (Repl.) 193-4, and 41 DIGEST 787. For Lord Campbell's Act (Fatal Accidents Act, 1846), see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Cases referred to :

- (1) *Thorogood v. Bryan, Cattlin v. Hills* (1849), 8 C.B. 115; 18 L.J.C.P. 336; 13 L.T.O.S. 284; 137 E.R. 452; 36 Digest (Repl.) 193, 1020.
- (2) *Ashby v. White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; reversed (1704), 1 Bro. Parl. Cas. 62, H.L.; 36 Digest (Repl.) 393, 395.
- (3) *Bridge v. Grand Junction Rail. Co.* (1838), 3 M. & W. 244; 1 Horn. & H. 26; 150 E.R. 1134; sub nom. *Armitage v. Grand Junction Rail. Co.*, 6 Dowl. 340; 36 Digest (Repl.) 193, 1019.
- (4) *The Milan* (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 509; 1 Mar.L.C. 185; 167 E.R. 167; 41 Digest 692, 5221.
- (5) *Armstrong v. Lancashire and Yorkshire Rail. Co.* (1875), L.R. 10 Exch. 47; 44 L.J.Ex. 89; 33 L.T. 228; 39 J.P. 136; 23 W.R. 295; 36 Digest (Repl.) 193, 1022.
- (6) *Adams v. Glasgow and South Western Rail. Co.*, 3 R. (Ct. of Sess.) 215.
- (7) *Little v. Hackett*, 9 Davis Sup. Ct. U.S. 366.
- (8) *Waite v. North Eastern Rail. Co.* (1859), E.B. & E. 728; 28 L.J.Q.B. 258; 32 L.T.O.S. 334; 5 Jur.N.S. 936; 7 W.R. 311; 120 E.R. 682, Ex. Ch.; 36 Digest (Repl.) 125, 628.
- (9) *Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest (Repl.) 157, 1095.

Also referred to in argument :

- Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 18 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), reported 12 P.D. 58, reversing a decision of BUTT, J., reported 11 P.D. 31, on a Special Case.

The personal representatives of two persons who were on board the *Bushire*, a British ship, and were killed in consequence of a collision with the *Bernina*, another British ship, brought an action under Lord Campbell's Act against the owners of the *Bernina*. The collision was the fault of both ships, but the deceased persons had nothing to do with the negligence which caused the accident. BUTT, J., held that he was bound by the decision in *Thorogood v. Bryan* (1), and gave judgment for the defendants, but this decision was reversed by the Court of Appeal, and the owners of the *Bernina* appealed.

It was admitted that, if *Thorogood v. Bryan* (1) was good law, the case fell within it, and the sole question in the argument was whether that decision could be sustained.

Sir Walter Phillimore and J. G. Barnes for the appellants.

Bucknill, Q.C., and Nelson for the respondents.

Their Lordships took time for consideration.

A Feb. 24, 1888. The following opinions were read.

LORD HERSCHELL.—This appeal arises upon a Special Case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives; and it is alleged that they lost their lives through the negligence of the appellants. The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons, who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*. The question arises whether under these circumstances the appellants are liable.

The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a prima facie case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor, again, do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts as, e.g., the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred.

In support of the proposition that this establishes a defence, they rely on *Thorogood v. Bryan* (1), which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but, though it was early subjected to adverse criticism, it has never come for revision before a Court of Appeal until the present occasion. That action was one brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The judge directed the jury (8 C.B. at p. 117) that,

"if they were of opinion that want of care on the part of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant."

The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this conclusion was arrived at. COLTMAN, J., said (*ibid.* at p. 130):

"It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defence of the driver of the carriage which directly caused the accident."

MAULE and VAUGHAN WILLIAMS, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself (*ibid.* at p. 131):

"I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased."

VAUGHAN WILLIAMS, J., said (*ibid.* at p. 133):

"I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with the driver? The judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though, if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured.

But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognised principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thorogood v. Bryan* (1). MAULE, J., says (*ibid.* at p. 132):

"On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring. The

A only other reason given is contained in the judgment of CRESSWELL, J., in these words (*ibid.* at p. 133):

“If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position.”

B Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* (1) was founded, and I entirely agree with the judges in the court below in thinking them inconclusive and unsatisfactory. I will not detain your Lordships further on this part of the case, beyond saying that I concur with the judgments of the judges in the court below, and specially with the very exhaustive judgment of LORD ESHER, M.R.

D It was suggested in the course of the argument that *Thorogood v. Bryan* (1) might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If, by a collision between two vehicles, a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, “I am not guilty, because but for the negligence of another person the accident would not have happened.” And I do not see how this defence is any more available as

E against a person being carried in one of the vehicles, unless the reasoning in *Thorogood v. Bryan* (1) be well founded. I have said that the decision in *Thorogood v. Bryan* (1) has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarised thus: The learned editors of SMITH'S LEADING CASES,

G WILLES and KEATING, J.J., strongly questioned the propriety of the decision in the notes to *Ashby v. White* (2). PARKE, B., whose dictum in *Bridge v. Grand Junction Rail. Co.* (3) WILLIAMS, J., followed in directing the jury in *Thorogood v. Bryan* (1), appears to have doubted the soundness of the judgment in that case. DR. LUSHINGTON, in *The Milan* (4), expressed strong disapproval of it; and though in *Armstrong v. Lancashire and Yorkshire Rail. Co.* (5) it was followed, and BRAMWELL and POLLOCK, BB., to say the least, did not indicate dissatisfaction with it, I understand that LORD BRAMWELL, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below.

H In Scotland *Thorogood v. Bryan* (1) was pronounced unsatisfactory in *Adams v. Glasgow and South Western Rail. Co.* (6). In America it has been followed in the courts of some states, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little v. Hackett* (7), which was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. FIELD, J., in delivering judgment, examined all the English and American cases, and the conclusion adopted was the same as that at which your Lordships have arrived. I have only this observation to add. *Waite v. North Eastern Rail. Co.* (8) was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the

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decision, were of opinion that it was clearly distinguishable from *Thorogood v. Bryan* (1) and did not involve a review of that case. I think they were right. As regards the other questions argued before your Lordships, I have only to say that I think they were properly dealt with by the court below. I am requested by **LORD BRAMWELL**, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make. I move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed, with costs. A
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LORD WATSON.—The appellants conceded in argument that, unless it can be shown that *Thorogood v. Bryan* (1) is a valid precedent, they cannot succeed in this appeal. Although nearly forty years have elapsed since that case was decided, I think the rule which it establishes must still be dealt with upon its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty, or intending to be guilty, of contributory negligence are entitled to rely. When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that, but for his own neglect, he would have sustained no harm. Upon the same principle, individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That constructive fault, which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are in *pari delicto*, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim, *Qui facit per alium facit per se*, there can be no reason why it should not apply in questions between them and the outside public, and not in questions between them and their fellow wrongdoers. But the facts which were before the court in *Thorogood v. Bryan* (1) do not appear to me to bring the case within that principle. C
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My noble and learned friend, **LORD BRAMWELL**, who is so conversant with the intricacies of English pleading, suggested in the course of the argument a technical ground upon which the decision in *Thorogood v. Bryan* (1) might be justified. In that view, the case would not be an authority for the appellants, who accordingly supported the reason assigned for the judgment, which was simply this, that the deceased passenger, by taking the seat on the omnibus, became so far identified with its driver that the negligence of its driver was imputable to him in any question with the driver or owner of the other omnibus which ran over him and was the immediate cause of his death. **COLTMAN** and **CRESSWELL, JJ.**, express themselves in terms which, if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. **COLTMAN, J.**, said (8 C.B. at p. 130): G
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“Having trusted the party, by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it.”

MAULE, J., was careful to limit his observations to the case before him (*ibid.* at p. 131. He said:

“I incline to think that for this purpose (i.e., recovering damages from the defendant) the deceased must be considered as identified with the owner of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.” I

I do not think the very eminent judges who decided *Thorogood v. Bryant* (1) intended to affirm that the deceased, by taking his seat in the omnibus, incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so their conclusion might be perfectly logical,

A but their premises would be directly at variance with the principles laid down in *Quarman v. Burnett* (9), which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger, travelling by a public conveyance, may be so unconnected with the driver as to be exempt from liability for his negligence, and yet be so identified with him as to lose all right of action against wrongdoers whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferior's negligence, in a question with wrongdoers, and not in a question with persons who are themselves free from blame.

It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan* (1) is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which *Thorogood v. Bryan* (1) rests. In my opinion, an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and, in the other, of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must of course be responsible for the consequences of his interference.

Counsel for the appellants endeavoured to support *Thorogood v. Bryan* (1) upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim *Respondet superior* does not apply, and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being, for the time, under his dominion. *Waite v. North Eastern Rail. Co.* (8) was the authority relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger *sui juris*; and the theory that an adult passenger places himself under the guardianship of the driver, so as to be affected by his negligence, appears to me to be absolutely without foundation, either in fact or law. I, therefore, concur in the judgment which has been moved.

LORD MACNAGHTEN.—I concur in the motion which has been proposed, and in the reasons upon which it has been founded.

Appeal dismissed.

Solicitors : *Pritchard & Sons*, for *Bateson, Bright & Warr*, Liverpool; *Lowless & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

THRUSSEL v. HANDYSIDE

[QUEEN'S BENCH DIVISION (Hawkins and Grantham, JJ.), January 16, 26, 1888]

[Reported 20 Q.B.D. 359; 57 L.J.Q.B. 347; 58 L.T. 344;

52 J.P. 279; 4 T.L.R. 266]

Negligence—Dangerous work—Duty of contractor—Precautions to prevent injury to workmen.

Negligence—Defence—Volenti non fit injuria—Master and servant—Injury to servant by third party—Knowledge by servant of danger.

Workmen were employed by the defendants to fix ironwork on the roof of a building. Even using the greatest care, these workmen frequently let bolts, rivets and drifts fall. At first a platform was provided by the defendants which protected those working on the ground floor of the building against these falling objects, but the defendants removed the platform in order to expedite the work on the ground floor. The plaintiff was employed by a separate firm as a carpenter, and was ordered to work on the ground floor almost underneath where the defendants' workmen were. Both the plaintiff and the defendants' workmen were aware of the danger that these falling objects presented, and the plaintiff had asked them to be careful. The plaintiff was injured by a falling iron drift. In an action by him against the defendants for damages for negligence, the jury found that the workmen were not negligent in the use of the rivets, drifts, and tools, but that the defendants were negligent in failing to take proper precautions to protect those below. The defendants appealed.

Held: (i) where a person was employed to perform work which he knew to be dangerous, and knew also that accidents would happen and when they did happen would be fraught with danger, and where other men in his vicinity were lawfully engaged in work which they were obliged to perform, he who was so engaged in the dangerous work was under a duty to provide against accidents arising from his dangerous work, whether from actual negligence or not, and, therefore, the defendants owed to the plaintiff a duty of care and were in breach of it; (ii) as the plaintiff was lawfully engaged in his work by the direction of his employer, and could not have removed himself out of the danger without running the risk of dismissal, his knowledge of the danger was not a voluntary acceptance of the risk so as to bring him within the principle *volenti non fit injuria*; (iii) as the plaintiff had no means of protecting himself against the injury except by disobeying his master's orders, he was not himself negligent, and was entitled to succeed.

Woodley v. Metropolitan District Rail. Co. (1) (1877), 2 Ex.D. 384, distinguished.

Notes. Contributory negligence as a complete defence to an action for negligence was done away with by the Law Reform (Contributory Negligence) Act, 1945: 17 HALSBURY'S STATUTES (2nd Edn.) 12.

As to standard of care in negligence actions, see 28 HALSBURY'S LAWS (3rd Edn.) 10 et seq. As to *volenti non fit injuria*, see *ibid.*, p. 82 et seq. For cases see 36 DIGEST (Repl.) 153 et seq.

Cases referred to:

- (1) *Woodley v. Metropolitan District Rail. Co.* (1877), 2 Ex.D. 384; 46 L.J.Q.B. 521; 36 L.T. 419; 42 J.P. 181, C.A.; 36 Digest (Repl.) 150, 783.
- (2) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, 10.
- (3) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, 11.
- (4) *Yarmouth v. France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, C.A.; 36 Digest (Repl.) 136, 710.

- A (5) *Wiggett v. Fox* (1856), 11 Exch. 832; 25 L.J.Ex. 188; 26 L.T.O.S. 309; 2 Jur.N.S. 955; 4 W.R. 254; 156 E.R. 1069; 34 Digest (Repl.) 285, 2032.
- (6) *Collins v. Selden* (1868), L.R. 3 C.P. 495; 37 L.J.C.P. 233; 16 W.R. 1170; 29 Digest (Repl.) 12, 134.
- (7) *Membery v. Great Western Rail. Co.* (1888), 4 T.L.R. 504, C.A., affirmed (1889), 14 App. Cas. 179; 58 L.J.Q.B. 563; 61 L.T. 566; 54 J.P. 244; 38 W.R. 145; 5 T.L.R. 468, H.L., 36 Digest (Repl.) 150, 786.

B Also referred to:

Francis v. Cockrell (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest (Repl.) 208, 1460.

Indermaur v. Dames (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311, Ex. Ch.; 36 Digest (Repl.) 46, 246.

Tarry v. Ashton (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 34 Digest (Repl.) 205, 1437.

Batchelor v. Fortescue (1883), 11 Q.B.D. 474; 49 L.T. 644, C.A.; 36 Digest (Repl.) 67, 363.

- D **Appeal** by the defendants, Handyside & Co., from a decision of the learned judge at Westminster County Court, sitting with a jury, awarding the plaintiff damages of £200 for personal injuries in an action brought by the plaintiff to recover compensation for personal injuries on the ground of negligence on the part of the defendants.

The plaintiff was a carpenter by trade, and was employed by a firm of contractors, Messrs. Lucas, who were engaged by the directors of the large building known as Olympia at West Kensington to do the seating and wood work generally at that structure. The defendants were a firm of contractors engaged by the directors to supply and fix the iron work of the roof of that building. At an earlier stage of their work the defendants' workmen were in the habit of using a gantry or platform, some fifty or sixty feet wide, resting on the ground, and this intercepted the bolts and rivets, or drifts, which dropped either from the men's hands or the roof, and prevented them from falling on to the ground below. On the approach of Christmas, 1886, the directors desired to push on and complete the work as soon as possible, and Messrs. Lucas told the defendants that they must remove their gantry, as it hindered them from fixing their seats for the audience. The defendants then removed the gantry, and their workmen did the work on a narrow platform suspended from the roof. On this platform there was no guard or anything to prevent things from falling. Previously to the accident the plaintiff had seen rivets fall, and had told one of the defendants' men that a rivet had fallen, and asked them to be careful, as they (the carpenters) were working underneath. The plaintiff was well aware of the danger attending propinquity to the defendants' workmen while engaged in putting up the roof. On Dec. 13, 1886 (the day of the accident) the plaintiff was ordered by his foreman to do certain work which brought him within ten or twelve feet of the perpendicular of the staging above, and, while engaged in sawing, a drift fell from the roof and inflicted serious injuries on the plaintiff's head. The accident occurred through an iron drift being struck against an iron plate which rebounded and drove the drift out of the hand of a man named Skerritt, one of the defendant's workmen. The drift fell clear of the staging as it left Skerritt's hand. The plaintiff brought his action and was nonsuited. He then obtained a new trial, which was tried in the Westminster County Court, and on this occasion he got a verdict for £200 damages, and the county court judge entered judgment for that amount. The defendants appealed.

Montagu Lush for the defendants.

Tatlock for the plaintiff.

Cur. adv. vult.

Jan. 28, 1888. **HAWKINS, J.**—We took time to consider this case, not because we entertained any doubt as to what our judgment ought to be, but to inquire into

the authorities, both those cited to us and those not cited. The action was brought to recover damages for injuries sustained in consequence of the alleged negligence on the part of the defendants' workmen in carrying out certain work whereby the plaintiff was injured. The action was remitted to the Westminster County Court, and the judge nonsuited the plaintiff. A new trial was granted, and the action was tried a second time in October, 1887, with a jury. The jury found for the plaintiff, and assessed the damages at £200. The motion before us is to set aside the verdict and enter judgment for the defendants on the following grounds: First, that there was no duty on the defendants to protect the plaintiff against the negligence of their workmen; secondly, assuming negligence on the part of the defendants' workmen, the plaintiff could not recover because either he himself had been guilty of negligence, or the principle of the maxim *volenti non fit injuria* applied; and authorities were cited to support those propositions.

The plaintiff was a workman of Messrs. Lucas, whose contract had nothing to do with the contract of the defendants. The plaintiff, though Lucas's workman, makes his claim on the defendants. The plaintiff, on the day of the accident, was engaged in sawing wood, and was not immediately under the staging, but some ten or twelve feet from the perpendicular of the staging above. He was lawfully there engaged in his ordinary occupation, and was directed to do the work by the foreman of Messrs. Lucas. No doubt the plaintiff knew that from some cause or other, whether through the negligence of the defendants' workmen or otherwise, bolts and rivets were frequently falling from the staging after the gantry had been taken away, and he had shown by his complaints that he was aware of the danger, and that the defendants' workmen were doing dangerous work unless precautions were taken. No step was taken to avert the danger. The defendants' men, too, were aware of the danger, and that even using the greatest care they would let slip from their hands these bolts, which falling would be a source of danger unless precautions were taken.

The question here is whether under these circumstances the plaintiff is entitled to recover, or whether the fact of his knowledge of the danger disentitles him to recover. The jury, after considering the case, gave a verdict to the effect that the defendants were guilty of negligence in not taking proper precautions for those below; that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk. They had been asked by the learned county court judge to say whether the accident arose through any negligence on the part of the defendants, and if so, had there been any contributory negligence on the part of the plaintiff. The jury found the defendants guilty of negligence, not in the use of the rivets or tools by their workmen, but in not taking proper precautions for the safety of those working below. They further find that there was no contributory negligence on the part of the plaintiff, and that he did not voluntarily incur the risk. The motion before us is to set aside that verdict, or to enter a nonsuit or the verdict for the defendants.

In the course of his able argument counsel for the defendants contended that there was no duty of any sort or kind which would impose on the servant of the defendants, or on the defendants themselves, a responsibility for the consequences of the accident; secondly, that there was contributory negligence on the part of the plaintiff; thirdly, that if there had not been any contributory negligence on his part, the principle of the maxim *volenti non fit injuria* would apply.

I will now state my views as to the rights of the parties, and shall state what I conceive to be the law applicable to the case. I do not attempt to lay down any general rule applicable to every case, for each case must stand on its own facts, but only a rule limited to such facts as exist in this case. Where a person is employed to perform work which he knows to be dangerous, and that accidents in it will happen, and when they do happen will be fraught with danger, and where other men in his vicinity are lawfully engaged in work which they are obliged to perform, he who is so engaged in the dangerous work is under a duty to provide against accidents arising from his dangerous work, whether from actual negligence

A or not. I am fortified in laying down such a rule by the observations of Sir BALIOL BRETT, M.R., in *Heaven v. Pender* (2). He said (11 Q.B.D. at p. 509):

B "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

C It is certain that the work in question on which the defendants' workmen were engaged was dangerous; it was obvious, too, that, from the method of working, whether by negligence or inevitable accident, if the things employed by the defendants' workmen in their work did fall, they would do so to the great risk and danger of the men working below. The question of duty is decisive in this matter. But there was a case cited for another purpose, which throws further light on the matter, *Woodley v. Metropolitan District Rail. Co.* (1) in which MELLISH, L.J., said (2 Q.B.D. at p. 391):

D "Now there can be no doubt that by the law of this country every person who carries on a dangerous trade is bound to take reasonable care that no other person (not being his own servant) suffers a personal injury from the manner in which his trade is carried on. No one has a right to carry on his trade in such a manner as is likely to cause personal injury to another. In the case of a servant who enters into the service of a master who carries on a dangerous trade, the right of the servant to be protected in his person is largely modified by the contract between master and servant. The servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business, and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants; but the servant of the contractor enters into no such contract with the railway company at all, and his contract with his own master is *res inter alios acta*, and, in my opinion, is altogether immaterial."

There was a duty then imposed on the defendants, when carrying on their dangerous work, to take not only care that there should not be negligence in the use of their tools by their workmen, but that proper precautions should be taken to prevent the inevitable result of any negligent use of the tools.

G The only other question then is, was there such negligence? I think there was evidence of negligence on which the jury could base their verdict, and they have so found. The defendants knew of the dangerous nature of the work, and of the danger of not taking precautions against the bolts and rivets falling down. Under the circumstances of the case, the omission to take such precautions was sufficient evidence to enable the jury to find the issue on that point against them.

H But that finding alone would not determine this matter; because, though the defendants might be guilty of negligence, yet the plaintiff might not be entitled to recover either because his own negligence had contributed to the accident, or the principle of the maxim *volenti non fit injuria* was applicable. What was the plaintiff's condition? He was altogether unconnected with the defendants or any of their workmen; he was an independent workman employed by another set of contractors to work on the very spot at which the accident happened. True, he was aware of the dangerous character of the defendants' work; and it cannot be doubted that he knew that bolts had fallen on the ground near to where he was working, and he remonstrated, and others with him, and asked the defendants' workmen to take some care. This appears from the evidence of James Skerritt, one of the defendants' workmen, who says that after the gantry had been removed he had warned the carpenters of the risk they ran, and that on one occasion he had asked the plaintiff's mate to keep away from under the staging for a quarter of an hour, but who replied that they (the carpenters) must live as well as the riveters

Was there any contributory negligence on the part of the plaintiff? I can find no such negligence at all. What he did was done according to orders, and he was careful and diligent in his work, and there is no evidence of negligence on his part.

Next, can he be said to have taken upon himself the risk; in other words, does the maxim *volenti non fit injuria* apply? The courts have said that this is a question for the jury; but even if it were left as a question of law for the court to determine, it would be difficult to say that the maxim applied to such a case as the present, where a man is lawfully engaged in his occupation and obeying the orders of those entitled to order him, and liable to instant dismissal if he refuse to obey, and after he has warned the other workmen to be careful in their work, and warned them of the probability of danger. The plaintiff was aware of the impending danger, but that is not the same as voluntarily incurring it.

MELLISH, L.J., in *Woodley v. Metropolitan District Rail. Co.* (1) said (2 Q.B.D. at p. 393):

"Is it, then, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service with his master, that he consented to the company running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion it is not. In the first place, it is by no means certain that the plaintiff, an ordinary bricklayer's labourer, understood at all what the extent of the risk was which he was running, or what the precautions were which were reasonably necessary. In the next place, assuming that he did understand what the risk was that he was running, and that he knew that the workmen in the tunnel were not reasonably protected, it seems to me that it would be extremely unjust to hold that he was obliged either at once to quit his master's employment or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say, 'I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed, if I was injured by their carelessness, I should have an action against the company, and that if I was killed my wife and children would have their action also.'"

Suppose this case: a man is employed by a contractor for clearing the streets, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman, an action is brought in the county court, and the cabman says in his defence, "You know my style of driving, you had seen me drive for a fortnight, I was only driving in my usual style." "Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight is nothing to do with it." It cannot be said, if I am lawfully engaged in my work, which I am bound to do or run the risk of summary dismissal and so deprive myself of my livelihood, and after warning to other workmen not to do me harm or run risks of danger, that in spite of all this I am wilfully incurring the risk. That is a totally different case from that of the foolhardy man who says, "Though there is risk to be run in what I am doing, yet I will run it," or that of a spectator or mere licensee, who has no place to lose, running the risk; such a person does voluntarily encounter the risk. But the plaintiff here practically says, "If I had my own free will and option I would not stop where I am and work"; indeed, his was a case in which his poverty and not his will consented to his running the risk. I think the words of MELLISH, L.J., that I quoted above are strong in favouring the view I have taken of this case.

It has been said that in *Thomas v. Quartermaine* (3) the judgment of the majority of the lord justices was in favour of the defendants. It is sufficient to say that the facts of that case are totally different from those of the present case. The

A plaintiff there who was deprived of his right of action was a servant of the defendants, and had full knowledge of the character of the premises in which he was working; and besides there was a variety of circumstances which distinguish it.

B In *Yarmouth v. France* (4) which came before the members of the Court of Appeal as a Divisional Court, it was held that mere knowledge of danger is not sufficient to disentitle a workman to recover against his employer, but there must be an assent on his part to accept the risk with a full appreciation of that risk to bring him within the principle of the maxim *volenti non fit injuria*. It is really a question of fact. In that case the court below held that the workman was disentitled to recover because, after knowing of and appreciating the risk, he continued the risk, and so must be deemed to have assented to it. But the Divisional Court on appeal ordered a new trial. LINDLEY, L.J., said (18 Q.B.D. at p. 661):

C "If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or have voluntarily incurred it because he does not refuse to face it; nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal rather than voluntary action might properly be inferred. A fortiori, might the jury properly come to such a conclusion if it was proved the workman was told by his superintendent not to mind, and if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself."

I have only one word to say about *Woodley v. Metropolitan Rail. Co.* (1). That case seems at first sight to look very like the present. The plaintiff was a servant employed by a contractor to work in a tunnel belonging to the defendant railway company, but who was in no way connected with the company. He was injured by a passing train of the company; there was a very small space allowed between the line of rails and the walls of the tunnel, but there was space enough for his safety if he had been careful and diligent to protect himself, and to stand so that danger could not happen to him while the trains were passing. The jury found the company guilty of negligence because they had not taken precaution to warn the plaintiff of his danger from passing trains if he failed to take precautions to protect himself. But, if a man having power to protect himself, and knowing of the danger relaxed his attention and guard for his own safety, that is either proof of contributory negligence on his part, or brings him within the principle of the maxim *volenti non fit injuria*. In *Woodley's Case* (1) he was certainly guilty of contributory negligence. It was not through inevitable cause, but through inadvertent conduct on his own part, that he was injured, and so the case is distinguishable from the present case, in which the plaintiff was doing his lawful work, and he could not have protected himself unless he had disobeyed his master's orders and gone directly against them.

I *Wiggett v. Fox* (5) was also cited; but that has nothing to do with the present case, for there the injury was inflicted by a fellow-workman, and was determined by the application of the rule of law relating to injuries inflicted on workmen by their fellow-workmen.

Another case cited was that of *Collins v. Selden* (6), but that is not in point; it was a decision on demurrer that the declaration was bad, as it did not disclose any duty by the defendant, in whose house the plaintiff was injured, towards the plaintiff for the breach of which an action could be maintained. Here the jury have found that the defendants were guilty of negligence in not taking proper precautions to prevent danger to those working below, and that the plaintiff had not been guilty of contributory negligence, nor had he so voluntarily incurred the risk as to bring himself within the principle of the maxim *volenti non fit injuria*. I agree with the verdict, and think this appeal ought to be dismissed.

GRANTHAM, J.—I am of the same opinion. As my learned brother has so exhaustively dealt with the facts of, and the authorities bearing on, this case, I do not purpose to go through them again or add anything to what he has said. It seems to me that it is only necessary to state the facts to show that the verdict of the jury and the judgment of the county court judge were right. The case is really independent of authority. The plaintiff was a workman engaged in his ordinary work of a carpenter, and the defendants were employers of other workmen engaged in their ordinary work of erecting the ironwork of the roof. The plaintiff's work was not dangerous either to himself or other people, but the work of the defendants' workmen was dangerous in its character. The question here is, were the defendants entitled to carry on work which would endanger other workmen on the premises in no way connected with them without taking precautions to obviate risk of accidents and injury? I think that ratio decidendi of *Thomas v. Quartermaine* (3) is inapplicable to the present case. If in the present case, it had been impossible for the defendants to take precautions against the danger there might be some foundation for the proposition that it was the duty of the plaintiff to protect himself; but that was not the case here on the facts, and therefore there was no such duty on the plaintiff. That fact is quite sufficient reason to uphold the judgment of the county court judge.

HAWKINS, J.—I may mention that there is a recent case, *Membury v. Great Western Rail. Co.* (7) decided by **MATHEW** and **A. L. SMITH, JJ.**, in accordance with our decision, and that case and the present seem to raise exactly the same point.

Motion refused.

Solicitors: *Watson, Sons & Room; Stanley & Woodhouse.*

[Reported by **W. P. EVERSLEY, Esq., Barrister-at-Law.**]

Re BLUNDELL. BLUNDELL v. BLUNDELL

[CHANCERY DIVISION (Stirling, J.), April 25, 26, 27, May 1, 1888]

[Reported 40 Ch.D. 370; 57 L.J.Ch. 730; 58 L.T. 933;
36 W.R. 779; 4 T.L.R. 506]

Trustee—Constructive trustee—Money wrongfully paid out of trust estate to stranger—Recovery—Need to prove knowledge of fraud or breach of trust.

A stranger to a trust who receives money from the trust knowing it to be part of the trust estate is not liable as a constructive trustee unless he was a party to a fraud or the breach of trust, or unless to his knowledge the fund was being applied in a manner inconsistent with the trust.

Trustee—Expense of administration of trust—Right to resort to trust estate.

A trustee has a right to resort in the first instance to the trust estate for making the necessary payments to the persons whom he employs to assist him in administering the trust estate. He is not bound in the first instance to pay those persons out of his own pocket and then recoup himself out of the trust estate.

Solicitor—Trustee client—Receipt of costs—Need to call on trustee to produce accounts.

Per STIRLING, J.: A solicitor dealing with a trustee, and having no notice of any breach of trust on his part, is clearly entitled to deal with him on the footing that he is executing the trust and doing nothing which is wrong, and he is not bound before he accepts payment out of the trust estate to call upon the trustees to produce his accounts and satisfy himself that he has acted in all respects properly.

Trustee—Executor—Personal liability—Employment of solicitor, auctioneer, or stockbroker—Right to indemnity.

Per STIRLING, J.: A trustee or an executor who has to employ a solicitor, auctioneer, or a stockbroker, enters into a contract on which he himself is personally liable, but by law he is entitled to be indemnified out of the trust estate.

Notes. Referred to: *St. Thomas's Hospital v. Richardson*, [1910] 1 K.B. 271.

As to becoming a constructive trustee by acquisition of trust property in general, see 38 HALSBURY'S LAWS (3rd Edn.) 858 et seq.; and for cases see 43 DIGEST 708 et seq.

Cases referred to:

(1) *Cruse v. Paine* (1868), L.R. 6 Eq. 641; 37 L.J.Ch. 711; 19 L.T. 127; 17 W.R. 44; affirmed (1869), 4 Ch. App. 441; 38 L.J.Ch. 225; 17 W.R. 1033, L.C.; 23 Digest (Repl.) 303, 3684.

(2) *Lacey v. Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 22 W.R. 586; sub nom. *Lacey v. Hill, Crowley's Claim*, 30 L.T. 484; 26 Digest (Repl.) 132, 936.

(3) *Barnes v. Addy* (1874), 9 Ch. App. 244; 43 L.J.Ch. 513; 30 L.T. 4; 22 W.R. 505, L.C. & L.J.J.; 43 Digest 715, 1538.

(4) *Stanier v. Evans, Evans v. Stanier* (1886), 34 Ch. 470; 56 L.J.Ch. 581; 56 L.T. 87; 35 W.R. 286; 3 T.L.R. 215; 43 Digest 712, 1509.

(5) *Re Spencer, Spencer v. Hart* (1881), 51 L.J.Ch. 271; 45 L.T. 645; 30 W.R. 296, C.A.; 42 Digest 173, 1806.

(6) *Harries v. Rees* (1867), 37 L.J.Ch. 102; 17 L.T. 418; 16 W.R. 91, L.J.J.; 43 Digest 711, 1500.

(7) *Keane v. Roberts* (1819), 4 Madd. 332; 56 E.R. 728; 43 Digest 959, 3992.

(8) *Gray v. Johnston* (1868), L.R. 3 H.L. 1; 16 W.R. 842, H.L.; 3 Digest (Repl.) 201, 411.

Summons by the Bavarian Brewery Co., Ltd., in an action brought by the company for the administration of the estate of a testator, Thomas Blundell, deceased, for an order that Messrs. Bower, Cotton and Bower, solicitors or any one of them should be ordered to pay into court the sum of £1,148 14s. 9d. This sum was the aggregate of amounts paid to them as their costs by one George Blundell who was executor of the will and a beneficiary under the trust therein provided for. The money had been paid in breach of trust out of the trust estate. A

The testator, by his will, dated April 21, 1882, appointed Timothy Harrington, Richard Berry, and his son George Thomas Blundell, trustees and executors of his will. He gave all his real and personal estate to his trustees upon trust as to his businesses that his son George Blundell should have the option of purchasing the said businesses and the leasehold premises upon which such businesses were carried on, and the stock-in-trade, plant, machinery, and other assets belonging to the said businesses at the time of his decease at the price of £6,000, and upon the terms therein mentioned, such option to be declared in writing within one month after the testator's death. He further declared that the said George Blundell should, if he preferred to do so, be at liberty to purchase the said businesses and leasehold premises at a valuation to be made according to the instructions of the other executors. As to the residue of his estate and effects, including the said businesses and the leasehold premises upon which the same were carried on, in case his said son should not elect to purchase the same under the provisions thereinbefore made upon trust, that his trustees should sell and convert the same into money, and out of the proceeds, and such part of his estate as should consist of money, pay his funeral and testamentary expenses and debts, and certain legacies. As to the remainder of the residuary trust moneys, he directed his trustees to divide the same in two moieties, and he gave one moiety of such residuary trust moneys to his son George Blundell absolutely, and the other moiety he gave on trust for the benefit of his son James Blundell and his children. B C D E

The testator died in September, 1882, and his will was proved on Nov. 22, 1882, by George Blundell alone. He employed Messrs. Bower, Cotton, and Bower to act as solicitors for him in the execution of the trusts, and they transacted a considerable amount of business on behalf of the estate, and received considerable sums of money from the executor on account of their costs for such business. The money which it was sought by the summons to make them pay into court was money received by them for such costs. George Blundell did not purchase or take the testator's businesses at a valuation under the terms of the will, but he carried on the business till July, 1883, but the business was not at that time profitable. F

On Blundell's instructions, Messrs. Bower, Cotton and Bower took counsel's opinion as to how he could buy the testator's businesses and counsel advised that this could not be done without leave of the court. Blundell disregarded this advice and when in July and September, 1883, the leases, plant, machinery, and stock of the testator's businesses were put up for sale by auction he bought some portion of the property through his agents. Some portion of the business premises were together with the furniture, bought by a Mr. Tabernacle who was a friend of Blundell's for £800. A part of this sum was borrowed on mortgage of the premises, Blundell undertaking to pay the interest, and subsequently Tabernacle granted Blundell a lease of the premises to enable Blundell to carry on the business there and to repay by way of rent in three or four years the amount advanced for the purchase. In subsequent proceedings these transactions were described by KAY, J., as: "a round-about course [adopted by the sole executor] . . . of getting the business into his own hands, by going through the form of a sale by auction to a nominee of his own from whom he took it over, a device which a man need not be a lawyer to understand was not an honest thing to do. It was a roundabout fashion of getting into his own hands that property which he had declined to purchase in the manner in which the testator gave him the power of purchasing." G H I

It was alleged that Messrs. Bower, Cotton and Bower acted as solicitors, both on the sale to Tabernacle, and in the granting of the lease to George Blundell, and

A that they were perfectly aware that George Blundell had purchased other parts of the property for himself, and that by reason of their knowledge of these breaches of trust they could not retain the costs which had been paid to them out of the estate.

Robinson, Q.C., and E. Ford for the summons.

Buckley, Q.C., and Levett for the respondents.

B **STIRLING, J.**—This case involves a question of great importance, not only to solicitors, but to all other persons who are employed by trustees to assist them in the discharge of their duties. The case which is put is this: an executor and trustee employs a solicitor to assist him in the winding-up of his testator's estate, and in the execution of the trust. I assume, and it is not disputed in the present case, that the employment of that solicitor is proper. In the course of his employment the solicitor requires the trustee to make a payment to him on account of his costs. The trustee does so, and does so, in point of fact, with the knowledge of the solicitor, out of the trust estate. It is said that the solicitor cannot retain the sum so paid to him out of the trust estate, except upon the terms that if the trustee upon the accounts being taken turns out to be a defaulter, and an order is made against him for payment of the balance into court, and he fails to do so, the solicitor should be liable to have the same order made against him. That is a very serious proposition for a solicitor dealing with a trustee, and if it is well founded in principle, it seems to me it cannot be confined to the case of a solicitor, but must extend to other persons, such as auctioneers and stockbrokers, who, as we all know, are necessarily employed by trustees, and are accustomed to deduct out of the proceeds of sales of property which they are employed to sell their own commission on the sale.

The first question is whether that is a true statement of the law? What is the position of a trustee or executor who has to employ a solicitor, an auctioneer, or a stockbroker? He enters unquestionably into a contract with reference to the employment of a solicitor, or auctioneer, or stockbroker, in which he himself is personally liable, but by law he is entitled to be indemnified out of the trust estate. What is that right of indemnity? I apprehend that in equity, at all events, it is not a right to be indemnified merely after he has made the necessary payments to the solicitor, or the auctioneer, or the stockbroker. In equity he is entitled to be indemnified, not merely against the payments actually made, but against his liability, and that has been repeatedly held. For example, a trustee in whose name shares are standing is entitled to be indemnified by his cestui que trust against calls on those shares, and he is not bound, before having recourse to that indemnity, to pay the calls, but he is entitled to come to this court and ask that he may receive from his cestui que trust personally the amount of the calls in order that he may pay them. That equity has been repeatedly enforced in this court. I may refer to the well-known case of *Cruse v. Paine* (1) decided by GIFFARD, V.-C., and also on appeal by LORD HATHERLEY, L.C.; and the same doctrine is laid down by SIR GEORGE JESSEL, M.R., in another well-known case, and applied under peculiar circumstances in *Lacey v. Hill, Crowley's Claim* (2), which arose out of the will of Sir Robert Harvey. It seems to me, that being the right of the trustee, he has a right to resort, in the first instance, to the trust estate for making the necessary payments to the persons whom he employs to assist him in administering that trust estate; that he is not bound, in the first instance, to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he may properly, in the first instance, resort to the trust estate, and pay those persons whom he properly employs their proper remuneration out of the trust estate.

I think that is in accordance with *Barnes v. Addy* (3). In that case we find that one of the trustees who was made a defendant paid over out of the trust estate to his solicitor a sum of £65, and it was sought to charge the solicitor with that £65. LORD SELBORNE says (9 Ch. App. at pp. 254, 255): "He is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money)."

That, no doubt, is a distinction between that case and this, but still, what LORD SELBORNE says there is none the less applicable to this case.

"It is said he is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money), because the authority of the trustees to apply that money in the payment of certain costs of a previous suit, which had been compromised, was not obtained from this court. Now, the trustee, Mr. Addy, was, as I have said, at that time beyond question the legal owner of the fund. He and Mr. Clark, the deceased trustee, had a right by the terms of the will, to be indemnified against all costs, properly or reasonably incurred, in connection with the trust. These costs had been incurred in a suit brought against them in the name of the present plaintiffs, the Barnes children, by a next friend, under the advice of Mr. Parker, the family solicitor, which suit having proceeded to a certain extent, had been compromised on the terms that all three shares of this fund—the Barlow share, the Barnes share, and the Addy share—should bear their proportion of the trustee's costs. The trustee Addy authorised the sale for that purpose, and that application of the money, and it was so applied; and I am most clearly of opinion, first of all, that there is nothing before us to show that such an application was improper on the part of Mr. Addy, the trustee."

But then he adds:

"But, secondly, that if it had been, the solicitor could not possibly have been held on that account responsible."

The ground on which the solicitor could not have been held to be responsible appears to be that he simply acted as agent for the trustee. He did not retain the money for his own use, but simply handed it over in payment of the costs incurred. There is an express decision by LORD SELBORNE that such an application of the fund was not improper on the part of Mr. Addy, and that, therefore, seems to be an authority that the trustee, having properly incurred expenses in administering the trust fund, was entitled to sell a part of the trust estate, and apply that directly in payment of costs. If, then, it was proper for the trustee to resort to the trust fund for payment of those costs, and to sell a part of the trust estate, and apply the proceeds in payment of those costs, how can it be improper for the solicitor to receive that amount? I fail to see it. To say that his right to receive and retain can be affected by the subsequent conduct of the trustee appears to me to be quite impossible, and it is a proposition for which there is no authority.

The only authority cited in support of the proposition is a totally different case, that of *Stanier v. Evans* (4), from the decision in which, as I understand it, I do not at all differ. [HIS LORDSHIP then referred to the facts of that case, and continued:] The ground upon which the case was decided appears to me to be undeniable—that solicitors could not contract with the estate; they had no lien on the estate; they could only get a lien by means of some proper agreement with the trustee. There had been no agreement whatever entered into; the trustee himself was a defaulter, he was unable to make the payment, he could not in any way resort to the trust estate for payment of his costs, because he had already in his hands a large sum which he ought to have applied in payment of those costs; and NORTH, J., held that under those circumstances the solicitor could stand in no better position than the trustee. I confess I cannot see how that decision can be quarrelled with in any way, but that is not a decision, to my mind, that in every case in which the solicitor of a trustee receives money in payment of costs out of the trust estate he can stand in no better position than the trustee himself does.

Coming, therefore, to the conclusion that in a proper case the trustee may pay costs properly incurred direct to his solicitor out of the trust estate, I have next to consider whether there are any circumstances, and if so, what circumstances which will make the solicitor liable as a constructive trustee for funds which are so received. Upon that *Barnes v. Addy* (3) is again valuable. LORD SELBORNE there says (9 Ch. App. at pp. 251, 252):

- A "That is a distinction to be borne in mind throughout the case. Those who create a trust clothe a trustee with legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may, no doubt, be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the
- B *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design upon the part of the trustees."
- C That doctrine so laid down by LORD SELBORNE has been expressly applied to solicitors in the Court of Appeal in *Re Spencer, Spencer v. Hart* (5). That was an action by the *cestuis que trust* against trustees for administration, the solicitors of the trustees being joined as defendants. It was alleged that greatly exorbitant sums had been allowed in the accounts as costs to the trustee's solicitors, and the relief asked as against them was that their bills might be taxed. Then the
- D solicitors demurred, and it was held that such action could not be maintained by third parties, *cestuis que trust*, against solicitors, and that the proper remedy was by petition under the Solicitors Act, 1843. BAGGALLAY, L.J., says this (51 L.J.Ch. at p. 272):

- E "Are Messrs. Ansdell & Son liable to the plaintiff in any other character than as solicitors? The principle on which agents can be made responsible as constructive trustees is very clearly defined by LORD SELBORNE in the case of *Barnes v. Addy* (3)."

Then he quotes from the headnote in the LAW REPORTS (9 Ch. App. 244), substituting for the general word "agent" the word "solicitor," and then he goes on:

- F "What is the case here? Are there any allegations sufficient to make them liable as constructive trustees? No; I can find nothing. There are allegations which seem to point to the solicitors having got the trust funds into their hands, but only as solicitors to the trustees. Therefore, the allegation is that the trustees themselves had realised the property and received the money, and there is nothing suggesting an improper receipt of the trust moneys by the solicitors. The £700 is stated to have been received by the trustees. Then the only
- G other suggestion is that the trustees had taken credit for £455, which they had allowed the solicitors to deduct as the amount of their bill of costs; but we do not know that that was in any way an excessive sum. If it is, it is open to the *cestui que trust* to obtain taxation of the bill under the Solicitors Act. Therefore, the joining these solicitors defendants as constructive "trustees cannot be justified."

- H Then LINDLEY, L.J., says (51 L.J.Ch. at p. 273):

"Prima facie, the only persons to sue an agent are his principals, although, no doubt, it might be shown that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a quasi-trustee, and in that case an action might be supported against him."

- I Therefore, it seems to me that is a direct authority that you cannot make a solicitor liable as a constructive trustee unless you can bring him within the doctrine of the court with reference to other strangers who are not themselves trustees, but who are liable in a proper case to be made to account as constructive trustees. What is the general doctrine as to that? I take it it is this, that a stranger to the trust receiving money from a trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which show that, to his knowledge, the money is being

applied in a manner which is inconsistent with the trust. That in general terms would come to this; you must make out either that the solicitor was party to a fraud, or that he was party to a breach of trust on the part of the trustee. That appears to me to be in accordance with the decision to which I have referred, and to be further supported by the case which has been referred to, before the Court of Appeal in the time of CAIRNS and ROLT, L.JJ., of *Harries v. Rees* (6).

The real difficulty in this case is what is sufficient to fix the solicitor with the liability of a constructive trustee? As I have said, he must be party either to a breach of trust or to some fraud, or at all events he must have brought home to him facts which show that the fund is being applied in a manner inconsistent with the trust. In the present case the trustee and executor, as I have said, was entitled to resort in the first instance to the trust fund for payment of the necessary costs, charges, and expenses incurred by him in executing his trust. Doubtless he might commit acts which would deprive him of the right to resort to those funds. If, for example, he was an utterly impecunious man, and he sold out part of the trust estate for the purpose of applying it in payment of a particular set of costs, and he did not so apply the proceeds of sale but kept them in his own pocket, I apprehend he would be debarred from further resorting to the trust estate for the purpose of paying the same costs. It would be a breach of trust on his part so to do, and if the solicitor, with knowledge of all the facts, received payment of part of the trust estate in satisfaction of a bill of costs, I think it is very possible that he might be held under those circumstances to be a constructive trustee. But this is to be borne in mind, that in all these cases, for the benefit of the cestuis que trust themselves, you are not narrowly to limit the power of the trustee to employ agents to assist him in executing the trust, and mere suspicion or intimation that something was wrong in the administration of the trust will not, to my mind, be sufficient to deprive the solicitor of the right to accept payment of part of the trust estate in satisfaction of costs, charges, and expenses properly incurred.

The general rule with reference to agents is well laid down by SIR JOHN LEACH in *Keane v. Roberts* (7), which is a case of bankers, and the doctrine which is laid down in that case was approved and followed by the House of Lords in *Gray v. Johnston* (8). SIR JOHN LEACH lays it down thus (4 Madd. at p. 357):

"Every person who acquires personal assets by a breach of trust, or devastavit, in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be prima facie consistent with the duty of an executor."

Therefore, a solicitor dealing with a trustee, and having no notice of any breach of trust on his part, is clearly entitled to deal with him on the footing that he is executing the trust, and is doing nothing which is wrong, and he is not bound before he accepts payment out of the trust estate to call upon the trustee to produce his accounts, and satisfy himself that he has acted in all respects properly.

But, suppose that he does know of some breach of trust—Can it be held that the mere knowledge of that is sufficient to preclude him from accepting payment? That would be a formidable doctrine, again not merely to solicitors, but to auctioneers and stockbrokers also. Supposing a stockbroker had knowledge that part of a trust fund was improperly invested, and that the trustee might be called upon to make good any loss which was occasioned by that investment, would he thereby preclude himself from deducting his commission upon a proper sale of another part of the trust estate? I think it would be difficult to come to such a conclusion, and to my mind, in order that the solicitor may be precluded from accepting payment out of the trust estate, you must bring home to him knowledge that at the time when he accepts payment the trustee had been guilty of such a

A breach of trust as to preclude him altogether from resorting to the trust estate for payment of any of those costs, and that in fact such an application was a breach of trust.

If that be the correct view of the law, what do we find in the present case? We find that in this case the executor improperly attempted to acquire, and did acquire, part of the trust estate for his own use and benefit. As regards the conduct of the solicitors, on the whole I cannot see anything which would lead me to cast any blame upon them whatever. It appears to me that down to the time of the sale by auction, at which this trustee and executor bid, through agents apparently, and attempted to acquire a part of the plant for his own use, they acted perfectly properly. They seem to me to have advised him that he could not do so, and that if he desired to acquire the property for his own benefit the only possible mode of doing it was by the sanction of the court in a suit properly framed for the purpose, and the fact that he had, contrary to their advice, acquired the property seems to have come upon them with the greatest surprise.

I cannot come to the conclusion on the evidence before me that the solicitors were parties to any fraud, or that they intentionally joined in any breach of trust whatever. No doubt they had notice at the time when they received the payments, some of which were certainly made to their knowledge out of the trust estate, that the trustee had committed a breach of trust, but I do not think it was brought home to them that they had notice that the transaction was such as to preclude the trustee entirely and altogether from resorting to the trust fund for payment of the costs, or that any such amount as was ultimately held to be recoverable from the trustee could be charged against him. Even at the moment when they carried in the account in this action, in April, 1885, there appears by the account they rendered to be a balance in favour of the trustee. I do not think that the facts are sufficient to justify me in holding that the solicitors were in this case affected with such notice of the position of the trustee with reference to the trust fund that I ought to hold them constructive trustees, and fix them with liability to repay these sums which they have received out of the trust estate on account of their costs. On these grounds I think the application fails, and, failing as it does, I think the costs ought to follow the event.

Solicitors: *W. Foster; Bower, Cotton & Bower.*

[*Reported by A. J. HALL, Esq., Barrister-at-Law.*]

Re TAMPLIN & SON. Ex Parte BARNETT

[QUEEN'S BENCH DIVISION (Cave and A. L. Smith, JJ.), February 14, 1890]

[Reported 59 L.J.Q.B. 194; 62 L.T. 264; 38 W.R. 351;
6 T.L.R. 206; 7 Morr. 70]

Bill of Sale—"True owner" of goods—Grantor's ownership qualified by rights of other persons—Partner—Bill of sale of partnership property—Extent of validity—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43), s. 5.

In s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, which provides for the avoidance, except as against the grantor, of a bill of sale in respect of personal chattels of which the grantor was not the true owner at the time of the execution of the bill, the words "true owner" are used in their natural and not in their artificial and technical sense. The grantor's ownership may be qualified by the existence of rights in other persons; he may have it subject to a lien or an equitable right, or he may be a tenant in common, and his co-tenant may have rights not affecting the property, but which are available against his co-owner. Hence a partner is the "true owner" of partnership property to the extent of his share in it, and a bill of sale executed by him over the partnership property is to that extent valid.

Notes. Referred to: *Lewis v. Thomas*, [1918-19] All E.R. Rep. 487.

As to the meaning of "true owner," see 3 HALSBURY'S LAWS (3rd Edn.) 283-284; and for cases see 7 DIGEST (Repl.) 129 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 576.

Cases referred to in argument:

Shipp v. Harwood (1747), 2 Swan. 586; 3 Atk. 564; 36 E.R. 739, L.C.; 36 Digest (Repl.) 554, 1137.

Re Bainbridge, Ex parte Fletcher (1878), 8 Ch.D. 218; 47 L.J.Bcy. 70; 38 L.T. 229; 26 W.R. 439; 7 Digest (Repl.) 36, 180.

Tuck v. Southern Counties Deposit Bank (1889), 42 Ch.D. 471; 58 L.J.Ch. 699; 61 L.T. 348; 37 W.R. 769; 5 T.L.R. 719, C.A.; 7 Digest (Repl.) 130, 741.

Richards v. Johnston (1859), 4 H. & N. 660; 28 L.J.Ex. 322; 33 L.T.O.S. 206; 5 Jur.N.S. 520; 157 E.R. 1000; 7 Digest (Repl.) 129, 734.

Jacobs v. Seward (1869), L.R. 4 C.P. 328; 38 L.J.C.P. 252; 20 L.T. 448; affirmed (1872), L.R. 5 H.L. 464; 41 L.J.C.P. 221; 27 L.T. 185; 36 J.P. 771, H.L.; 43 Digest 391, 146.

Fennings v. Lord Grenville (1808), 1 Taunt. 241; 127 E.R. 825; 43 Digest 503, 433.

Appeal from the decision of the judge of the Pontypridd County Court, declaring the appellant's title under a bill of sale to certain goods to be bad, and ordering him to repay their value to the respondent, who was the trustee in bankruptcy of the grantor, the elder Tamplin, and of his son.

In 1884 Tamplin, the elder, commenced business as a butcher, and in 1885 Tamplin, the son, joined his father, and £140 was paid by him into the partnership account. After this date a new shop was opened, on which appeared the name of the father and the son, and billheads were used in the business with the heading E. Tamplin & Son, family butchers and bacon curers. The name of the elder Tamplin alone was retained as it had always been over the door of the old shop. In June, 1888, the two Tamplins being in want of money to meet certain costs of legal proceedings which had been taken against them, the elder Tamplin, with the son's assent, executed a bill of sale of certain goods which were partnership property of the father and son, in favour of Barnett the respondent, in consideration of the sum of £60. The money was paid to the elder Tamplin, and was used to pay the costs of the proceedings which had been taken against the father and son.

A The two Tamplins were jointly adjudicated bankrupt, and the county court judge declared the bill of sale void on the ground that as to the partnership goods the elder Tamplin, the grantor, was not the true owner within the meaning of s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882. The grantee of the bill of sale appealed.

By s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882 :

B “Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.”

Bigham, Q.C., and Glascodine for the appellant.

C *Channell, Q.C., and Benson* for the trustee.

CAVE, J.—In this case the two debtors appear to have been carrying on business together as butchers, and were made bankrupt in their business. The business was commenced in 1884 by the father, and in 1885 the son joined him. In 1888 they were in want of money, and the father applied to Barnett for an advance on a bill of sale. A bill of sale was prepared by which certain household furniture, admittedly belonging to the father, and certain other property alleged to be partnership property, was charged with the repayment of the £60 borrowed by the father. The first contention raised was, that there was not in fact a partnership between the father and son, or, if there was one, it did not extend to the goods the subject of the bill of sale. I had great difficulty in ascertaining what took place before the county court judge, as this point was not taken with sufficient particularity before him. No one may stand by and not take a point in the court below and then come and take it in the Court of Appeal. Nor, on the other hand, is it enough merely to take the point, leaving counsel or the judge to find out the grounds on which it was taken. The objection should be taken and argued, and the grounds of it brought out, in order that it may if necessary be met by evidence. I think there was a partnership, and that this was partnership property.

F It was admitted that, apart from the Bills of Sale Acts, under the common law the bill of sale holder would have a good title, as it was obvious that these two persons wanted money for partnership purposes, and agreed to raise the money by mortgaging their property to the holder of the bill of sale, and they do so by saying it was the property of the elder bankrupt, and that, it was admitted, gives the grantee a good title to the whole, apart from the Bills of Sale Acts. It is not necessary to rely on the doctrine of estoppel as against the younger bankrupt. Certain cases were referred to, but it is not necessary to decide this question. It is clear that the younger bankrupt assented to the bill of sale in order to raise money for partnership purposes, and this is strong evidence of an authority from him to the elder to execute the bill of sale and transfer the joint property to Barnett.

H The respondent, however, relies on s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882. The words are :

“Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale,”

I and the marginal note is to the following effect: “Bill of sale not to affect after-acquired property.” It is, therefore, tolerably clear what was in the mind of the legislature when the Act was passed, as the common practice before the Act had been for the grantor to include not only present property, but property brought afterwards on to the premises, and the Act was passed to put an end to that practice.

The question we have to consider is, to what extent that section applies where one of two partners executes a bill of sale of partnership property purporting to convey, not only his own moiety but the whole of the property. I do not agree

that this empowers the owner of any share, however small, to execute a bill of sale of the whole partnership property which shall be good under this section as against trustees and creditors. In s. 5 the words "true owner" are used in their natural and not their artificial and technical sense. They mean that a man must be the true owner of the goods which he purports to convey. It does not follow, because he is the owner of the property subject to a lien or equitable right, that he ceases to be the true owner. As the words are used in the popular sense, it does not mean to say that, where your true ownership of property is qualified by some rights existing in others, you may not convey the property. You may convey it as true owner subject to any rights existing in others which may qualify yours. There must always be someone who can be spoken of as the true owner of the property. It may be a man may have it subject to a lien or equitable right, or he may be a tenant in common, and his co-tenant may have rights not affecting the property, but which are available against his co-owner; but the existence of rights of that kind does not prevent the true owner from parting with his interest.

In the present case both partners wanted money for partnership purposes, and if both had joined and conveyed, the bill of sale would be good under s. 5. So in the same way the elder Tamplin was, within the meaning of the section, the true owner of his moiety, and the younger Tamplin likewise of his moiety. This was a conveyance by the elder Tamplin of the whole property, and, therefore, of his half, with the intention both of himself and his son that the conveyance should be absolute on the part of the son, and, therefore, if the son has any rights, this would not negative the fact that the elder Tamplin was the only person who could be described as the true owner of his moiety. If both convey, they are true owners; and if one conveys even the whole, he is still the true owner of his own moiety, though not of the moiety of the other.

I do not see any other construction that can be placed on it. If a man were allowed to give a bill of sale over property not his own—i.e., in the name of some other person as owner who was not owner—it is clear s. 5 would not be complied with. This view was not presented to the court below, but it really was not material, as it was purely a question of law which could not be altered by the facts. The learned county court judge was wrong in compelling the bill of sale holder to pay back all the money he had received from the sale of the partnership property. The proper order was that the bill of sale holder should retain one half and pay over the other half to the trustee in bankruptcy.

A. L. SMITH, J.—This case is one of some little complication. The main point was, What is the meaning of the words "true owner" within s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882? We must look at the substance in order to see if there was a partnership. There are certain facts beyond dispute. In 1885 negotiations were opened between the father and son. The son advances £140. Why? After that date he joins the father in the trade of a butcher, and the £140 was embarked in that business. The old shop was left as before, and a new shop was opened under the name of Tamplin and Son. They got into difficulties, and they want money to get out of them; so the father goes to Barnett and gets an advance on a bill of sale. The father was the grantor, the money was handed to him, and was applied by the father and son to pay the costs of the legal proceedings which had been taken against them. I think there was a partnership, and that the haystack, etc., were used in their business of butchers.

The trustee tries to set aside the bill of sale by saying the property was joint property. That is made out, and then he says, "The bill of sale is void by s. 5, and although the estate has had the benefit of the advance, yet I will wipe it away." The question then turns on the meaning of the word true owner. The trustee really says this: "If I show there was a partnership, and that these were partnership goods, the bill of sale is void." There was a subsidiary point as to the meaning of the sidenote in s. 5, as to which I agree with CAVE, J. What is the meaning of true owner? And to ascertain this I ask this question: Assuming a partner

A is an execution debtor, what step can the sheriff take? The law is, that the sheriff goes in and seizes the undivided moiety of the execution debtor partner, and when he has sold it, he puts the vendee in as tenant in common with the partner against whom there is no execution. Then the vendee has to look out (I believe the law is so), and find out his rights for himself. The father here had an undivided moiety of this property, and he was, therefore, the true owner within the meaning of s. 5. On that I found my judgment.

Order varied.

Solicitors: *Hervey Smith*, for *Barnett*, of Cardiff; *Crowders & Vizard* for *Davies*, of *Pontypridd*.

[*Reported by W. B. YATES, Esq., Barrister-at-Law.*]

D

COCHRANE v. ENTWISTLE

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), May 9, 1890]

[Reported 25 Q.B.D. 116; 59 L.J.Q.B. 418; 62 L.T. 852;
38 W.R. 587; 6 T.L.R. 319]

E

Bill of Sale—Form—Bill comprising personal chattels and chattels real—Avoidance—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43), s. 9.

F

A bill of sale, given by way of security for the payment of money, assigned "all and singular the several chattels and things specifically described in the schedule . . . together with all the tenant-right valuation, goodwill, tillages, and interest" of the grantor in a farm. The schedule contained the following items, among others: "nine acres of wheat, nine acres of oats, two acres of barley," and also "all the tenant-right valuation, goodwill, tillages, and interest of and in the farm."

G

Held: as the bill of sale assigned chattels real as well as chattels personal it was not in accordance with the statutory form, and, further, it was void as to the personal chattels.

Notes. Considered: *Swanley Coal Co. v. Denton*, [1906] 2 K.B. 873. Referred to: *Re North Wales Produce and Supply Society, Ltd.*, [1922] All E.R.Rep 730.

As to the subject-matter of bills of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 274 et seq.; and as to the statutory requirements for bills of sale, see *ibid.* 284 et seq. For cases see 7 DIGEST (Repl.) 60. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 9 and Schedule, see 2 HALSBURY'S STATUTES (2nd Edn.) 580, 583.

Cases referred to:

I

- (1) *Re Burdett, Ex parte Byrne* (1888), 20 Q.B.D. 310; 57 L.J.Q.B. 263; 58 L.T. 708; 36 W.R. 345; 4 T.L.R. 260; 5 Morr. 32, C.A.; 7 Digest (Repl.) 60, 322.
- (2) *Re Barber, Ex parte Stanford* (1886), 17 Q.B.D. 259; 55 L.J.Q.B. 341; 54 L.T. 894; 34 W.R. 507; 2 T.L.R. 557, C.A.; 7 Digest (Repl.) 56, 290.

Also referred to in argument:

Thomas v. Kelly (1888), 13 App. Cas. 506; 58 L.J.Q.B. 66; 60 L.T. 114; 37 W.R. 353; 4 T.L.R. 683, H.L.; 7 Digest (Repl.) 60, 318.

Appeal by the plaintiff, the grantee of a bill of sale, from a decision of MANISTY, J., at the trial without a jury dismissing his claim against the defendants for

damages for the conversion of certain goods and chattels on the ground that the bill of sale was void A

The defendant Entwistle was the sheriff of Leicester, and the other defendants were a firm of auctioneers. The sheriff had seized the goods and chattels under an execution against one Mrs. Beebe, and the auctioneers had sold them. The plaintiff claimed the goods under a bill of sale granted to him by Mrs. Beebe on Feb. 28, 1888, to secure the repayment of a loan of £50, with interest. The bill of sale, so far as is material, was as follows: B

"The mortgagor doth hereby assign unto the mortgagee all and singular the several chattels and things specifically described in the schedule hereto annexed or hereinafter written now in and about the premises known as . . . together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the said farm, land, and premises, by way of security for the payment of the said sum of £50." C

The schedule, among other things, contained "9 acres of oats, 9 acres of wheat, 2 acres of barley," and also "together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the farm known as —." At the trial MANISTY, J., held that the bill of sale was void as not being in accordance with the form prescribed by the Act of 1882, inasmuch as it assigned chattels real as well as personal chattels. The plaintiff appealed. D

By the Bills of Sale Act (1878) Amendment Act, 1882, s. 9:

"A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." E

H. Kisch and Horace Kent for the plaintiff.

J. V. Austin for the defendants.

LORD ESHER, M.R.—In this case the sheriff seized and sold certain goods and chattels under an execution, but the growing crops were not seized or sold. The plaintiff sued the defendants for seizing and selling his chattels, and the onus was on him to prove that they were his. At the trial he relied upon a bill of sale to prove his title. The goods were seized and sold on behalf of an execution creditor of the grantor of the bill of sale, and the question is, whether the bill of sale is good against that creditor. The defendants say that the bill of sale is void because it is not in accordance with the form prescribed by s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882. F

Is this bill of sale in the form prescribed, or so nearly so as to be really equivalent to that form? It is a bill of sale given to secure the repayment of a loan of £50 advanced by the plaintiff, and in the document the security is stated to be the chattels and things enumerated in the schedule, and also several chattels real. The schedule itself enumerates a large number of personal chattels, and also the chattels real described in the body of the document. The security, therefore, consisted of all the things enumerated in the schedule, consisting of both chattels personal and chattels real. At the trial the plaintiff insisted that he was, by virtue of the bill of sale, entitled to the personal chattels. G

Those being the facts, is this bill of sale in accordance with the prescribed form? Is it exactly in the form, with only the blank spaces left in that form properly filled in? By the Act only personal chattels can be included in a bill of sale, and therefore this bill of sale is not in accordance with the form because chattels real are included in it. It is not substantially in the form, and it has not the same legal effect, but a larger effect. H

It is then contended by the plaintiff that, upon the authority of *Re Burdett, Ex parte Byrne* (1), the security may be divided, and that if this bill of sale, so far as it relates to the personal chattels, is in accordance with the form, the part relating to the chattels real may be struck out, and the rest be good. That case, however, is no authority for such a proposition. The dispute there was as to certain chattels I

A real, and it was held that, inasmuch as chattels real were not within the Act, a conveyance of chattels real, though contained in a bill of sale, was not void by the Act. That case was rightly decided, but has nothing to do with this case, where the dispute is as to personal chattels. This appeal must be dismissed with costs.

FRY, L.J.—This is an important question as to the validity of a bill of sale. This bill of sale describes the security as being :

B “all and singular the several chattels and things specifically described in the schedule hereto annexed or hereinafter written . . . together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the said farm, land, and premises.”

C Is that form in accordance with the form prescribed by the Act? The form in the Act is confined to “all and singular the several chattels and things specifically described in the schedule,” and relates only to personal chattels.

The rule laid down in *Re Barber, Ex parte Stanford* (2) is this, that the form and the instrument in dispute must be compared, and that, if it appears that the instrument is different from the form, and through such difference has substantially any greater or lesser legal effect, the instrument is not in accordance with the form and is void. Here the instrument assigns things which are not personal chattels, and is therefore plainly not in accordance with the form, and has a greater legal effect than the form.

E LOPES, L.J.—The plaintiff here relies upon a bill of sale. By s. 9 of the Act of 1882 that bill of sale must be in accordance with the form, otherwise it is void. When the form is looked at, it appears that it contains these words: “All and singular the several chattels and things.” It is clear that the words “chattels and things” only include personal chattels and nothing more. This bill of sale contains in the schedule chattels real as well as chattels personal, and is therefore, not the same as, and has not the same legal effect as the form. It is, therefore, void, and this appeal must be dismissed.

F LORD ESHER, M.R.—I desire to add that, if the argument of the plaintiff were tenable, the whole protection intended to be provided by the statute for ignorant and careless debtors would be done away with.

Appeal dismissed.

Solicitors : *Cooper & Sons; Crowders & Vizard, for Owston, Leicester.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

BACUP CORPORATION v. SMITH

[CHANCERY DIVISION (Chitty, J.), April 23, 1890]

[Reported 44 Ch.D. 395; 59 L.J.Ch. 518; 63 L.T. 195;
38 W.R. 697]*Public Health*—"Owner"—Receiver appointed by court in an action—*Public Health Act, 1875* (38 & 39 Vict., c. 55), s. 4.

A receiver of rents and profits appointed by the court in an action held not to be an "owner" of the premises within the definition of that word in s. 4 of the Public Health Act, 1875, and, therefore, the service on him of notices under s. 150 of the Act was not a good service.

Notes. The definition of "owner" in s. 4 of the Public Health Act, 1875, has been re-enacted by s. 343 of the Public Health Act, 1936.

Referred to: *De Grelle, Houdret & Co. v. Bull* (1894), 1 Mans. 118.

As to the meaning of "owner" under the Public Health Acts, see 31 HALSBURY'S LAWS (3rd Edn.) 51-52; and for cases see 38 DIGEST (Repl.) 184-185. For the Public Health Act, 1875, ss. 4, 150, 267, see 19 HALSBURY'S STATUTES (2nd Edn.) 60, 70, 96; for the Public Health Act, 1936, ss. 343, 346, see *ibid.* 495, 499; for the Highways Act, 1959, ss. 189, 190, 213, see 39 HALSBURY'S STATUTES (2nd Edn.) 612, 613, 638.

Cases referred to in argument:

Eddleston v. Francis (1860), 7 C.B.N.S. 568; 3 L.T. 270; 141 E.R. 938; sub nom. *Edlestone v. Francis*, 25 J.P. 135; 38 Digest (Repl.) 189, 170.

Peek v. Waterloo and Seaford Local Board of Health (1863), 2 H. & C. 709; 3 New Rep. 131; 33 L.J.M.C. 11; 9 L.T. 338; 27 J.P. 807; 9 Jur.N.S. 1344; 12 W.R. 252; 159 E.R. 293; 38 Digest (Repl.) 184, 137.

Cook v. Montagu (1872), L.R. 7 Q.B. 418; 41 L.J.M.C. 149; 26 L.T. 471; 37 J.P. 53; sub nom. *R. v. Bath Justices, Cook v. Montagu*, 20 W.R. 624; 36 Digest (Repl.) 337, 797.

St. Helens Corp'n. v. Kirkham (1885), 16 Q.B.D. 403; 50 J.P. 647; 34 W.R. 440; 26 Digest (Repl.) 626, 2755.

Adjourned Summons by which the plaintiffs, Bacup Corporation, sought to recover against the defendants the sum of £356 12s. 2d. in respect of works executed by them in levelling, paving, etc., Blackwood Road, Bacup.

The plaintiffs, the urban sanitary authority for the borough of Bacup, on July 8, 1886, served upon James Hitchon, the receiver appointed by the court in an action of *Taylor v. Atherton*, of the rents and profits of certain premises fronting, adjoining, or abutting on a certain street, called Blackwood Road in the said borough, a notice under s. 150 of the Public Health Act, 1875, requiring him to level, pave, flag, channel, and make good the street on which the said premises fronted in the manner mentioned in such notice. The notice not having been complied with, the plaintiffs executed the works mentioned therein, and the proportion of the expenses incurred and payable by the owner of the said premises was assessed in manner provided by the said Act at the sum of £356 12s. 2d. Notice of the apportionment was served upon the said James Hitchon on Nov. 28, 1887, and on Dec. 1, 1887, he, through his solicitors, objected to the service of the notices upon him, and repudiated all liability in respect of the works executed by the plaintiffs. By an order dated Dec. 10, 1888, made in the action of *Taylor v. Atherton*, James Hitchon was discharged from being receiver, and James Cunliffe was appointed in his place, and by another order in the said action, dated Dec. 18, 1888, liberty was given to the plaintiffs in the present action, notwithstanding the appointment of a receiver in the action of *Taylor v. Atherton*, to bring any action to enforce any right which they might have under the Public Health Act, 1875, in respect of the works mentioned in the notices. The plaintiffs accordingly brought this action by

- A originating summons against the defendants as trustees of the will of John Turner, the testator in the action of *Taylor v. Atherton*, asking for an order directing an account to be taken of what was due to them for principal and interest, in respect of the apportioned expenses of £356 12s. 2d., and directing that their charge for the same upon the premises, under s. 257 of the Public Health Act, 1875, should be enforced by a sale of the premises, or of a competent part thereof, in default of
- B payment of what should be found due on taking the account. The summons was adjourned into court for the determination of the question, whether there had been a good service of the notice on the "owner" within the definition of that word in s. 4 of the Public Health Act, 1875.

Upjohn for the plaintiffs.

- C *Byrne, Q.C.*, and *Warrington* for the defendants.

CHITTY, J.—This action is brought to enforce a charge, and it is rightly admitted by counsel for the plaintiffs that there is no charge unless there has been a good notice. Whether there is a good notice or not, depends upon s. 4 of the Public Health Act, 1875. Section 4 is what is commonly called a defining section, and it begins, "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them." The term "owner" occurs in the long list of expressions, and the definition is this:

- E " 'Owner' means the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

The notice was served upon a receiver appointed in an action by this court. A receiver is not an agent for any other person, and a receiver is not a trustee. The receiver is appointed by the order of this court, and is responsible to this court, and cannot obey the directions of the parties in the action, and in no sense does he stand in the position of agent to the parties who are interested at the suit of whom, or one of whom, he has been appointed. I am not at liberty to change these two words "agent" or "trustee" and to expand them so as to make them include a person who is not a trustee. To do so would be to usurp the functions of the legislature, and it must be borne in mind that I am construing a definition section. The legislature has used a term "owner" which for convenience it thought fit to use throughout the Act, and then to avoid ambiguity it defines it. I am not at liberty to add to this definition or to expand the definition. The object of the definition is to make the thing clear.

- H Counsel for the plaintiffs in his argument, which is very ingenious, tried this method of reasoning. He said, put the words "whether on his own account, or as agent, or trustee, for any other person" into brackets, then the section will run—" 'Owner' means the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, or who would so receive the same if such lands or premises were let at a rack rent." Then he had to admit that, if that had been the language of the Act of Parliament, it could not have been reasonably contended that the person receiving the rents, merely as collector, would be an owner within the definition, because it is plain from the authorities and the other parts of the Act that whoever is owner within this clause is personally liable, and that would have been a construction which, in my opinion, would not have been put upon the words. Then he ingeniously says that I am to read the words "whether on his own account or as agent or trustee for any other person" as thrown into a bracket, and as put with a view to extend the definition of "owner" to persons who would not otherwise have been included within it. But he wants to take another step, and wants me to expand these words until I have so expanded them that they shall include some other person not within the clause. The method of reasoning is one that I can follow intellectually, but cannot adopt

judicially. The result is that, on the construction of this word "owner," the notice A
is not good.

Very curiously, however, additional force is given to the contention on the part
of the defendant, that the receiver of the court (for I am not speaking of the
receiver of the parties) is not within the words, by the legislation relating to a
cognate subject. In the Nuisances Removal Act, 1855, passed to amend the
Nuisances Removal and Diseases Prevention Acts, 1848 and 1849, there is, in s. 2, B
a definition of the word "owner" which is in the same words as the definition I
have before me in this Act of 1875, with this remarkable difference; the words there
are

"or as trustee or agent for any other person, or as receiver or sequestrator
appointed by the Court of Chancery, or under any order thereof."

That being the definition of the legislature, of course it must have been held for C
the purposes of that Act that the receiver and the sequestrator were owners. But
that is one of the Acts that is repealed by the Act of 1875, and as the legislature
had before it, when it was framing the Act of 1875, the wider definition which would
have included the receiver appointed by the Court of Chancery, or the sequestrator,
it advisedly left the words out.

It is even more remarkable still, for this additional circumstance I am about D
to mention shows that the attention of the legislature was pointedly directed to this
question of definition, because in the Metropolis Management Act, 1855, s. 250,
which stands in the statute-book as the Act immediately preceding the Nuisances
Removal Act, 1855, there is a definition of "owner" which does not include the
receiver or the sequestrator. It is expressed in similar terms to that in the E
Nuisances Removal Act, 1855, with the exception that these words "receiver and
sequestrator appointed by the court" are omitted. The legislature, therefore, had
before it the definitions and its choice of definition. It appears to me it has
advisedly dropped those words, seeing the hardship that would be inflicted on
receivers and sequestrators. It must be remembered that the owner of the in-
heritance is not always present when the receiver in a suit is appointed by the F
court to receive rents. A case of this kind occurs—a tenant for life of the land
mortgages his life estate, and does not pay interest; the mortgagee applies to the
court, and obtains an order for a receiver; the receiver is of course in receipt of the
rents; a few days after the tenant for life dies, but the receiver, according to
the definition of the Nuisances Removal Act, 1855, would be the owner, and he would
be the owner, according to the contention of counsel for the plaintiff, on the Public G
Health Act, 1875. He would be personally liable, and he would have no fund for his
indemnity, because there would be nothing behind the tenant for life in any way.
Possibly, and not improbably, the legislature had some such view as that which I
have been expressing; but however, that may be, it is quite plain that there is a
definition clause, and that I am not at liberty to add to it or to extend it as con-
tended by counsel for the plaintiffs.

That being so, without dealing with some of the arguments which have been H
presented to me, I am of opinion that the notice is bad, and, as has been admitted,
that there is no charge. I perhaps should add that the legislature has provided for
the case of service by s. 267, namely, by posting the notice up on the property
itself.

Solicitors: Woodcock, Ryland & Parker, for Woodcock & Son, Haslingden; I
Torr, Janeways, Gribble & Oddie.

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

A

VADALA v. LAWES

[COURT OF APPEAL (Lindley and Bowen, L.JJ.), April 21, 22, 1890]

[Reported 25 Q.B.D. 310; 63 L.T. 128; 38 W.R. 594]

B *Conflict of Laws—Foreign judgment—Enforcement—Defence—Foreign judgment obtained by fraud—Re-trial of matters in issue before foreign court.*

When an action is brought in England to enforce a foreign judgment, the defendant may plead as a defence that the plaintiff induced the foreign court by fraud to come to a wrong conclusion, even if this involves the English court re-opening the whole case and going into the very facts which were investigated and were in issue in the foreign court.

C *Abouloff v. Oppenheimer* (1) (1882), 10 Q.B.D. 295, applied.

Notes. The principle laid down in this case does not apply to judgments in rem: see 7 HALSBURY'S LAWS (3rd Edn.) 148.

Referred to: *Syal v. Heyward*, [1948] 2 All E.R. 576.

D As to judgments obtained by fraud, see 7 HALSBURY'S LAWS (3rd Edn.) 147–148; and for cases see 11 DIGEST (Repl.) 515–517.

Cases referred to:

(1) *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; 52 L.J.Q.B. 1; 47 L.T. 325; 31 W.R. 57, C.A.; 11 Digest (Repl.) 516, 1308.

E (2) *Bank of Australasia v. Nias* (1851), 16 Q.B.D. 717; 20 L.J.Q.B. 284; 16 L.T.O.S. 483; 15 Jur. 967; 117 E.R. 1055; 11 Digest (Repl.) 503, 1212.

(3) *Ochsenheim v. Papelier* (1873), 8 Ch. App. 695; 42 L.J.Ch. 861; 28 L.T. 459; 37 J.P. 724; 21 W.R. 516, L.C. & L.J.; 11 Digest (Repl.) 516, 1307.

(4) *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 6 Jur. N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, 1372.

F Also referred to in argument:

Flower v. Lloyd (1879), 10 Ch.D. 327; 39 L.T. 613; 27 W.R. 496, C.A.; 36 Digest (Repl.) 994, 3399.

De Medina v. Grove (1846), 10 Q.B. 152; 15 L.J.Q.B. 287; 6 L.T.O.S. 481; 10 Jur. 428; 116 E.R. 59; 12 Digest (Repl.) 630, 4867.

G *Duchess of Kingston's Case* (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. 12th Edn. 754; 21 Digest (Repl.) 225, 225.

Henderson v. Henderson (1844), 6 Q.B. 288; 1 New Pract. Cas. 22; 13 L.J.Q.B. 274; 3 L.T.O.S. 178; 8 Jur. 755; 115 E.R. 111; 11 Digest (Repl.) 515, 1291.

Shedden v. Patrick (1854), 23 L.T.O.S. 194; 1 Macq. 535, H.L.; 21 Digest (Repl.) 307, 680.

H *Prudham v. Phillips* (circa 1747), Amb. 763; 27 E.R. 490; 21 Digest (Repl.) 315, 734.

Crawley v. Isaacs (1867), 16 L.T. 529; 11 Digest (Repl.) 511, 1269.

Philipson v. Egremont (1844), 6 Q.B. 587.

I **Appeal** by the plaintiff from a decision of the Divisional Court (DENMAN and WILLS, JJ.), reported 62 L.T. 701, which set aside a decision in the plaintiff's favour given by CHARLES, J., at the trial of the action and ordered a re-trial.

The plaintiff had brought an action in the Tribunal of Commerce at Messina against the defendant in respect of certain bills of exchange accepted by one Luigi Reynolds as agent of the defendant. Before that court the defendant denied that Reynolds was his agent, and pleaded that the bills were given in respect of certain gambling transactions on the Stock Exchange, and were, therefore, null and void. The plaintiff, however, obtained judgment, but that judgment, on appeal to the Court of Appeal at Messina, was reversed. From that decision the plaintiff appealed to the Supreme Court of Cassation at Palermo, which sent the case to the

Court of Appeal at Palermo to try whether or not the bills had been concocted by Reynolds and the plaintiff to cover gambling transactions. That court restored the decision of the Tribunal of Commerce at Messina. The present action was brought on that judgment by the plaintiff against the defendant. A

The defence pleaded that the alleged judgment was obtained by fraud, of which the following (*inter alia*) were the particulars: Luigi Reynolds had certain gambling transactions with the plaintiff, who sought to recover from him certain sums of money in respect of such transactions; and for the purpose of making out that the defendant was liable to the plaintiff, the plaintiff concocted certain bills of exchange purporting to be accepted by Luigi Reynolds, but which were not, in fact, accepted by him; and commenced proceedings in the courts at Messina upon those bills. That, subsequently, for the purpose of defrauding the said courts, the plaintiff and Reynolds fraudulently prepared other bills of exchange, which Reynolds accepted. Plaintiff then, by some means unknown to the defendant, substituted the bills really accepted by Reynolds for the ones on which his signature had been forged, and which were deposited in court. This was done for the purpose of inducing the court to believe that the bills in respect of which the action was brought were given *bona fide* by the said Reynolds. In his further particulars the defendant stated that "the said bills were given for the purpose of enabling Reynolds to repay to the plaintiff moneys lost by him in speculative and gambling transactions with the plaintiff, and that the plaintiff concealed from the court the facts above mentioned and induced the court to believe that the bills were discounted in the ordinary course of business with the authority of the defendant." In reply plaintiff pleaded that no defence was disclosed, and that the allegations in the defence contained had been raised in the action in the Italian court and were there duly heard and determined against the defendant by the judgment sued on. B C D E

At the trial before CHARLES, J., the cross-examination of the plaintiff as to the transactions being speculative or gambling was objected to. The objection was upheld by the judge on the ground that the Italian courts had determined the point, and having regard to the defence and particulars it was not open to the defendant to attempt to prove the fraud suggested. The defendant thereupon submitted to a verdict and moved for a new trial. The motion came before the Divisional Court (DENMAN and WILLS, JJ.), who granted a new trial, holding that the defence that the Italian courts had been misled by the fraud of the plaintiff was open to the defendant on his pleadings. From this decision the plaintiff appealed. F

Finlay, Q.C., A. T. Lawrence and Leslie for the plaintiff. G

Sir Richard Webster, Q.C., and English Harrison for the defendant, were not called on to argue. H

LINDLEY, L.J.—This is an action brought by the plaintiff upon a judgment obtained in the Italian courts. The Italian action was brought upon certain bills of exchange, and the defence raised in that action was in substance that those bills of exchange which purported to be ordinary commercial bills were given in respect of gambling transactions by an agent of the defendant, without his authority, and that the defendant is not liable upon them. That action was tried on its merits; that is to say, the questions whether those bills were given for gambling transactions, and whether, if they were, the defendant was affected by notice of it, were fully gone into, and decided in favour of the plaintiff. Judgment was accordingly given for the plaintiff for the amount of those bills, and it is upon that judgment that this action is brought. I

The defence raised in the action on that judgment is one of the matters in controversy now. It is alleged on the one side that the only defence raised is, that the judgment of the Italian court was obtained by fraud; that is to say, that there was a shuffling of bills (I will not go through it all in detail) in the Italian courts, a substitution of some genuine ones for some forged ones, and that by that shuffle and fraud the Italian courts were imposed upon. That head of defence is obviously

A open to the defendant, and has been tried by CHARLES, J., and found in favour of the plaintiff; that is to say, the judge has decided that the evidence in support of that defence is insufficient to support it. Then it is alleged by the defendant (and this is what gave rise to the controversy) that he has also raised another ground of defence to this action, viz., that the plaintiff in Italy fraudulently represented these bills as commercial bills when he knew they were not, and he thereby imposed

B on the courts and obtained his judgment.

The first question is whether that defence is really raised. CHARLES, J., thought it was not. He thought the only defence which was really raised was that to which I have already alluded, and which was tried. The Divisional Court, on looking further into the pleadings and looking at the particulars, have come to the conclusion that the defence may be construed, and ought to be construed, as raising that second

C head of defence; and, upon looking at the amended statement of defence, it appears to me that the defence is capable at all events of being fairly construed in the wider sense contended for by the defendant. I do not think it is very clear; but certainly there is no surprise, because, if there is any ambiguity at all in the defence, that ambiguity is removed by the particulars which make it clear enough. I quite accede to the argument for the plaintiff that the particulars are particulars of the defence;

D but if there is some little obscurity in the pleadings, and that obscurity is more than removed by the particulars, I am not disposed to construe the pleadings so narrowly as the plaintiff has asked us to construe them. Therefore, the conclusion I have come to is this: that what I will call the second head of the defence, namely, that the plaintiff imposed upon the Italian courts by fraudulently representing to the courts that these bills were good commercial bills, and not bills for gambling transactions,

E is sufficiently raised to enable the defendant to go into it, if in point of law he is entitled to do so. That gets rid of the question simply on the particulars, which is after all a comparatively small point, because, if he is entitled to raise this defence and he had asked it, the Divisional Court would have given leave to amend, and probably so should we if we had been asked.

But we now come to another and a more difficult question, and that is, whether

F this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter; using general language, that is a general proposition unconditional and undisputed.

G Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment you cannot go into the merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail?

That point appears to me to have been one of very great difficulty before *Abouloff v. Oppenheimer* (1). At the time when that case was decided, namely, in 1882, there was a long line of authorities, including *Bank of Australasia v. Nias* (2), *Ochsenheim v. Papelier* (3), and *Cammell v. Sewell* (4), all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff v. Oppenheimer* (1) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud

I to prove it without reopening the merits had never come forward for explicit decision. That exact point was raised in *Abouloff v. Oppenheimer* (1), and it was decided. I cannot possibly fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that, if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can re-open the whole case, even although you will have in this court to go into the very facts which were investigated and which were in issue in the foreign court. The technical question that the issue is the same is technically answered by the technical reply that the issue is not the same, because

in this court you have to consider whether the foreign court has been imposed upon. That to my mind is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false was the very question of fact that had been adjudicated on in the foreign court; and notwithstanding that was so, when the court came to consider how the two rules to which I have alluded could be worked together, they said: "Well, if that foreign judgment was obtained fraudulently, and if it is necessary in order to prove that fraud to re-try the merits, you are entitled to do so according to the law of this country." I cannot read this case in any other way.

LORD COLERIDGE uses language which I do not think is capable of being misunderstood. In order to understand the judgment, it is well to look at the argument for the defence—an argument conducted by Mr. Benjamin and Mr. Cohen, and an argument which I understand to have been accepted by the court: "Even if the Russian courts had inquired into the existence of the fraud, and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court." Then LORD COLERIDGE says in his judgment (10 Q.B.D. at p. 302):

"An ingenious attempt has been made to take this case out of the general proposition [namely, that you can impugn a foreign judgment for fraud] and to call in aid another equally clear proposition, namely, that the courts of this country, in dealing with a foreign judgment, will not inquire whether the foreign court pronounced a judgment correct in point of law, or right and accurate in point of fact, and that inasmuch as the defence now relied upon might have been, and perhaps was, brought before the foreign court which decided against the allegation of fraud, the foreign court, in the words of DE GREY, C.J., was mistaken, and not misled. The answer to that contention has been given in the course of the argument for the defendants. We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either re-trying, or even re-discussing any question which was, or could have been, submitted to the determination of the Russian courts."

Counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying, that you cannot re-try the merits. To a technical objection it is a good technical answer to say: "The substance is the same that you do re-try the merits (as I understand the judgment) for the purpose of satisfying an English jury that the foreign court has been imposed upon; and if you cannot prove that the imposition was made without retrying the merits, you are at liberty to re-try them." I understand the decision to go that length. BAGGALLAY, L.J., expresses the same opinion. He says (*ibid.* at p. 303):

"If the judgments had not been improperly obtained, the right of the plaintiff would be clear. In using the words 'improperly obtained' I desire to be understood as not limiting them to a case where a fraud has been perpetrated upon the foreign court itself. I apply them also to a case where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based."

That is to say, not only where there has been a fraud on the court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but

A where the plaintiff has obtained judgment by the use of perjured evidence, that is such a fraud as would enable the defendant to impeach the foreign judgment.

The present Master of the Rolls [LORD ESHER] then BRETT, L.J., said (*ibid* at p. 306):

B "It is a very small matter to be considered whether these facts ought to have been alleged in the defence by the defendants, or whether they ought to have been asserted in the reply by the plaintiffs, and the question has been fully argued before us whether, if the plaintiffs' fraud were asserted by the defendants at the trial in the Russian courts, and if evidence in proof of it were given by them, they are now debarred from relying on the plaintiffs' fraud as a defence to the present action. I will assume that in the suit in the Russian courts the plaintiffs' fraud was alleged by the defendants and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence that they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true and that the fraud was committed, the defendants will be entitled to succeed in the present action."

Then at the end of his judgment he says (*ibid.* at p. 308):

E "I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign court."

F That last passage can only be applicable to cases where there is what is called extraneous fraud such as imposition on the court itself; but when I come to look at the defendant's argument and the whole judgment, I cannot conceal from myself that the point has been decided in the way I have already mentioned.

G Therefore, it is competent in point of law for the defendant in this action to raise this defence; and to satisfy the jury, if he can, that the Italian court was misled by the fraud of the plaintiff, that fraud consisting in this, that the plaintiff knowingly placed before the Italian court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact, not only that the bills were for gambling transactions, but further that the Italian court has been imposed on by the fraud, that is a good defence according to *Abouloff v. Oppenheimer* (1). It appears to me, therefore, impossible, in the face of that case, to differ from the view taken by the Divisional Court, and, therefore, this appeal must be dismissed.

H **BOWEN, L.J.**—I am of the same opinion.

Appeal dismissed.

Solicitors: *Harries, Wilkinson & Raikes; Markby, Stewart & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

LAWRANCE v. LORD NORREYS AND OTHERS

[HOUSE OF LORDS (Lord Herschell, Lord Watson and Lord Macnaghten), December 12, 13, 1889, April 22, 1890]

[Reported 15 App. Cas. 210; 59 L.J.Ch. 681; 62 L.T. 706;
54 J.P. 708; 38 W.R. 753; 6 T.L.R. 285]

Limitation of Action—Recovery of land—Concealed fraud—Proof—Necessary evidence—Charge brought after long period—Onus of proof.

By the Real Property Limitation Act, 1833, s. 26: "In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed."

Held: a plaintiff who desired to avail himself of the provisions of s. 26 and allege a concealed fraud was not released from the ordinary rule of pleading, applicable to cases of fraud, namely, that general allegations, however strong might be the words in which they were stated, were insufficient to amount to an averment of fraud of which any court ought to take notice. It was not a sufficient compliance with the rule to state facts and circumstances which merely implied that the defendant, or someone for whose action he was responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributed to it; and if that connection was not sufficiently apparent from the particulars stated, it could not be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim were capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect. When a plaintiff, to escape from the provisions of the Act of 1833, brought charges of concealed fraud, for the first time, after a period like seventy years the duty of making a full and candid statement was specially incumbent on him, and unless the nature of the frauds alleged was in itself calculated to suggest the improbability of their being discovered by ordinary research, it was equally his duty to state the considerations to which he ascribed his ignorance of their existence. The amount and kind of explanatory statement required in order to impart relevancy to such charges necessarily varied according to circumstances.

Per LORD WATSON: It is not any and every fraud which will elide the provisions of the statute and keep alive a right of action for recovery of the lands. To constitute a fraud which will have that effect, in the first place, it must be a fraud which has deprived the plaintiff of his land, and, in the second place, it must be a concealed fraud in the sense that it was not only unknown to the plaintiff and those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit. The onus is, therefore, on the plaintiff to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them by the exercise of reasonable diligence.

A *Pleading—Striking out—Statement of claim—Action abuse of process—Inherent jurisdiction of court—Exercise only in very exceptional cases.*

Per LORD HERSCHELL: The court has an inherent jurisdiction to dismiss an action which is an abuse of its process, but that jurisdiction ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

B **Notes.** The Real Property Limitation Act, 1833, s. 26, was repealed by the Limitation Act, 1939, and the corresponding provisions are contained in s. 26 of this latter Act. For particulars of frauds, see R.S.C., Ord. 19, r. 6 (1).

C As to particulars of fraud, see 30 HALSBURY'S LAWS (3rd Edn.) 17–18; as to the inherent jurisdiction of the court to stay or dismiss proceedings, see *ibid.* 407; and for cases see DIGEST (Practice) 85–92, 977–979. For the Limitation Act, 1939, s. 26, see 13 HALSBURY'S STATUTES (2nd Edn.) 1188.

Case referred to:

(1) *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, 686; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, H.L.; Digest (Practice) 292, 251.

D **Appeal** by the plaintiff from a decision of the Court of Appeal (COTTON, BOWEN and FRY, L.JJ.), reported 39 Ch.D. 213, reversing a decision of STIRLING, J., and ordering that the action be struck out.

In June, 1886, the appellant commenced an action of ejectment in the Queen's Bench Division, in which he sought to obtain possession of extensive estates in

E Lancashire known as the Towneley estates, which had been in the possession of the respondents and their predecessors in title for many generations. In his statement of claim he set out a pedigree showing his title to the property by descent from one Jonathan Lawrance the younger, who died in 1816. On the application of the respondents, that statement of claim was struck out by the judge in chambers on the ground that the claim was barred by the Real Property Limitation Act,

F 1833, and that, therefore, no reasonable cause of action was shown. From that decision the appellant appealed to the Divisional Court, and at the same time, with the view of taking the case out of the operation of the Real Property Limitation Act, 1833, he asked for leave to amend his statement of claim by adding certain allegations of fraud against one John Towneley, who in or about the year 1816, as the appellant alleged, wrongfully took possession of the estates,

G thereby defrauding one Lebius Lawrance, the son of Jonathan Lawrance the younger, through whom the appellant claimed, who was then residing in the United States in ignorance of his right to succeed to the property. The Divisional Court (LORD COLERIDGE, C.J., and DAY, J.), refused to allow the amendment, and dismissed the action with costs as frivolous and vexatious. The appellant commenced a fresh action in the Chancery Division, and filed a statement of claim which,

H although it contained further allegations of fact and somewhat elaborated the charges of fraud, yet was substantially the same as the amended claim proposed to be used in the first action. The respondents moved to have the appellant's statement of claim in the second action struck out, and to have the new action dismissed as frivolous and vexatious. STIRLING, J., allowed an affidavit to be filed by the appellant, sworn by Colonel Jaques; thought that enough was alleged by the appellant, and that the court was not bound to go into the question whether it was probable that he would succeed at the trial; and, therefore, dismissed the respondents' motion for the dismissal of the action. His decision was reversed by the Court of Appeal and the plaintiff appealed to the House.

Warmington, Q.C., and *Upjohn* for the appellant.

Rigby, Q.C., *Jeune, Q.C.*, and *Trevelyan* for the respondents.

Their Lordships took time for consideration.

April 22, 1890. The following opinions were read.

LORD HERSCHELL.—This is in some respects an extraordinary case. The present appellant, who is the plaintiff, commenced an action in the Queen's Bench Division, in June, 1886, against the same defendants, claiming to recover possession of the Towneley estates in the county of Lancaster. By his statement of claim he alleged title alternatively as the heir-at-law of Richard Towneley, who died in 1706, and as the heir-at-law of Jonathan Lawrance the younger, who died, seised of the premises claimed, in 1816. A summons was taken out to dismiss the action on the ground that no reasonable cause of action was disclosed, and that it was frivolous and vexatious. This summons was referred by the judge at chambers to the Divisional Court, and while the matter was pending there the appellant took out a summons for leave to amend, which was also referred to the Divisional Court, to be heard with the other summons. The proposed amendments were framed with the view of showing such a concealed fraud as would prevent the lapse of time operating, by virtue of the statute of limitations, as a bar to the action. In the result, the court made an order dismissing the action. This was admitted to be inevitable, unless the proposed amendments were allowed; and the court considered that under the circumstances before them leave to amend ought not to be granted.

The present action was then brought in the Chancery Division against the same parties, upon the same title, and to recover the same estate, the allegations designed to avoid the operation of the Real Property Limitation Act, 1833, comprising those embodied in the proposed amendments. Where an action is thus brought on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinised.

I will first call attention to what a plaintiff must prove, in order to oust the ordinary operation of the statute. The Real Property Limitation Act, 1833, s. 26, says:

"... in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered..."

It is not enough, therefore, to prove a concealed fraud. The person bringing the suit must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

I proceed to consider the allegations made in the statement of claim. It is noteworthy at the outset, that testamentary disposition has been apparently unknown in the family, for every person named in the pedigree is alleged to have died intestate. The connecting link between the families of Towneley and Lawrance is said to have been Mary, the daughter of Richard Towneley, who married one John Lawrance and died in America in 1742. She became heiress of Richard Towneley on the failure of the issue of his son Charles. When this event occurred is not stated, but it appears to have taken place many years before 1816, for it is alleged that Jonathan Lawrance the younger was "for many years, and until shortly before his death, out of possession of the premises." He came from America, where he resided, to establish his title to the property, but at what date is not stated. He employed solicitors in England, and brought an action or actions, in what court does not appear. He made a compromise with one John Towneley, whose position in regard to the property is not disclosed. "Partly by means of such actions, and partly under or by virtue of the deed of compromise," Jonathan

A Lawrance recovered possession of the Towneley estates. He died in 1816, seised in fee and in possession of those estates. He left behind him as his heir-at-law his son Lebius Lawrance, who was then grown up, and had a son born to him two years afterwards. But until 1886 Lebius Lawrance and the persons claiming under him remained ignorant of their title to the property. That is the story told in the statement of claim.

B The story of the fraud, which is said to be a concealed fraud within the meaning of the Real Property Limitation Act, 1833, and to have deprived Lebius Lawrance and those claiming under him of the property in question, is equally singular. It is this. On the death of Jonathan Lawrance his solicitors in England, who had in their possession the evidences of his title and the deed of compromise, were about to communicate to Lebius Lawrance, whose address in America they knew, C the facts that his father had recovered the estates and died intestate seised of them. But John Towneley, the party to the deed of compromise, having wrongfully taken possession of the Towneley estates, intervened and fraudulently induced them not to make the communication. He further fraudulently, and with intent to deprive Lebius Lawrance of the property, induced the solicitors to deliver to him the evidences of Jonathan Lawrance's title to the property, including D the deed of compromise, and having thus obtained possession of them, he fraudulently, and with the intent aforesaid, destroyed those documents. It is also alleged that John Towneley fraudulently, and with the same intent, procured to be taken up and destroyed the tombstone erected over the grave, at Walpole, in the State of Massachusetts, of Mary Towneley, afterwards Mary Lawrance, and her husband, "on which certain material particulars establishing the identity of the E said Mary Towneley, and certain material particulars of her family, were inscribed," Lebius and his son being ignorant of the facts inscribed on the tombstone.

Assuming that it could be proved that the solicitor abstained, at the instance of John Towneley, from communicating to Lebius Lawrance the facts with which they would otherwise have made him acquainted, how would this show that the non-communication of these facts by the solicitors deprived Lebius Lawrance or his F successors in title of the estate? It does not appear to me to be a natural or necessary consequence. He knew that he was the heir-at-law of his father, and I take it that he knew also that his father had gone from America to England for the purpose of establishing his title to the estate. I say this because, where the state of ignorance of Lebius Lawrance at the time of his father's death is as to certain facts elaborately averred, he is not alleged to have been ignorant of this. G An heir-at-law of one who, as far as appeared to him, had died intestate (for if he knew nothing of any will he would naturally assume this) would ordinarily be led to make inquiries for the purpose of ascertaining what property his ancestor had died possessed of, and the more so if he knew that the person to whom he was heir laid claim to an estate, and had shortly before his death gone to England to establish his title to it. The fraud, if committed, shut up one avenue H only by which Lebius Lawrance could have ascertained his rights; it left all others open. And I am not prepared to say that, if it were proved beyond doubt, it would make good the essential element in the chain of proof, viz., that the plaintiff had thereby been deprived of the estate. What is there to show that, in spite of the fraud, Lebius or his successor might not with diligence have ascertained their rights? No circumstances are stated here to show how in the present case the I fraud had an effect which, as I have said, does not appear to me to be a natural or necessary consequence of it. This was the view taken by STIRLING, J.; and I think the same observation applies to the suggested destruction of the tombstone. What is there to show that Lebius Lawrance or his successors knew of the existence of the tombstone or would have done so but for its destruction, or that with due diligence they could not otherwise have ascertained the facts which they would have derived from an inspection of it? STIRLING, J., however, thought the allegation that John Towneley had fraudulently obtained possession of the deed of compromise and other evidences of title and destroyed them would, if established,

be sufficient to sustain a charge of concealed fraud within the meaning of the statute. The Court of Appeal expressed no opinion upon this point. I propose to take the same course. But I must observe that it is not stated how or when the fraud was discovered. For aught that appears, so far as the facts are stated, the rights of the appellant's predecessors might have been ascertained, and the means of establishing them obtained half a century ago.

The statement of claim being of the character I have described, I think it becomes important to consider the history of the litigation by which the appellant has sought to assert his alleged right, and to ascertain the origin of the allegations which it contains. STIRLING, J., was disposed at first to treat these allegations as mere fiction, but he ultimately allowed the plaintiff to adduce evidence to show that they were not so. The court had, therefore, before it all the explanation which the plaintiff or his advisers have to offer of the development which the charges of fraud undoubtedly exhibit since they first took shape, and all the facts which can be suggested to show that the claim is a genuine one. The suggestion of a concealed fraud appears for the first time in a crude form in the amended statement of claim submitted to the Queen's Bench Division. The alleged reason why the original statement of claim was silent on the subject was, in substance, this: that Colonel Jaques, the agent of the plaintiff, late in the American army, who had been called to the Bar in America, would neither take the law from his own counsel nor trust his own solicitors with the facts, lest perchance they should fall into the hands of the enemy. He had read a reported case which led him to differ from the counsel who was advising him, and he had reason to believe, he says, that some other solicitors whom he had previously instructed "to follow up the clues" which he gave them in reference to the claim had betrayed his confidence.

A comparison of the statement of claim in this action with the proposed amendment in the Queen's Bench Division shows a distinct growth in the charges of fraud. Neither the tombstone, nor Jonathan Lawrance's litigation, nor the deed of compromise, has any place in the amended statement of claim submitted to the Queen's Bench Division. There was, however, an allusion in the course of the argument to a tombstone, and the appellant's solicitor is careful to explain that the story of the tombstone was, in substance, to be found in the instructions laid before counsel to settle the amendments, but he is unable to say why it was omitted from the proposed amendments. I can only draw the inference, either that it was not then thought of sufficient importance to be put forward, or that it was known to be incapable of proof. The story of the litigation and of the deed of compromise seems to be of later origin, and to owe its existence to the discussion in the Queen's Bench Division. The only allegation in the statement of claim then prepared was, that John Towneley obtained from the solicitors and destroyed "the evidence of title to the said premises." The counsel who was resisting the application to amend, argued upon this that the best thing that could happen to the heir-at-law would be to destroy the deeds. What was the answer given by the counsel for the plaintiff? He said that the case had been argued as if the documents which constituted evidence of title must have been deeds, but when the heir-at-law claims through a pedigree, as Lawrance did, the best evidence of title are the certificates of births, deaths, and marriages. Not a word about actions ending in a deed of compromise by which the ancestor obtained possession of the estate. And yet the destruction of this deed is one of the most, indeed perhaps the most, material allegation in the present statement of claim.

The main point to which the learned judges in the Queen's Bench Division directed the attention of the appellant's counsel was the apparent impossibility of bringing forward any proof of such a fraud as that alleged to have been committed so far back as the year 1816. As to this the learned counsel stated that reliance would be placed on one Richardson, who was said to have been a clerk in the office of the solicitors who acted for Jonathan Lawrance. Richardson was said to be in America, and it was admitted that he must at that time have been

A probably upwards of ninety years of age. Extracts were read from two letters of his, written more than thirty years ago, to certain persons whose connection with the present case did not appear, referring apparently to some claim to the personal property of a Lawrance, and offering his assistance for a £5 note. But these letters contained no allusion of any kind to any fraud. Then it was said that Richardson had made some verbal communications to somebody in court "in connection with the fraud." And beyond that counsel could not go.

B On the materials before them the Queen's Bench Division thought the story unworthy of serious attention. STIRLING, J., as I have said, though at first disposed to treat the allegations in the statement of claim as fiction, gave the plaintiff an opportunity of filing affidavits. The affidavit of Colonel Jaques was accordingly filed. I agree with the Court of Appeal that it is impossible to conceive anything C more shadowy or unsatisfactory than that gentleman's affidavit. It does not show how or when the alleged fraud came to be discovered. It does not show, as might easily have been done if the allegations were true, when and in what court the alleged action or actions were brought. It proffers no explanation of the strange circumstance that Lebius Lawrance never inquired or never learned what his father, whose heir he was, died possessed of. There is no reference in it to Richardson, nor is there any suggestion that any means of proving the appellant's allegations can be found in any other quarter.

It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings E was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, F this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated G by the affidavits filed on behalf of the appellant; but they have not been so. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation.

H For these reasons I concur with the Court of Appeal in thinking that the action is an abuse of the process of the court. I accordingly move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

I LORD WATSON.—This is a case of a very unusual character. Your Lordships are of opinion that its circumstances are such as to justify the exceptional treatment with which it met in the Court of Appeal. I shall endeavour, without entering into minute details, to indicate the reasons which have led me to the same conclusion.

At the time when this suit was brought on the Chancery side of the High Court, more than seventy years had elapsed from the date at which the title alleged by the appellant accrued; and, during the whole of that period, the respondents and their predecessors remained in the undisturbed possession of the lands which he is now, for the second time, and upon substantially the same grounds, attempting to recover from them. It is sufficiently obvious, on the face of the previous

common law action, as well as of the present proceedings, that the appellant's claim is barred by the Real Property Limitation Act, 1833, unless he can show, in terms of s. 26, that he has hitherto been fraudulently deprived of his estate and of the means of recovering it.

Section 26 of the Act reserves no remedy against purchasers for value; but the respondents do not stand in that position, and it is conceded that they are affected by the acts of their ancestor, John Towneley, to whom the frauds alleged in his pleadings are imputed by the appellant. But it is not any and every fraud which will elide the provisions of the statute, and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect these statutory requirements must be fulfilled. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place, it must be a concealed fraud in this sense, that it was not only unknown to the plaintiff and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit. The onus is, therefore, upon the appellant to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them, by the exercise of reasonable diligence, during the fifty-nine years which followed the death of his great-grandfather, Jonathan Lawrance, in 1816.

In my opinion, a plaintiff, who desires to avail himself of the provisions of s. 26, is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by LORD SELBORNE, L.C., in *Wallingford v. Mutual Society* (1) (5 App. Cas. at p. 697):

"General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice."

It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.

When a plaintiff, in order to escape from the Real Property Limitation Act, 1833, brings charges of concealed fraud, for the first time, at a distance of seventy years, it appears to me that the duty of making a full and candid statement is specially incumbent upon him. And unless the nature of the frauds alleged is in itself calculated to suggest the improbability of their being discovered by ordinary research, it is equally his duty to state the considerations to which he ascribes his ignorance of their existence. The amount and kind of explanatory statement required in order to impart relevancy to such charges will necessarily vary according to circumstances.

I have rarely seen a case in which fulness and candour of statement, were more imperatively required than in the present; and I have met with no other case in which both were so studiously withheld. The appellant argued, as might have been expected, that he could not make a fuller statement without detailing his evidence. That is the usual excuse put forward when an attempt is made to launch a tentative charge of fraud in vague and general terms; and it rests on no better foundation than the fallacious assumption that a statement of facts and circumstances admitting of proof is the same thing with a statement of the evidence required to substantiate them. I purposely avoid particular criticism of the defects of averment which I find in the appellant's statement of claim. One observation

A I think it right to make, and it is that his averments, so far from excluding, seem to me to point directly to the inference, that the alleged frauds (if they ever were committed) could, with due diligence, have been easily discovered at any time after the news of Jonathan Lawrance's death became known to his relatives in America. Stripped of its general assertions, which are of no relevancy, the statement of claim presents to my mind a tissue of improbabilities which ought

B not to be sent to proof.

Such being the opinion which I entertain with respect to the character of the appellant's allegations, I concur with the Court of Appeal in thinking that the present action is, in the strictest sense of the words, vexatious and oppressive. With a view to that result, it is legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the

C claim, from first to last, which is a very singular and suggestive one. These considerations satisfy me that the order appealed from ought to be sustained, not in pursuance of any order or rule, but in virtue of the inherent jurisdiction of the court to prevent abuse of its procedure.

LORD MACNAGHTEN.—I concur.

D Solicitors: *H. Thomas; Ward, Mills, Witham & Lambert.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

E

Re HESTER. Ex Parte HESTER

F [COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), March 1, 1889]
[*Reported* 22 Q.B.D. 632; 60 L.T. 943; 5 T.L.R. 326; 6 Morr. 85]

Bankruptcy—Receiving order—Rescission—Composition with creditors—Consideration of proposal by court—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 18.

G Where an application is made to rescind a receiving order on the ground that the creditors have accepted a composition or scheme and have assented to the receiving order being rescinded, the court will not be bound by the consent of all the creditors, but will consider whether the proposal is for the benefit of the creditors as a whole, and whether it is detrimental to morality and to the interests of the public, and likely to prove a source of imminent danger to future creditors. The fact that the debtor had not availed himself of the machinery of s. 18 of the Bankruptcy Act, 1883, [now Bankruptcy Act, 1914, s. 16] regarding compositions and schemes of arrangement, **held** to be a strong circumstance inducing the court to refuse to rescind the receiving order.

H

Notes. The Bankruptcy Act, 1883, s. 18, has been replaced by s. 16 of the Bankruptcy Act, 1914, and s. 35 of the Act of 1883 was replaced by s. 29 (1) of the Act of 1914. As to power to rescind a receiving order in certain cases, see

I ss. 12 and 108 of the Act of 1914.

Followed: *Re Flatau, Ex parte Official Receiver*, [1893] 2 Q.B. 219. Considered: *Re Izod, Ex parte Official Receiver*, [1895–9] All E.R.Rep. 1259. Applied: *Re Telescriptor Syndicate*, [1903] 2 Ch. 174. Referred to: *Re Burnett, Ex parte Official Receiver* (1894), 1 Mans. 89; *Re A Debtor, Ex parte Official Receiver* (1901), 84 L.T. 666.

As to appeals from and applications to rescind or set aside receiving orders, see 2 HALSBURY'S LAWS (3rd Edn.) 339, 355; and for cases see 5 DIGEST (Repl.) 179–

180, 182. For the Bankruptcy Act, 1914, ss. 12, 16, 29 (1) and 108, see 2 HALSBURY'S STATUTES (2nd Edn.) 338, 341, 362, 418.

Cases referred to:

- (1) *Ex parte Carr* (1886), 35 W.R. 150; 3 T.L.R. 120, C.A.; 4 Digest (Repl.) 180, 1639.
- (2) *Re Dixon and Cardus, Ex parte Dixon and Cardus* (1888), 37 W.R. 161; 5 Morr. 291, C.A.; 4 Digest (Repl.) 182, 1663.

Also referred to in argument:

- Re Wemyss, Ex parte Wemyss* (1884), 13 Q.B.D. 244; 53 L.J.Q.B. 496; 32 W.R. 1002; 1 Morr. 157, D.C.; 4 Digest (Repl.) 180, 1634.
- Re Leslie, Ex parte Leslie* (1887), 18 Q.B.D. 619; 56 L.T. 569; 35 W.R. 395; 4 Morr. 75, D.C.; 4 Digest (Repl.) 180, 1641.
- Re Gyll, Ex parte Board of Trade* (1888), 58 L.J.Q.B. 8; 59 L.T. 778; 37 W.R. 164; 5 Morr. 272, D.C.; 4 Digest (Repl.) 204, 1830.

Appeal by the debtor from a decision of the Queen's Bench Division (CAVE and CHARLES, JJ.), affirming a decision of the registrar of Hertfordshire county court refusing to rescind a receiving order made against the debtor.

On Nov. 6, 1888, a receiving order was made against the debtor on the petition of one Dyer, a judgment creditor for £144 5s. On Nov. 30 application was made to the registrar of St. Albans County Court to rescind the receiving order, with the petitioning creditors assenting, but he refused the application until notice had been served on the official receiver. On Dec. 3 the official receiver attended and opposed the application, and the registrar refused to rescind the receiving order. The debtor appealed against the refusal to rescind the receiving order, and at the hearing produced a consent to its rescission, signed by all the creditors, except five, two of whom were alleged to be amply secured, and the other three to have debts for a very small amount. There was no evidence that the debts had been paid.

Winslow, Q.C., and *F. C. Willis* for the debtor.

Sir Edward Clarke, Q.C., and *Muir Mackenzie*, for the official receiver, were not called on to argue.

LORD ESHER, M.R.—It seems to me that there is hardly any colour at all for this appeal. As to *Ex parte Carr* (1), I can see nothing obscure in what is said in the judgments. What was laid down in that case was this: that it is a matter of discretion whether the receiving order shall be set aside or not, and that, where the registrar has exercised his discretion, this court will pause long before it interferes with that discretion. It does not seem to me to be obscure. I think that *Ex parte Carr* (1) went further, and said that in exercising the discretion the court must have in each case all the facts before it, and then this court will consider the facts in each case and say whether the discretion was or was not wrongly exercised. That seems to me to be right.

Re Dixon and Cardus (2), which seems to me to say that where there is a receiving order and there has not been payment in full, there being no suggestion that the receiving order was wrongly made at the beginning, any proposal less than a payment in full must be a scheme of arrangement; and if that arrangement is not in substance the same as an arrangement which would satisfy s. 18 of the Bankruptcy Act, 1883, looking at the fact that it is possible for the debtor to propose a scheme with all the formalities of s. 18, it is a very strong matter to be considered against the proposal that the debtor has not proceeded under s. 18. It is a strong matter to consider that, instead of proceeding under s. 18, the debtor proposes to the court to annul the receiving order, and so take the hands of the court off. But that case did not decide that, if the proposed scheme of arrangement is equivalent to a scheme under s. 18, and the court can see its way to be perfectly safe, the proposed scheme should be at once declined, merely because the formalities of s. 18 had not been fulfilled. I do not think it is necessary to decide that point now.

- A In the present case the debtor has got the consent of all his creditors but three. He has not, however, got that consent in the way pointed out by s. 18—namely, by a meeting of his creditors, and after full discussion. He does not propose to proceed with this scheme of arrangement under s. 18. *Prima facie*, that is a strong circumstance against him. Great stress has been laid on the fact that he has got the consent of all his creditors. We must see what that consent amounts to.
- B It is not pretended that he has got their consent upon payment in full, although they have all of them signed receipts in full. If creditors, without getting paid in full, sign receipts in full, it requires to my mind very considerable explanation as to how they came to do such an unbusinesslike thing, and it seems to me that that alone is a badge of folly. The cases are clear to show that the court will not be bound by the consent of all the creditors. The court will, although the consent of all the creditors has been obtained, consider whether what they have consented to is for the benefit of the body of creditors as a whole. The court has gone further, and said that under this Bankruptcy Act it will not only consider whether what is proposed is in favour of the creditors, but it will also consider whether what is proposed is a safe course to sanction, and is not detrimental to morality and to the public at large. The court will consider the position of the debtor, and see whether there are not future creditors who must come into existence immediately, and whether what is proposed will not put them into imminent danger. Those are considerations which this court has laid down for its guidance, and we adopt them and apply them to this case.
- C
- D

- E That being so, I am not satisfied that what is proposed here is for the benefit of the existing creditors. Nor am I satisfied that this proposal could be anything but an imminent and immediate danger to future creditors who must come into existence immediately after the annulment of the receiving order. Indeed, I am strongly of opinion that this proposal would place those future creditors in imminent danger. Therefore, I not only am not prepared to disagree with the discretion exercised by the court below, but I think that the discretion was exercised rightly, and I think that all the reasons given by CAVE, J., are good reasons, with which I absolutely agree. Under those circumstances the appeal must be dismissed.
- F

- BOWEN, L.J.**—I am entirely of the same opinion. With regard to *Ex parte Carr* (1), it is sufficient to say, in the first place, that it does not raise the point that is raised before us, but a different point. I wish to add that I see nothing in *Ex parte Carr* (1), or in the language used by the court, read by the light of the subsequent matter, in the least inconsistent with what has been said by the Master of the Rolls. The point which was raised in *Ex parte Carr* (1) is not the point raised today. *Re Dixon and Cardus* (2), decided by the Court of Appeal, raises precisely the same point, and it seems to me that the decision and the language in that case are absolutely right, if I may venture to say so with respect to a decision of the Court of Appeal by which we are bound. That case seems to me to decide, in the first place, that where there has not been a payment in full, and where there are no other objections to the receiving order, it is not enough for the debtor to collect the assents of his creditors, and to come to the court and ask it to rescind the receiving order. He ought, if he wishes the court to interfere in a matter which is one of discretion, to bring before the court some clear ground for thinking that what is proposed is a bona fide proposal which it will be in the interests of the creditors to sanction. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said, that the proposal ought also to be one which is not detrimental to the public. I believe that is part and parcel of what the court has to consider in these applications under this Act. A proposal of that kind must take the shape, as it is a business matter, of some scheme or plan.
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In *Re Dixon and Cardus* (2) the court stopped short of saying that it was necessary that the proposed scheme should be accompanied with, or based upon, all the formalities of s. 18; they left it an undecided question. It was not necessary to

decide it, nor is it necessary to decide it now. I express no opinion upon it. But the court said that, even if it was not so, the existence of s. 18 was a matter which the court could not disregard. There was in existence a section of the Bankruptcy Act which provided the machinery for dealing with arrangements between debtors and creditors, and if the debtor had abstained from taking the benefit of the machinery provided by that section, the court would watch narrowly to see what he was doing, and whether there was any just reason for his abstaining from taking the benefit of such machinery. Unless the court were satisfied that the plan which he was bringing forward, and which was not exactly based upon the formalities of s. 18, was in substance one that was certain to result in success, it would not interfere with the discretion of the court below refusing to accept such a scheme. That is what *Re Dixon and Cardus* (2) decides. This case seems to me to be one in which the facts demand imperatively, in the interests of the creditors and the public, that it should be applied.

FRY, L.J.—I am entirely of the same opinion. It appears to me that this appeal was presented under the idle notion that the court is bound by the assents of the creditors obtained, not by a meeting of the creditors, not after a full and open discussion of the rights and interests of the parties and the position of things, but by a debtor going round to his various creditors and obtaining their assents to the setting aside of the receiving order—upon what representation and in what manner those assents were obtained we do not know. It is an idle notion that the court is bound by the assents of the creditors. The court has far larger and more important duties to perform than merely to see whether the creditors have assented to the rescinding of the receiving order. We are bound in the exercise of our jurisdiction in the matter, and I think I might almost say in all matters under the Act, to take a wider view. We are bound to regard not only the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country. I conceive that one of the objects of the statute was, if not to put an end to, at least to discourage private arrangements between the debtor and his creditors. Anyone who knows the history of the law of debtor and creditor in this country, knows that private arrangements between debtor and creditor have often been scandalous; that they give opportunities for misrepresentation, for private bargains and for undue preferences; and I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act. In *Re Dixon and Cardus* (2) I agreed with the Master of the Rolls that we would not decide that under no circumstances could a proposal or arrangement have effect given to it unless it proceeded under s. 18 of the Act. Nor will I now say that no proposal or arrangement can have effect given to it except under the provisions of that section. But I repeat what I then said, that I should hesitate long before I gave effect to such a proposal, and that for the two obvious reasons—on the one hand, that the legislature has provided a general scheme for proceeding in bankruptcy—has indicated the securities which are required and the discretion which is to be exercised before any composition or arrangement is to be binding, and, on the other hand, the notorious evils which attach to private arrangements between debtor and creditor, and which I for one should do my best to prevent creeping into the administration of this Act. I think, therefore, that the decision of the court below was perfectly right, and was put on the right grounds, and that this appeal must fail.

Appeal dismissed.

Solicitors: *Nicholls & Co.*, for *Nicholls & Brown*, Luton; Solicitor, Board of Trade.

(Reported by *WALTER B. YATES, Esq.*, Barrister-at-Law.)

A

Re CONNAN. Ex Parte HYDE

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), March 2, 22, 1888]

[Reported 20 Q.B.D. 690; 57 L.J.Q.B. 472; 59 L.T. 281;
4 T.L.R. 423; 5 Morr. 89]

B

Bankruptcy—"Final judgment"—*Debt attached by garnishee order—Stay of execution on judgment—Bankruptcy Act, 1883* (46 & 47 Vict., c. 52), s. 4 (1) (g).

C

By the Bankruptcy Act, 1883, s. 4 (1) [see now Bankruptcy Act, 1914, s. 1 (1) (g)]: "A debtor commits an act of bankruptcy in each of the following cases . . . (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt . . . and he does not . . . either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt. . ."

D

Where a judgment creditor has obtained a final judgment against the debtor and the debt has been attached by a garnishee order absolute, the garnishee order operates as a stay of execution upon the judgment until it is discharged by an order of the court, even though the creditor has in fact paid the debt to the garnishor. The creditor cannot, therefore, serve a bankruptcy notice in respect of the judgment debt as he has not obtained a final judgment against the debtor upon which execution has not been stayed within the meaning of s. 4 (1) (g) of the Bankruptcy Act, 1883.

E

Notes. Section 4 (1) (g) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 1 (1) (g) of the Bankruptcy Act, 1914.

Distinguished: *Re Dennis, Ex parte Dennis* (1888), 60 L.T. 348.

F

As to non-compliance with a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 272 et seq.; and for cases see 4 DIGEST (Repl.) 90 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Case referred to in argument:

Re Ide, Ex parte Ide (1886), 17 Q.B.D. 755; 55 L.J.Q.B. 484; 35 W.R. 20; 2 T.L.R. 884; 3 Morr. 239; 4 Digest (Repl.) 93, 341.

G

Appeal by a debtor from a receiving order made against him by Mr. Registrar GIFFARD on the petition of J. Hyde, the alleged act of bankruptcy being non-compliance with a bankruptcy notice.

H

On Jan. 28, 1887, Hyde obtained a final judgment against the debtor, Connan for £70 9s. 8d. On July 27, 1887, W. H. Making, who was a judgment creditor of Hyde for £100, served on the debtor, Connan a garnishee order nisi attaching all debts due from him to Hyde and on Aug. 4 the garnishee order was made absolute. On Dec. 15, 1887, Hyde served Connan with a bankruptcy notice in respect of the judgment debt, and with the notice Hyde's solicitor sent a letter, in which he said:

I

"The charging orders obtained on the judgment by Mr. Hyde against you have been discharged by payment, and therefore the amount of the judgment debt and costs is now properly payable by you to Mr. Hyde."

It was proved on the hearing of the petition that, before the service of the bankruptcy notice, Hyde had in fact paid the debt which he owed to Making. The Registrar held that Hyde was entitled to issue the bankruptcy notice, and that Connan had committed an act of bankruptcy by not complying with it, and he made a receiving order against him. The debtor appealed.

Lynch and Watt for the debtor.

Herbert Reed for the petitioning creditor.

Cur. adv. vult.

Mar. 22, 1888. **FRY, L.J.**—The Master of the Rolls has requested me to deliver the first judgment in this case. The facts are shortly these: On Jan. 28, 1887, judgment was recovered by Hyde against Connan for £70 9s. 8d.; and on July 27, 1887, Making, who was a creditor of Hyde's, served on Connan a garnishee order nisi, attaching debts due from Connan to Hyde; and on Aug. 4 that order was made absolute. The effect of that order being made absolute was to put Making in the position of creditor as regards the judgment debt due from Connan to Hyde, and to enable Making to issue execution thereon. So matters stood at the time when a bankruptcy notice was served by Hyde on Connan. With that notice was sent a letter informing Connan that the charging order upon the debt had been discharged by payment of what was owing by Hyde to Making.

The question is, whether the creditor who has served that notice is a person who has obtained a final judgment against the debtor on which execution has not been stayed, within s. 4 (1) (g), of the Bankruptcy Act, 1883. In my opinion, he is not such a person. I have said that the effect of making the garnishee order absolute was to entitle Making to levy execution on the judgment. But the effect of it was also to make a stay of execution so far as Hyde was concerned. It may be that there is a right on Hyde's part to have that stay removed by applying to the court, either under r. 23 of Ord. 42 or under its general jurisdiction. No such application was made, and the fact is, that during the whole of the seven days when the bankruptcy notice was pending, Making might have issued execution against Connan. If Connan had paid Making the amount of the debt during the same period, Connan would have been under no further liability in respect of it. Therefore, at the time when the bankruptcy notice was served, there was a stay of execution upon the judgment so far as Hyde was concerned, by reason of the garnishee order. That order had not been in any way varied or discharged, and the notice was consequently bad. In my opinion, the appeal must be allowed, and the receiving order discharged.

LOPES, L.J.—The Bankruptcy Act, 1883, s. 4, (1) (g), provides that a debtor who does not comply with a bankruptcy notice within seven days commits an act of bankruptcy; and that where a creditor has obtained a final judgment against a debtor, and execution thereon has not been stayed, such bankruptcy notice may issue. The question is, whether execution has been stayed in this case? I think that the effect of the garnishee order was to stay execution so far as Hyde was concerned. While the garnishee order was in force he could not issue execution. In this case it appears that he had, in fact, paid the garnishee his debt; but, in my opinion, when he paid that debt, he should have taken some proceeding calling upon Making to show cause why the garnishee order should not be discharged. This is not, therefore, such a final judgment, upon which execution has not been stayed, as to come within s. 4 (1) (g). The receiving order must be discharged.

LORD ESHER, M.R.—I am of the same opinion.

Appeal allowed.

Solicitors: *George Johnson; F. A. Foster & Co.*

[*Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.*]

Re RHODES. RHODES v. RHODES

[COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), February 15, 17, 1890]

[Reported 44 Ch.D. 94; 59 L.J.Ch. 298; 62 L.T. 342;
38 W.R. 385]

Mentally Disordered Person—Maintenance—Necessaries—Implied obligation to pay for necessities supplied—Right to recover payments for necessities from estate of deceased person.

Whenever necessities are supplied to a person who by reason of his disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. An obligation can be implied on the part of a lunatic to repay out of his property sums expended for necessities supplied to him, provided they are suitable to his station in life and that the provision of money or necessities is made under circumstances which justify the law in implying such an obligation, i.e., an intention on the part of the provider to be repaid and to constitute a debt against the lunatic's estate.

The deceased, a lunatic not so found by inquisition, was confined to an asylum for several years before her death. She had property of her own, but the income was insufficient to cover the expenses and the balance was made up by her brother and members of the family. On her death intestate the brother's son, acting as his father's executor and on behalf of his brothers and sisters, took out a summons claiming that the amount of the extra expenses contributed by the family should be repaid to them out of the estate on the ground that they had been for necessities.

Held: the relatives, in making the payments for the maintenance of the deceased, did not constitute themselves creditors against the estate, and so were not entitled to claim the money from the estate.

Notes. Considered: *Re J.*, [1909] Ch. 574; *Pontypridd Guardians v. Drew* (1926), 90 J.P. 169. Referred to: *Healing v. Healing* (1902), 51 W.R. 221; *Birkenhead Union Guardians v. Brookes* (1906), 95 L.T. 359; *Nash v. Inman*, [1908-10] All E.R.Rep. 317.

As to civil capacity of person mentally disordered, see 29 HALSBURY'S LAWS (3rd Edn.) 406 et seq.; and for cases see 33 DIGEST (Repl.) 593 et seq.

Cases referred to:

- (1) *Re Weaver* (1882), 21 Ch.D. 615; 48 L.T. 93; 47 J.P. 68; 31 W.R. 224, C.A.; 33 Digest (Repl.) 594, 104.
- (2) *Manby v. Scott* (1663), O.Bridg. 229; 1 Sid. 109; 1 Keb. 441; 124 E.R. 561; Ex. Ch.; 33 Digest (Repl.) 588, 41.

Also referred to in argument:

Wentworth v. Tubb (1841), 1 Y. & C.Ch. Cas. 171; 5 Jur. 1150; 62 E.R. 840; affirmed, 12 L.J.Ch. 61; 6 Jur. 980, L.C.; 33 Digest (Repl.) 594, 100.

Williams v. Wentworth (1842), 5 Beav. 325; 49 E.R. 603; 33 Digest (Repl.) 591, 101.

Nelson v. Duncombe, Duncombe v. Nelson (1846), 9 Beav. 211; 15 L.J.Ch. 296; 7 L.T.O.S. 447; 10 Jur. 399; 50 E.R. 323; 33 Digest (Repl.) 594, 102.

Howard v. Digby (1834), 2 Cl. & Fin. 634; 8 Bli.N.S. 224; 6 E.R. 1293, H.L.; 33 Digest (Repl.) 593, 99.

Re Gibson (1871), 7 Ch. App. 52; 25 L.T. 551; 20 W.R. 107, L.JJ.; 33 Digest (Repl.) 654, 981.

Brockwell v. Bullock (1889), 22 Q.B.D. 567; 58 L.J.Q.B. 289; 53 J.P. 405; 37 W.R. 455; 5 T.L.R. 362, C.A.; 33 Digest (Repl.) 636, 716.

Appeal from a decision of KAY, J., refusing a claim by relatives for several sums expended by them in support of a lunatic in excess of the income of her own property.

Eliza C. Rhodes, a lunatic not so found by inquisition, had property of her own which produced a small income. Her brother placed her in an asylum at the cost of £140 a year, being more than the lady's private income. The brother died, and his son, A. C. Rhodes, the defendant, and other members of the family, continued to provide for the maintenance of the lunatic in the same manner. On the death of the lunatic intestate, A. C. Rhodes, as executor of his father, and administrator of the intestate, claimed to retain so much of the lunatic's estate as would repay the extra cost of the maintenance of the lunatic which had been defrayed by his father and himself and brothers and sisters. In an administration action brought by the next-of-kin of the lunatic against A. C. Rhodes, the chief clerk refused to allow the extra payments made as above mentioned towards the maintenance of the lunatic. A. C. Rhodes then took out a summons to vary the chief clerk's certificate by allowing this extra expense to be repaid out of the lunatic's estate on the ground that the payments were for necessities, and that the evidence did not show that they were made with an intention of making a gift of the same. KAY, J., held that it had not been proved that the placing of the lunatic in an expensive asylum was a necessary, and also that the payments made were in the nature of a gift. From this decision A. C. Rhodes appealed.

Renshaw, Q.C., and *W. F. Phillpotts* for the defendant.

Millar, Q.C., and *Curtis Price* for the next-of-kin of the lunatic.

COTTON, L.J.—This is an appeal against a decision of KAY, J., refusing to allow a claim made by the defendant on behalf of himself and his brother and his sisters, and as the legal personal representative of his father, for several sums expended in the support of the lunatic in excess of the income of her own property.

The case raises several questions, one of which is of considerable importance; and although in the view which we take that question is not necessary to the decision of the case, yet, as it has been fully argued, we think we ought to express our opinion upon it. That question is whether there can be an implied contract on the part of a lunatic not so found by inquisition to repay out of her property sums expended for necessities supplied to her.

The term "implied contract" is a most unfortunate expression, because there cannot be a contract by a lunatic. But, whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of that person to pay for such necessities out of his own property. It is asked, can there be an implied contract by a person who cannot contract? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities. I think the expression "implied contract" is erroneous and a very unfortunate one. In *Re Weaver* (1) which was before this court, we did not decide the question whether there could be what has been called an "implied contract" by a lunatic, and SIR GEORGE JESSEL, M.R., did express an opinion that there could be no implied contract on the part of a lunatic, as he was incompetent to make an express contract.

We all agree with the view that I have now expressed, and I have stated it in order to prevent any doubt arising in consequence of the question being left undecided in *Re Weaver* (1), though it was mentioned.

But then, though there may be an implied obligation on behalf of the lunatic, the necessities must be supplied and paid for under circumstances which would justify the law in implying an obligation to repay the money spent upon them. I have no difficulty as to the question whether this expenditure was for necessities, for the law is well established that, when the necessities supplied are suitable to the position in life of the lunatic, an implied obligation to pay for them out of his property will arise. But then the provision of money or necessities must be made

A under the circumstances which would justify the law in implying an obligation. [His LORDSHIP then discussed the evidence, and came to the conclusion that the relatives of the lunatic in making the payments for her maintenance did not intend to constitute themselves creditors against her estate.]

B **LINDLEY, L.J.**—The question we have to decide is whether a sum of £1,100 is payable as a debt out of the assets of the deceased lady. The claim is made on the ground that the money has been properly expended for necessaries. I think that the facts are all in favour of the money having been reasonably and properly expended for necessaries. Against that it is said that the lady might have been supported at an expense which her own income would have been sufficient to meet; but, as in the case of a claim made for necessaries against the estate of an infant the claimant is not always bound to show that he sent the infant to the cheapest school that could be found, so in this case the fact that some cheaper place of residence might possibly have been found for this lady is not necessarily an answer to this claim, assuming that it can be made. The question whether an implied obligation arises in favour of a person who supplies a lunatic with necessaries is a question of law, and in *Re Weaver* (1) a doubt was expressed whether there was an obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression "implied contract" has been used to denote an obligation implied by law which is not a contract at law. Obligations of this class have also been called obligationes quasi ex contractu. But that a lunatic's estate may be liable for necessaries has been settled as far back as *Manby v. Scott* (2), where the three learned judges who heard that case, after holding that an infant might be bound for necessaries provided for him, proceeded: "And what has been said of an infant is applicable to an idiot in case of housekeeping." I do not doubt that the cost of necessaries can be recovered against a lunatic's estate in a proper case. [His LORDSHIP then dealt with the evidence, and agreed with the conclusion arrived at by COTTON, L.J.]

F **LOPES, L.J.**—If a person provides necessaries for a lunatic, and intends to be repaid for so doing and to constitute a debt against the lunatic's estate, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries. It seems to me strange that the law to this effect could be doubted. I have known several cases in the Queen's Bench Division of this kind: Action brought for goods sold and delivered; plea, insanity; replication, necessaries. And I have never heard any doubt expressed that that was a perfectly good replication. [His LORDSHIP then discussed the evidence, and came to the same conclusion as the rest of the court.] Then the question arises whether these payments were for necessaries. I should not myself have felt any difficulty as to that, because what are necessaries has to be determined according to the circumstances of each particular case, and things may well be necessaries in one case which would not be so in another. The question what are necessaries must always be considered with reference to the reasonable requirements of the person under disability, having regard to his means and station in life. The appeal fails, and must be dismissed with costs.

Appeal dismissed.

I Solicitors: Grover & Humphreys; Spencer, Gibson & Co.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

THYNNE v. SHOVE

[CHANCERY DIVISION (Stirling, J.), May 22, 1890]

[Reported 45 Ch.D. 577; 59 L.J.Ch. 509; 62 L.T. 803;
38 W.R. 667; 6 T.L.R. 346]

Business—Sale—Goodwill—Right of purchaser to use vendor's name.

In the absence of special agreement the purchaser of the goodwill of a business carried on under the vendor's name has the right to use the vendor's name in connection with that business so long as he does not thereby expose the vendor to liability.

The plaintiff, a baker, sold his business and the goodwill thereof to the defendant who also bought his stock-in-trade, including trade cards printed with the plaintiff's name. The deed contained an assignment of the premises on which the business was carried on and "of all the beneficial interest and goodwill" of the plaintiff in the business but there was no express assignment of the right to use the plaintiff's name. The defendant used the trade cards until stocks were exhausted and then had more printed, and proceeded to issue them. In an action for an injunction brought by the plaintiff to restrain the defendant from issuing the cards, or otherwise using or trading in the name of the plaintiff,

Held: by virtue of the assignment to him of the goodwill of the business, the defendant was entitled to use the plaintiff's name to show that the business had been formerly carried on by the plaintiff, but he was not entitled to use it in such a way as to hold the plaintiff out as the real owner of the business, thus exposing him to liability.

Levy v. Walker (1) (1879), 10 Ch.D. 436, considered.

Notes. Applied: *Burchell v. Wilde*, [1900] 1 Ch. 551. Considered: *Townsend v. Jarman* (1900), 69 L.J.Ch. 823.

As to rights of transferee of the goodwill of a business, see 38 HALSBURY'S LAWS (3rd Edn.) 12; and for cases see 43 DIGEST 81 et seq. As to assignment of right to name, see 38 HALSBURY'S LAWS (3rd Edn.) 599; and for cases see 43 DIGEST 289 et seq.

Cases referred to:

- (1) *Levy v. Walker* (1879), 10 Ch.D. 436; 48 L.J.Ch. 273; 39 L.T. 654; 27 W.R. 370, C.A.; 43 Digest 83, 875.
- (2) *Millington v. Fox* (1838), 3 My. & Cr. 338; 40 E.R. 956, L.C.; 43 Digest 233, 778.
- (3) *Gray v. Smith* (1889), 43 Ch.D. 208; 59 L.J.Ch. 145; 62 L.T. 335; 38 W.R. 310; 6 T.L.R. 109, C.A.; 12 Digest (Repl.) 150, 954.

Motion for an injunction restraining the defendant from using, printing or publishing cards and bill-heads printed with the plaintiff's name, or otherwise using or trading in his name.

The plaintiff, Arthur Thynne, carried on the business of baker and pastrycook at 44, Tranquil Vale, Blackheath. On Mar. 27, 1890, he entered into a contract with the defendant to sell to him as a going concern the leasehold house and premises in which his business was carried on, together with the goodwill of the business, with certain stock-in-trade and fixtures.

By a deed dated April 26, 1890, by which the sale was carried out, the plaintiff, in consideration of the sum of £850, assigned to the defendant the house or shop and premises and

"all the beneficial interest and goodwill of the said Arthur Thynne in the said trade of a baker and pastrycook, so carried on by him as aforesaid;"

but there was no express assignment of the right to use the plaintiff's name. Under the conditions of sale the defendant also purchased at a valuation the stock-

- A in-trade, fixtures, fittings, and utensils of the business, which comprised a number of cards and paper bags on which the plaintiff's name appeared. On the cards was printed. "A. Thynne, Baker and Confectioner, The Village Bakery, Blackheath," and a rustic scene was depicted in one corner. The defendant used these cards until they were exhausted, and then he had more printed, and proceeded to issue them. The plaintiff denied his right to do this, and on May 16 commenced the
- B present action, claiming by his writ an order that all cards, bill-heads, and bags printed by or for the defendant in the name of "A. Thynne" might be delivered up to him, and also an injunction to restrain the defendant from printing or publishing such cards or documents, or otherwise using or trading in the name of the plaintiff.

The case came on upon motion for an injunction but the hearing of the motion was treated as the trial of the action.

- C *Hastings, Q.C.*, and *Bradford* for the plaintiff.
Buckley, Q.C., and *Levett* for the defendant.

STIRLING, J., stated the facts, and continued: Upon the evidence before me, the grounds on which the plaintiff puts his case are these:

- D "On May 13 I discovered that the defendant had issued cards in my name, by which he wished the public to understand that I was still carrying on business at 44, Tranquil Vale aforesaid. The defendant has no right to use my name, and I strongly object to his so doing, as it will materially injure me if I start again in business at Blackheath."

- E This taken literally, is far in excess of the plaintiff's rights, for, by virtue of the assignment to him of the goodwill, the defendant has the right to use the name of the plaintiff for the purpose of showing that the business is that formerly carried on by the plaintiff, and he has the full right to use it, except that he must not so use it as to expose the plaintiff to liability by holding him out as the real owner of the business. That is the only limit to the defendant's right to use the plaintiff's name.

- F The defendant, on the other hand, says:

"I deny that the plaintiff can be materially or at all injured, as I deny his right to solicit any of the customers of the said business so purchased by me as aforesaid, and contend that I have the right to use the name Arthur Thynne as a trade name."

- G The question, then, is, Is the defendant entitled to use the plaintiff's name without any limitation? It seems to me that the defendant, in claiming to use the plaintiff's name as a trade name without limitation or qualification, is also in excess of his rights. The defendant has the right to use the plaintiff's name, but upon principle he ought not so to use it as to expose the plaintiff to liability, and no case has ever decided contrary to this. *Levy v. Walker* (1) was cited, but in that case
- H Miss Charbonnel, who formerly carried on the business in partnership with Miss Walker, had married a Mr. Levy, and the partnership of "Charbonnel and Walker" had been dissolved. So the use of the name "Charbonnel and Walker" by the defendant in that case could not subject Mr. and Mrs. Levy to any liability, because the use of it could not suggest to anyone that Mr. or Mrs. Levy was a partner.
- SIR GEORGE JESSEL, M.R., there says (10 Ch.D. at p. 447):

- I "The plaintiffs are not actual partners in the firm of 'Charbonnel and Walker'; the dissolution decreed by the court has been duly advertised, and no person dealing with Miss Walker for the first time can make Mr. and Mrs. Levy liable. Notice has been given to all the persons who dealt with the firm at the dissolution, and none of them can make Mr. or Mrs. Levy liable. What conceivable interest the plaintiffs have in the question as to the firm name under which Miss Walker chooses to carry on the business, I have been unable to ascertain."

JAMES, L.J., in delivering judgment, gave an opinion upon a point which the Master of the Rolls did not, although he did not say that he held a contrary opinion. He says (*ibid.* at p. 448):

"But there is another point upon which I myself cannot entertain a doubt, which is this: that the assignment of the goodwill and business of 'Charbonnel and Walker' did convey the right to use the name of 'Charbonnel and Walker,' and the exclusive right to use that name as between the vendor and purchaser of that business. Whether it would prevent another person from afterwards using the name of Charbonnel, I do not say; but the trade name, made up of two real names, as the Master of the Rolls says—the trade name of 'Charbonnel and Walker' (whether it was entirely a fictitious name can make no difference)—was the name of the business, and that business was sold. That was the name with which every article sold might have been impressed, just as in the case of *Millington v. Fox* (2), where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the business."

In that case, it is important to observe that the name of "Charbonnel and Walker" was not the name of any two persons carrying on the business, but was in reality a "fancy name." And JAMES, L.J., in his judgment does not say that if a person were so using the name of the assignor of a goodwill as to expose him to liability he would not be entitled to relief by way of injunction. This distinction was pointed out by COTTON, L.J., in the recent case of *Gray v. Smith* (3), which illustrates the true principle to be applied in such cases. His Lordship there says (43 Ch.D. at p. 221):

"Mr. and Mrs. Levy could not be subjected to any liability by the use of the name 'Charbonnel and Walker' by the defendant, as the use of that name could not suggest to anyone that Mr. and Mrs. Levy was a partner."

In the present case it seems to me that both parties have put their respective rights too high. The defendant is entitled to use the plaintiff's name so long as he does not by so doing expose him to any liability; and, on the other hand, he is not entitled so to use it as to have that effect. As a proper mode of putting an end to the case, I make the following order: By consent restrain the defendant, his servants, and agents from using the name of the plaintiff in such a way as to expose the plaintiff to liability by holding him out as a person with whom contracts are to be made which would impose liability on the plaintiff. No costs on either side.

Solicitors: *Ingoldby, Buckley & Adkin; Keene, Marsland & Bryden.*

[Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.]

A

Re DICKINSON. Ex Parte CHARRINGTON & CO.

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), November 23, 1888]

B

[Reported 22 Q.B.D. 187; 58 L.J.Q.B. 1; 60 L.T. 138;
37 W.R. 130; 5 T.L.R. 82; 6 Morr. 1]

Bankruptcy—Secured creditor—Creditor who has obtained order for a receiver—Execution—Completion—Sale of goods in possession of receiver—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), ss. 9, 45.

C

By the Bankruptcy Act, 1883, s. 9: "(1) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court. . . (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

D

By s. 45: "(1) Where a creditor has issued execution against the goods . . . of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale. . . ."

E

Judgment creditors obtained an order appointing a receiver to receive the debtor's stock-in-trade and other property, all further questions being reserved until further order. The receiver went into possession and continued in possession until after the debtor had filed his petition in bankruptcy and a receiving order had been made against him. When the debtor was adjudged bankrupt a trustee was appointed, the goods in the possession of the receiver were sold by arrangement, and the proceeds were paid into a suspense account without prejudice as to who was entitled to them. The judgment creditors claimed that they were secured creditors and were entitled to the proceeds of sale by virtue of the receiving order.

F

G

Held: the appointment at the instance of the judgment creditors of a receiver of the debtor's goods did not make them "secured creditors" within the meaning of s. 9 (2) of the Bankruptcy Act, 1883; even if the receiver's possession of the goods amounted to execution, the execution had not been completed by "seizure and sale" within the meaning of s. 45 of the Act; therefore, the judgment creditors were not entitled to retain the proceeds of the sale of the goods as against the debtor's trustee in bankruptcy.

H

Notes. The Bankruptcy Act, 1883, has been repealed. Sections 9 and 168 of that Act have been replaced by ss. 7 and 167 of the Bankruptcy Act, 1914. For s. 45 of the 1883 Act, see now s. 40 of the 1914 Act, as amended by the Administration of Justice Act, 1956, s. 36 (4) (36 HALSBURY'S STATUTES (2nd Edn.) 476).

I

Distinguished: *Mason and Barry v. La Société Industrielle et Commerciale des Métaux* (1889), 5 T.L.R. 582. Considered: *Levasseur v. Mason and Barry* (1890), 63 L.T. 700; *Re Hastings, Ex parte Brown* (1892), 61 L.J.Q.B. 654; *Re Potts, Ex parte Taylor*, [1893] 1 Q.B. 648; *Re Pearce, Ex parte The Official Receiver, The Trustec*, [1919] 1 K.B. 354. Referred to: *Re Tillett, Ex parte Kingscote* (1889), 5 T.L.R. 269; *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727.

As to equitable execution, see 16 HALSBURY'S LAWS (3rd Edn.) 104 et seq.; and for cases see 21 DIGEST (Repl.) 620. As to secured creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 298, 299; and for cases see 4 DIGEST (Repl.) 386 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Cases referred to in argument:

Re Watkins, Ex parte Evans (1879), 13 Ch.D. 252; 49 L.J.Bey. 7; 41 L.T. 565; 28 W.R. 127, C.A.; 4 Digest (Repl.) 391, 3542.

Anglo-Italian Bank v. Davies (1878), 9 Ch.D. 275; 47 L.J.Ch. 833; 39 L.T. 244; 27 W.R. 3, C.A.; 21 Digest (Repl.) 773, 2586.

Salt v. Cooper (1880), 16 Ch.D. 544; 50 L.J.Ch. 529; 43 L.T. 682; 29 W.R. 553, C.A.; 21 Digest (Repl.) 779, 2634.

Re Pope (1886), 17 Q.B.D. 743; 55 L.J.Q.B. 522; 55 L.T. 369; 34 W.R. 693; 2 T.L.R. 826, C.A.; 21 Digest (Repl.) 662, 1518.

Re Hall, Ex parte Roche (1871), 6 Ch. App. 795; 40 L.J.Bey. 70; 25 L.T. 287; 19 W.R. 1129, L.C. & L.JJ.; 5 Digest (Repl.) 869, 7295.

Re Davies, Ex parte Williams (1872), 7 Ch. App. 314; 41 L.J.Bey. 38; 26 L.T. 303; 36 J.P. 484; 20 W.R. 430, L.JJ.; 5 Digest (Repl.) 868, 7285.

Re Gourlay, Ex parte Abbott (1880), 15 Ch.D. 447; 50 L.J.Ch. 80; 43 L.T. 417; 29 W.R. 143, C.A.; 4 Digest (Repl.) 388, 3527.

Mackay v. Merritt (1886), 34 W.R. 433; 5 Digest (Repl.) 875, 7324.

Edwards v. Edwards (1876), 2 Ch.D. 291; 45 L.J.Ch. 391; 34 L.T. 472; 24 W.R. 713, C.A.; 21 Digest (Repl.) 781, 2653.

Appeal from an order of CAVE, J., that a sum of £721, in the hands of the chief official receiver, should be paid over to the trustee in the bankruptcy.

On Dec. 5, 1887, the creditors, Messrs. Charrington & Co., obtained judgment in an action against Dickinson for £2,930; and on Dec. 7, in execution of that judgment, the sheriff took possession of the debtor's goods at the Green Dragon, Fleet Street, and at the Bedford Head, Maiden Lane (in both of which houses the debtor carried on business as a publican), under a *fi. fa.*

On Dec. 9 the execution creditors applied *ex parte* to a judge of the Queen's Bench Division under s. 25 (8) of the Supreme Court of Judicature Act, 1873 [see now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45 (18 HALSBURY'S STATUTES (2nd Edn.) 482)], and obtained an order in the action, appointing a member of the firm of Charrington & Co., without security, until further order, to receive the stock-in-trade and other property and effects belonging to the debtor, and unencumbered by any mortgage or other document or process of law, at the Green Dragon, Fleet Street, and at the Bedford Head, Maiden Lane, but without prejudice to the rights of any prior encumbrancer, or his possession (if any), or to the rights of the landlord of the premises, all further questions being reserved until further order.

Notice of the appointment of the receiver was served upon the sheriff's man in possession, authorising him to hold possession of the goods for the receiver; and he continued in possession of them until after Jan. 13, 1888, when the debtor filed his own petition in bankruptcy, and a receiving order was made against him. On Jan. 16 the debtor was adjudged bankrupt, and a trustee was appointed. The goods in the possession of the receiver were then sold by arrangement, and the proceeds paid to a suspense account in the name of the official receiver, without prejudice to the question as to who was entitled to them.

The trustee then made an application to the court asking that the proceeds of the sale might be paid out to him. Charrington & Co. opposed the application upon the ground that, by virtue of the receiving order, they were secured creditors, and themselves entitled to the proceeds. CAVE, J., held that the trustee in the bankruptcy was entitled to the money. Charrington & Co. appealed.

Henn Collins, Q.C., and *MacColl* for the creditors.

Winslow, Q.C., and *F. H. Colt*, for the trustee in bankruptcy, were not called on to argue.

A LORD ESHER, M.R.—Notwithstanding a most able argument to the contrary, we are of opinion that we must agree with the decision of CAVE, J.

Counsel for the creditors has first argued this case upon s. 9 of the Bankruptcy Act, 1883. He admits that, unless it can be brought within sub-s. (2) of s. 9, it is within the first part of the section, and his clients would be postponed to the trustee in bankruptcy; but he says that it is within sub-s. (2). His argument is

B that the case is brought within sub-s. (2) by the order appointing a receiver. The order appointing a receiver was made in the action of *Charrington & Co. v. Dickinson*, and was that one of the plaintiffs in that action should be appointed without security until further order to receive the stock-in-trade and other property and effects belonging to the defendant at his public-house, and unencumbered by any mortgage or other document or process of law, but without prejudice to the rights

C of any prior encumbrancer or his possession (if any), or to the rights of the landlord of the premises. Counsel says that that order makes Charrington & Co. secured creditors.

The definition of a secured creditor in s. 168 (1), of the Bankruptcy Act, 1883, is:

“‘Secured creditor’ means a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor.”

D Do Charrington & Co. hold a mortgage on the property of the debtor? It is not contended that they do. Do they hold a charge on the property of the debtor? That again is not contended. But it is said that they hold a lien on the property. How can possession of the property by this receiver establish a lien on the part of the creditor? Is the receiver agent of the creditor so that he holds the goods for him? Surely not. He is appointed by the court and holds the goods for the court. He does not in truth hold the goods for the creditor in any sense. He holds any property vested in him for the court to deal with as it thinks fit. Charrington & Co. do not, therefore, come within sub-s. (2) of s. 9 at all.

E Counsel for the creditors has further argued that this is a delivery in execution. How can the appointment of a receiver of these goods be a delivery of them in execution? Counsel says that the order for a receiver might be supplemented by an order for sale afterwards. But he does not say whether it is to be an order for a sale by a creditor or by the receiver. He dealt with that part of the argument very lightly, because he knew what a difficulty he would be in if he said that the creditor could sell. In that case the creditor has not completed the execution. If, on the other hand, the creditor cannot sell, counsel is met by the other horn of the dilemma. In that case the execution cannot be completed. Section 45 (1) of the Act provides that where a creditor has issued execution against the goods or lands of a debtor, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order; and by sub-s. (2) an execution against goods—which this would be—is completed by seizure and sale. The receiver’s possession

G of these goods has not resulted in a sale at all; and, therefore, even if the obtaining of an order for a receiver of the stock-in-trade and other effects is an issuing of execution against goods, the execution was not completed before the date of the receiving order in bankruptcy.

H My own impression is, that the receiver’s possession of these goods was not a seizure in execution, and that this case is not brought within sub-s. (2) of s. 9 of the Act. If, however, the case is within that subsection, the creditor is still met by s. 45, not having completed his execution by seizure and sale. But, speaking for myself, I should like to put my judgment on the first ground, that the appointment at the instance of a judgment creditor of a receiver of the goods of the debtor does not make such creditor a secured creditor within the meaning of s. 9 (2) of the Bankruptcy Act, 1883.

I FRY, L.J.—Before the Supreme Court of Judicature Act, 1873, when a judgment creditor had sued out execution on his judgment without getting satisfaction,

and the judgment debtor was possessed of an interest in land that could not be taken in execution at law, the Court of Chancery aided the judgment creditor in proper cases by appointing a receiver of the rents and profits of the land, which were paid into court to the credit of the action, and were paid out, on proper security, to the creditor. That process was known as equitable execution. There were other cases in which, where satisfaction at law could not be had and the debtor was possessed of any equitable interest, equitable execution would be granted in aid of a legal judgment by the appointment of a receiver. A

So far as I am aware, that was the extent to which the appointment of a receiver, at the instance of a judgment creditor, went before the Judicature Acts. But now, by the Supreme Court of Judicature Act, 1873, s. 25 (8), the High Court may appoint a receiver in all cases in which it shall appear to the court to be just or convenient. Acting under that provision, a judge of the High Court has appointed a receiver in the present case, not with power to receive the earnings of the business, but merely to hold certain chattels. It appears to me that that is all that the receiver can do under the order that has been made. Whether he can do anything else under a further order I do not know; nor do I know whether a receiver should have been appointed at all in such a case. Subsequently to that order appointing a receiver on behalf of the judgment creditor, a receiving order in bankruptcy was made against the judgment debtor. B

By s. 9 (1) of the Bankruptcy Act, 1883 :

"On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court, and on such terms as the court may impose." C

Pausing there, the effect of the receiving order in bankruptcy is to put an end to any rights which the judgment creditor might have had under this previous order for a receiver. But then there is a saving clause (sub-s. (2)) : D

"But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." E

How, if the creditor in this case were a secured creditor, he is to realise or deal with his security under this order, I cannot say, and counsel has not suggested. But, in my opinion, he is not a secured creditor. This order creates no charge. Under it, the receiver can merely hold the property. It creates no lien, either legal or equitable. The creditor here, therefore, is not a secured creditor. But it is said that he is a creditor who has issued and completed execution. F

It remains, therefore, to consider s. 45. That section provides that,

"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order"; G

and sub-s. (2) says that, "an execution against goods is completed by seizure and sale." It is said that this receivership order is equitable execution. I do not myself see how it can be said to be execution at all, because by no means can the judgment be realised by force of this order. But if it is execution, then it was not completed by sale before the date of the receiving order in bankruptcy. H

LOPES, L.J.—I have nothing to add.

Appeal dismissed.

Solicitors : *Lorley & Morley; Nash, Field & Withers.*

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.] I

A

Re HENDERSON. Ex Parte HENDERSON

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), February 3, 1888]

[Reported 20 Q.B.D. 509; 57 L.J.Q.B. 258; 58 L.T. 835;
36 W.R. 567; 4 T.L.R. 283; 5 Morr. 52]

B

Bankruptcy—"Final judgment"—Order for alimony pendente lite—Arrears of payments—*Bankruptcy Act*, 1883 (46 & 47 Vict., c. 52), s. 4 (1) (g).

C

By the *Bankruptcy Act*, 1883, s. 4 (1): "A debtor commits an act of bankruptcy in each of the following cases . . . (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt . . . and he does not . . . either comply with the requirements of the notice, or satisfy the court that he has a counterclaim set-off or cross demand which equals or exceeds the amount of the judgment debt. . . ."

D

An order for alimony pending the hearing of a wife's petition for judicial separation is not a "final judgment" within the meaning of s. 4 (1) (g), and, therefore, a bankruptcy notice cannot be issued by the wife against the husband founded on arrears of payments due under the order.

Notes. Section 4 (1) (g) of the *Bankruptcy Act*, 1883, has been repealed. See now s. 1 (1) (g) of the *Bankruptcy Act*, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 325).

E

As to final judgments and orders, see 2 HALSBURY'S LAWS (3rd Edn.) 274, 275; and for cases see 4 DIGEST (Repl.) 95 et seq.

Case referred to:

(1) *Re Faithfull, Ex parte Moore* (1885), 14 Q.B.D. 627; 54 L.J.Q.B. 190; 52 L.T. 376; 33 W.R. 438; 1 T.L.R. 263; 2 Morr. 52, C.A.; 4 Digest (Repl.) 96, 865.

F

Also referred to in argument:

Re Linton, Linton v. Linton (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 33 W.R. 714; 49 J.P. 597; 2 Morr. 179, C.A.; 4 Digest (Repl.) 329, 2992.

G

Appeal by a petitioning creditor from the refusal of Mr. Registrar BROUGHAM to make a receiving order against the debtor.

The creditor, who was the debtor's wife, had presented a petition for judicial separation on the ground of his desertion, and on June 9, 1887, SIR JAMES HANSEN, P., made an order that the husband should pay his wife alimony pendente lite at the rate of £120 per annum, payable monthly.

H

On Oct. 7, 1887, five monthly instalments were in arrear, and the wife served a bankruptcy notice upon her husband in respect of the nonpayment of the instalments. Upon the hearing of a bankruptcy petition founded on the notice, the registrar held that the notice was bad, as the money was not due under a final judgment. The wife appealed.

Sidney Woolf for the wife.

M. Muir Mackenzie for the husband.

I

LORD ESHER, M.R.—I am very sorry to say that I think that the law does not enable us to give relief in this case in the form in which it is asked. An order has been made upon the husband to pay alimony to his wife pendente lite, the order being for £120 a year, payable monthly. The question is whether that order is a final judgment within s. 4 (1) (g) of the *Bankruptcy Act*, 1883. That question must be determined by considering whether it is a final judgment at the time that it is made. If it is not then, it cannot be made so by the money not being paid, or by other circumstances arising afterwards. I make that observation in order

to meet the argument that if arrears have been allowed to accrue, that circumstance would make such an order as this final, although it might not be so otherwise. A

The question comes to be this. Is an order to pay £10 a month pendente lite a final order at the time that it is made, or is it not? Assuming that it would be a judgment if it was final, can it be said to be final? I do not see how it can be maintained that an order to pay so much a month pendente lite is a final order. It is an order pendente lite—that is, while the lis is pending. That seems to me the most interlocutory order that can be imagined. It appears to me that the whole of the order is interlocutory, and none of it final. B

It is argued that any order to pay money can be held to be final on the authority of the decision in *Ex parte Moore* (1). It seems to me that that case does not go so far as that. The decision in that case is that an order to pay costs, when part of a final judgment, can itself be treated as a final judgment. But this order to pay £10 a month is not part of a final judgment. We must, therefore, dismiss the appeal. C

FRY, L.J.—I regret that the wife was ever advised to take these proceedings, because it was abundantly clear that they could not succeed. The wife is calling upon us to exercise the peculiar jurisdiction given by the Bankruptcy Act, 1883, and claims to be within s. 4 (1) (g). It appears that she had presented a petition for judicial separation, and that in June, 1887, an order was made upon the husband to pay or cause to be paid to his wife alimony at the rate of £120 per annum pendente lite. In the first place, that order is not a judgment. It is a simple order. We are not at liberty to hold that a creditor who has obtained an order is a creditor under the statute, who has obtained a judgment. In the next place, it is not final. It is made pendente lite. It comes to an end, therefore, as soon as final judgment is obtained. Moreover, it is liable to be varied at the will of the court from month to month, and from week to week, the court having power at any time to alter in any way the amount of the alimony, or to discharge the order altogether. Such an order is as little final as any I can imagine. D E

It was argued that *Ex parte Moore* (1) was an authority in favour of the wife. In that case a final judgment had been pronounced in the action, and part of that judgment was an order for an inquiry as to damages, and an order for payment of costs. It was thereupon argued that the order for an inquiry prevented the order as to costs being a final judgment, and it was held in this court that a final judgment is not rendered other than final in so far as it is an absolute order for immediate payment by containing also directions which have to be worked out afterwards. F G

LOPES, L.J.—A bankruptcy notice cannot be founded upon any order, however final, unless it is part of a final judgment in a suit. What is the order in the present case? It is an order for payment of alimony pendente lite which may be varied from day to day, and which is determined with the determination of the suit. In my opinion, such an order is essentially interlocutory, and, therefore, cannot be said to be a final judgment within s. 4 (1) (g), of the Bankruptcy Act, 1883. H

Appeal dismissed.

Solicitors: *Lewis & Lewis; Tyrrell, Lewis & Co.*

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.] I

A

VALENTINI v. CANALI

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Bowen, L.J.), November 29, 1889]

B

[Reported 24 Q.B.D. 166; 59 L.J.Q.B. 74; 61 L.T. 731;
54 J.P. 295; 38 W.R. 331; 6 T.L.R. 75]

Infant—Contract—Void contract—Infant's right to recover money paid—Goods used or consumed—Infants' Relief Act, 1874 (37 & 38 Vict., c. 62), s. 1.

C

By s. 1 of the Infants' Relief Act, 1874: "All contracts . . . entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void."

An infant who has consumed or used goods for which he has paid money under a contract which is void under s. 1 of the Infants' Relief Act, 1874, cannot recover the money so paid.

D

The plaintiff, an infant, entered into an agreement with the defendant to become tenant of a restaurant and agreed to purchase certain fixtures and furniture. He entered into possession, paid for the fixtures and furniture, and gave the defendant a promissory note for the balance. The plaintiff used the premises for some time before leaving. The contract being void under the Infants' Relief Act, 1874, the plaintiff claimed that the part of the purchase money paid by him to the defendant should be repaid to him.

E

Held: as the plaintiff had had the use of the premises and furniture for some time without payment he was unable to place the defendant in the same position in which he had been before the agreement, and, therefore, could not recover the purchase money paid by him.

Notes. Applied: *Pearce v. Brain*, [1929] All E.R.Rep. 627. Referred to: *Stocks v. Wilson* (1913), 108 L.T. 834.

F

As to infants' capacity in contract, see 21 HALSBURY'S LAWS (3rd Edn.) 138 et seq.; and for cases see 28 DIGEST (Repl.) 507, 508. For the Infants' Relief Act, 1874, see 12 HALSBURY'S STATUTES (2nd Edn.) 940 et seq.

Cases referred to in argument:

G

Holmes v. Blogg (1818), 8 Taunt. 508; 2 Moore, C.P. 552; 129 E.R. 481; 28 Digest (Repl.) 508, 211.

Wilson v. Kearse (1800), Peake, Add. Cas. 196; 28 Digest (Repl.) 508, 210.

Thornton v. Illingworth (1824), 2 B. & C. 824; 4 Dow. & Ry.K.B. 545; 2 L.J.Q.S.K.B. 175; 107 E.R. 589; 32 Digest 356, 387.

Coxhead v. Mullis (1878), 3 C.P.D. 439; 47 L.J.Q.B. 761; 39 L.T. 349; 42 J.P. 808; 27 W.R. 136; 28 Digest (Repl.) 504, 200.

H

Corpe v. Overton (1833), 10 Bing. 252; 3 Moo. & S. 738; 3 L.J.C.P. 24; 131 E.R. 901; 28 Digest (Repl.) 508, 216.

Everett v. Wilkins (1874), 29 L.T. 846; 28 Digest (Repl.) 508, 213.

Appeal from a decision of the judge of Woolwich County Court.

I

The plaintiff, who was born on June 5, 1869, and was, therefore, an infant at the time of the transaction, entered into an agreement, on Aug. 15, 1888, with the defendant to take from him a restaurant situate at Artillery Place, Woolwich, from the date of the agreement until June 21, 1889, at a yearly rent of £32, payable quarterly. The plaintiff agreed to refund to the defendant all sums which should be paid by him for rates and taxes in respect of the premises after the date of the said agreement, and also to purchase from the defendant the fixtures and furniture of the shop according to a list of prices annexed to the agreement, and amounting in the whole to £102 6s. 9d. The plaintiff entered into possession, paid £68 15s. in respect of the purchase money for the fixtures and furniture, and gave the defendant his promissory note for the balance. In September, 1888, the plaintiff

paid the rent accrued since he had taken possession, but was in default in the following December, when the defendant distrained. After the distress the beds and bedding and some gas fixtures remained on the premises. In January, 1889, the plaintiff left the premises, and commenced proceedings in the Chancery Division, in which he claimed (i) that the agreement should be set aside; (ii) that the promissory note should be delivered up to be cancelled; (iii) repayment of that part of the purchase money which had already been paid by him. The action was ordered to be remitted to the county court. The county court judge found that there had been no misrepresentation by the defendant as to the nature of the business, and refused to order repayment of the sum of £68 15s., but gave judgment for the plaintiff on the two first heads of his claim. The plaintiff appealed.

By s. 1 of the Infants' Relief Act, 1874:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

J. R. Paget for the plaintiff.

H. A. Forman, for the defendant, was not called on to argue.

LORD COLERIDGE, C.J.—I think that the decision of the learned county court judge is correct in this case. The plaintiff was an infant when he entered into this so-called contract under which he made certain payments and gave his promissory note for the balance of the purchase money. He satisfied the county court judge that he was an infant both at the time of the contract and at the date of the action, and the learned judge very properly declared the contract to be null and void under the statute, and ordered that the promissory note should be delivered up to be cancelled. He declined, however, to order repayment by the defendant of the money paid by the plaintiff in pursuance of this void agreement, under which the plaintiff had used and enjoyed the goods of the defendant during the space of five months.

The learned counsel for the plaintiff has relied upon s. 1 of the Infants' Relief Act, 1874. Let us examine this Act of Parliament. The words of the section no doubt are very strong:

"All contracts whether by specialty or simple contract henceforth entered into by infants for the repayment of money lent, or to be lent, or for goods supplied . . . shall be absolutely void."

But these words must be construed so as to give a sensible and reasonable construction to the Act which was passed for the purpose of protecting young people. It is obvious that if the plaintiff's construction of the section be the correct one there are many cases in which it would give rise to the grossest violations of natural justice. I think that the old rule of law on this point was just, and that it has not been altered by the Act. That rule was that where an infant had received something for which he had given consideration, if he was unable to return that for which the consideration had passed he could not recover the consideration. In other words, he was not to be allowed to recover money paid for what he had consumed or used.

In the present case the plaintiff has had the use of a quantity of furniture and other goods for five months; he has paid for these things, and the learned county court judge, as the transaction was a fair one, free from any taint of fraud or misrepresentation, has declined to order the repayment of the money thus paid, because the plaintiff was unable to replace the defendant in the same position as if there

A had been no such transaction. That decision is in accordance with cases decided before the passing of the Infants' Relief Act, 1874, the principle of which, in my opinion, that statute was not intended to affect.

BOWEN, L.J., concurred.

Appeal dismissed.

B Solicitors: *A. P. Jackson; A. W. Stone.*

[*Reported by A. H. LEFROY, Esq., Barrister-at-Law.*]

C

MICKLETHWAIT v. NEWLAY BRIDGE CO., LTD.

D [COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), July 22, 1886]

[Reported 33 Ch.D. 133; 55 L.T. 336; 51 J.P. 132; 2 T.L.R. 844]

Highway—Ownership of soil—River—Ownership of bed—Adjoining landowner—Presumption of ownership ad medium filum—Rebuttal—Onus of proof.

E On the grant of land adjoining a highway or a non-navigable river, one half of the soil of the road or of the bed of the river is presumed to pass, unless there is something in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption. This rule is applicable, although the measurement of the property granted can be satisfied without including the half of the road or the half of the bed of the river, and although the property be described as bounded by the river or road, and notwithstanding that the map or plan referred to in the deed of grant does not in the coloured portion (dealt with by the conveyance) include such moiety of the road or river.

F Per COTTON, L.J.: One may look at the surrounding circumstances, but only to see whether there were known to both parties facts existing at the time of the conveyance which showed that it was the intention of the vendor to do something as regards the half of the road or the half of the bed of the river which rendered it necessary that he should retain in himself the soil which would otherwise pass to the purchaser of the piece of land abutting on the river or road. It is not sufficient that circumstances which afterwards occur show that it is very injurious to the grantor that the conveyance should include half the bed of the river or half the soil of the road.

G Per LINDLEY, L.J.: The burden lies on the grantor to prove the existence of circumstances which take the case out of the rule.

I **Notes.** Applied: *Pryor v. Petre*, [1894] 2 Ch. 11. Distinguished: *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. Applied: *Re White's Charities, Charity Comrs. v. London Corpn.*, [1898] 1 Ch. 659; *London City Land Tax Comrs. v. Central London Rail. Co.*, [1913] A.C. 364; *Thames Conservators v. Kent*, [1918] 2 K.B. 272. Referred to: *Devonshire v. Pattinson* (1887), 20 Q.B.D. 263; *Haynes v. King*, [1893] 3 Ch. 439; *Mellor v. Walmesley*, [1905] 2 Ch. 164.

As to the ownership of an adjoining owner of half the soil of a highway and half the bed of a river, see 19 HALSBURY'S LAWS (3rd Edn.) 65, 66, and *ibid.* vol. 39, pp. 510–512. For cases see 26 DIGEST (Repl.) 333–337, 44 DIGEST 90–93.

Cases referred to:

(1) *Lord v. Sydney Comrs.* (1859), 12 Moo.P.C.C. 473; 33 L.T.O.S. 1; 7 W.R. 267; 14 E.R. 991, P.C.; 44 Digest 13, 52.

- (2) *Berridge v. Ward* (1861), 10 C.B.N.S. 400; 30 L.J.C.P. 218; 25 J.P. 695; 7 Jur.N.S. 876; 142 E.R. 507; 26 Digest (Repl.) 336, 555.
- (3) *Leigh v. Jack* (1879), 5 Ex.D. 264; 49 L.J.Q.B. 220; 42 L.T. 463; 44 J.P. 488; 28 W.R. 452, C.A.; 26 Digest (Repl.) 336, 553.
- (4) *Dwyer v. Rich* (1871), I.R. 6 C.L. 144; 26 Digest (Repl.) 337, *203.
- (5) *Beckett v. Leeds Corpn.* (1872), 7 Ch. App. 421; 26 L.T. 375; 36 J.P. 596; 20 W.R. 454, L.JJ.; 26 Digest (Repl.) 336, 556.
- (6) *Marquis of Salisbury v. Great Northern Rail. Co.* (1858), 5 C.B.N.S. 174; 28 L.J.C.P. 40; 32 L.T.O.S. 175; 23 J.P. 22; 5 Jur.N.S. 70; 7 W.R. 75; 141 E.R. 69; 26 Digest (Repl.) 334, 519.

Also referred to in argument:

Newson v. Pender (1884), 27 Ch.D. 43; 52 L.T. 9; 33 W.R. 243, C.A.; 28 Digest (Repl.) 759, 145.

Plumstead Board of Works v. British Land Co. (1875), L.R. 10 Q.B. 203; 44 L.J.Q.B. 38; 32 L.T. 94; 39 J.P. 376; 23 W.R. 634, Ex. Ch.; 26 Digest (Repl.) 561, 2279.

Appeal by the defendants from an order of BACON, V.-C., granting the plaintiffs an interlocutory injunction restraining the defendants from erecting a bridge.

By an indenture of conveyance dated Mar. 7, 1854, and made between John Micklethwait, of the first part, Joseph Lowden, of the second part, and George Lucas, of the third part, reciting that Micklethwait, being seised in fee of the hereditaments therein conveyed, did, by a lease dated Sept. 4, 1852, demise all that piece of land at Newlay, containing 6,194 square yards, and bounded by the new line of road from the Leeds and Bradford Railway to the iron bridge over the river Aire, called New Laiths Bridge, on the west, by other land of Micklethwait's, on the east or north-east, by the river Aire on or towards the north, and by an intended road twenty-four feet in width, running parallel to the road leading from St. Helen's Mill to the said new line of road on or towards the south; and also certain dye works, cottages, and buildings thereon, with the appurtenances, for twenty-one years, at the rent and under the covenants therein mentioned; and that it was thereby covenanted that, if Lowden during the continuance of the demise should be desirous to purchase the demised premises, he should take and become the purchaser thereof at the sum of £1,359 15s., and that on payment of the purchase money the premises should be conveyed to Lowden, and that, if Lowden should be desirous of purchasing any quantity of the land adjoining to the east or north-east boundary of the demised premises not exceeding an acre in quantity, and to be severed or divided from the estate of Micklethwait by a line running parallel to the east or north-east boundary, Lowden should become the purchaser of and entitled to a conveyance of the same after the rate of £800; and reciting that Lowden, being desirous, in pursuance of the power for that purpose contained in the lease, of purchasing the demised premises, and also of purchasing additional quantities of land adjoining the south and east boundaries of the same, Micklethwait had agreed with Lowden for the sale to him of the hereditaments thereafter described (subject as thereafter mentioned) at the price of £1,623 15s. 11d.; it was witnessed that, in pursuance of the said agreement, and in consideration of that sum, Micklethwait conveyed to Lowden and his heirs

"All that piece or parcel of land of an irregular shape, being part and parcel of a certain close of land called 'the Upper Brigg Flatt,' as the same part or parcel is now staked out and divided from the adjoining lands of the said John Micklethwait, situate at Newlay, in the township of Bromley, in the parish of Leeds, in the county of York, containing by admeasurement on the westerly side thereof 404 feet, on the easterly or north-easterly side thereof 291 feet and 6 inches, on the westerly side thereof 330 feet, and on the southerly end thereof 140 feet, and admeasuring in the whole 7,752 square yards or thereabouts, be the same more or less, and bounded on or towards the west by a new road leading from the Leeds and Bradford Railway to the iron bridge sometime

- A** since erected by John Pollard, Esq., deceased, over the river Aire, called New Laiths Bridge, at Newlay aforesaid, on or towards the east or north-east by other land belonging to the said John Micklethwait, on or towards the north by the river Aire, and on or towards the south by a new road twenty-four feet in width, running parallel to the road leading from St. Helen's Mill to the before-mentioned new road; and also all those dye works [etc.], which said
- B** parcel of land with the dye works, cottages, and buildings thereon, are more particularly delineated and described in the plan drawn on the second skin of these presents, and therein coloured pink, together with all and singular houses, outhouses, ways, roads, paths, passages, waters, water-courses, wells, drains, fences, rights, liberties, easements, profits, privileges, advantages, and appurtenances whatever to the said land, dye works, buildings, and hereditaments expressed to be hereby conveyed, or any part thereof heretofore usually
- C** held, occupied, or enjoyed (and particularly a right of road, way, and passage for the said Joseph Lowden, his executors, administrators, and assigns, and his and their servants, agents, workmen, customers, and others having occasion, in going to or from the said hereditaments expressed to be hereby conveyed, to pass and repass with or without horses, etc., to or from the said iron
- D** bridge called New Laiths Bridge, on payment of the usual and accustomed tolls heretofore paid in respect thereof to the said John Micklethwait, his heirs and assigns)."

The deed also conveyed a right of way from the land conveyed over the new road on the west side, and over the new road on the south side. The habendum was to dower uses in favour of Lowden, after which came several exceptions and reservations, including the following :

- E**
- "And also saving, excepting, and reserving unto the said John Micklethwait, his heirs and assigns, the right and privilege, with or without workmen, agents and others, horses and carts, and with all suitable and requisite materials and implements, of entering from time to time into and upon the said hereditaments and premises expressed to be hereby conveyed, or any part thereof, for
- F** the purpose of renewing, altering, repairing, and amending the said new bridge, called New Laiths Bridge, and the toll-houses and buildings thereto adjoining, he and they and his and their servants doing as little damage as may be, and paying unto the said Joseph Lowden, his executors, administrators, and assigns, reasonable compensation for all such damage as may be thereby done or occasioned."

- G** The deed contained a proviso that nothing therein contained should affect, prejudice, or interfere with any right of Micklethwait, his heirs and assigns, then existing, to take rent or toll in respect of and as a compensation for persons, horses, etc., passing along the land, road, or way of Micklethwait leading to and from the Leeds and Bradford turnpike-road near to the Acorn inn, through Newlay, and
- H** into and from the township of Horsforth, and over the iron bridge. In the plan on the deed the land was coloured red up to the roads on the east and south-west, and up to the river, which was edged with blue. The land conveyed by the deed of 1854 was afterwards sold to the Midland Rail. Co. The approach to the iron bridge was by the road on the west of the property. On the north bank of the river, and bounded by it on the south, was a piece of land belonging to the trustees
- I** of Lady Cardigan.

The defendant company proposed, with the consent of the railway company and Lady Cardigan's trustees, to erect a free foot-bridge across the river from the land of the railway company to that of Lady Cardigan's trustees; and this action was brought by John Micklethwait's successor in title against the bridge company and their directors to restrain the erection of the proposed bridge. The plaintiffs raised four objections to the bridge: (i) That the erection of the proposed bridge and its approaches would interfere with the right of entry, reserved by the conveyance to Lowden, for the purpose of repairing the iron bridge; (ii) that the use of the

new bridge would interfere with the plaintiffs' right to take toll, and would be a breach of the provision in the conveyance that nothing therein contained should interfere with the rights of the grantor, his heirs and assigns, to take tolls for the use of the old bridge; (iii) that the moiety of the bed of the river adjoining the land which belonged to the grantor, did not pass by the conveyance, but remained in him, and consequently now belonged to the plaintiffs, and that the erection of the new bridge would be a trespass on their property; (iv) that the northern approach to the proposed bridge would open on a lane called Fleeta Lane, which the defendants said was a public thoroughfare, while the plaintiffs said that it was not but that it partly belonged to them, and that persons crossing the new bridge would probably trespass on the plaintiffs' property by passing along Fleeta Lane, to or from the bridge. BACON, V.-C., granted an interlocutory injunction to restrain the erection of the new foot-bridge, and from this order the defendants appealed.

Macnaghten, Q.C., and *W. P. Beale* for the defendant company.

Byrne for the directors.

Marten, Q.C., *Romer, Q.C.*, and *E. S. Ford* for the plaintiffs.

COTTON, L.J.—This is an appeal by the defendants from an order made by BACON, V.-C., granting an injunction restraining both the company and the directors of the company from erecting a bridge, and also from committing a trespass on a road claimed to belong to the plaintiffs, on which the northern approach to the defendants' bridge would abut, by opening a way on to it for the purpose of that approach.

The principal question in dispute is that relating to the construction of the bridge, and that was the main point of interest to the plaintiffs, because they have a bridge close to the place on which it is intended to put the bridge of the defendants. The plaintiffs charge a toll both for foot passengers, and, I suppose, for carts, which pass over their bridge, but the bridge to be erected by the defendants is to be a free bridge. Four points were urged on behalf of the plaintiffs. The first point was, and the Vice-Chancellor decided, that a portion of the bed of the river which adjoins the land of the defendants (the other half of the river belonging to Lady Cardigan's trustees) belonged to the plaintiffs and was vested in them, and, therefore, that putting the bridge over that portion of the river was an act of trespass. That turns on the true construction and effect of the conveyance of Mar. 7, 1854. Up to the date of that conveyance the plaintiffs, or their predecessors in title, were the owners of the land comprised in it, and of part of the land lying opposite to it on the other side of the river. They had a good deal of other property in the neighbourhood, and in that year they made a grant or conveyance to Joseph Lowden, who was the predecessor in title of the defendants. That conveyance followed up a lease which had been previously granted to Lowden, and which gave the lessee an option to buy the land which was comprised in the lease and certain additional land. One great point made on behalf of the plaintiffs was that the lease specifically described the quantity of land to be bought, which was not to be more than an acre, and gave the price very definitely. The property conveyed was described in the conveyance, and shown in the annexed plan, as bounded on the west by a new road leading to the plaintiffs' bridge. The defendants propose to put their bridge a little to the eastward of the bridge of the plaintiffs, but with an approach starting from the new road and made upon the land of the defendants, and then the new bridge is to cross the river to the land of the Cardigan trustees.

There is no doubt that the piece of land conveyed to the defendants' predecessor, Lowden, did comprise the bank of the river at the spot in question. The conveyance (which is a conveyance of what was demised by the lease) comprises the land specified and marked out by metes and bounds, but it described it as bounded on the north by this river, and then there are large general words. I do not myself place reliance on those general words, but they are certainly as wide as the general

A words which had been used in one of the cases cited to us, and on which reliance was placed. The question is whether this conveyance of a piece of land described by quantity of yards, and as being bounded on the north by the river, does carry with it, as part of that which was conveyed, the right to the soil *ad medium filum aquæ*.

B In my opinion, the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, there, on the true construction of the instrument, the half of the bed of the river or of the road passes, unless there is sufficient in the surrounding circumstances, or in the expressions in the instrument, to show that that was not the intention of the parties. It is a presumption only that the words do include, not only the land so described by metes and bounds, but also half of that by which it is said to be bounded—half the soil of the road, or the public thoroughfare, or half the bed of the river—and that presumption may be rebutted. One may look at the surrounding circumstances, but only to see whether there were, known to both parties, facts existing at the time of the conveyance which showed that it was the intention of the vendor to do something as regards the half of the road or the half of the bed of the river which rendered it necessary that he should retain in himself the soil which would otherwise pass to the purchaser of the piece of land abutting on the river or the road. There may be many circumstances, whether appearing on the face of the conveyance or otherwise, which show that it was not the intention of the parties that the general presumption should apply. It is not sufficient that circumstances which afterwards occur show that it is very injurious to the grantor that the conveyance should include half the bed of the river or half the soil of the road. Circumstances may arise which show how prejudicial such a construction is to the vendors, and it may be that, if the vendor and purchaser had thought of those circumstances, or the possibility of those circumstances, they might have introduced into the conveyance words which would have shown that the soil was not to pass; but the mere fact that, if the vendor had been prudent, or if he had known that what would hereafter arise would render it to his disadvantage that the soil of half of the river should pass, in my opinion, is not a circumstance which prevents the presumption from arising.

Before considering the circumstances of the case I will refer to one or two of the cases cited to show that what I have said is really a correct statement of the law. I think the authorities show that conclusively. In *Lord v. Sydney Comrs.* (1) there was a grant from the Crown of a piece of land described as bounded on one side by a creek, and it was held that, even as against the Crown, the grant must be taken to pass the soil of the creek up to the middle. *Berridge v. Ward* (2) is a very important case indeed, because there the map annexed to the conveyance coloured the land down to the edge, but did not include any portion of the highway, one half of which was nevertheless held to pass by the conveyance. That case lays down the rule as to presumptions generally, and is a very strong instance of its application.

H *Leigh v. Jack* (3) was referred to, in which the Court of Appeal held that the rule did not apply. That case is an illustration of the circumstances which may show that the presumption is not intended to apply to the particular conveyance. There the property was laid out for building, and there was an intended road which I adjoined and bounded the plot which was conveyed to one of the parties. It was obviously necessary that the vendor should retain the soil of that intended road in order that he might make it into a road and then dedicate it to the public. This object was shown by the conveyance, which described the road as an intended road, and the purchaser must have known that no part of it was intended to pass. That is really the explanation of these cases. It was urged by counsel for the plaintiffs that the rule could only have arisen from its being useless to a vendor when parting with his property to retain an adjoining strip of land forming half of the bed of the river or half of the soil of the road. I think very likely that this was the origin

of the rule; but, when a rule is once established as a rule of construction, we are not enabled to depart from it merely because it is shown it might be, for some purposes, of interest to the vendor to retain half of the bed. If he was, at the time, known to himself and known to the purchaser, to be about to do something which rendered it necessary for him to have the ownership of half the bed, that rebuts the presumption; but the mere fact that it now appears that the bit of road would be of use to him, though he had no intention at the time of the purchase of doing anything which would require it to be in him, in my opinion does not enable us to depart from the rule. There is nothing in the circumstances which occurred in the present case to rebut the presumption, because at the time when this conveyance was executed nobody was wishing to make another bridge across the river. It was not anybody's interest to do it, apparently, till the railway company, or somebody for them, got the piece of land and wanted a toll-less bridge opened to their railway, and then it could not have been done unless the Cardigan trustees, who were the owners of the other half of the bed, had been willing that they should build the bridge. At the time of the conveyance nothing was contemplated by the plaintiffs' predecessors which would render it necessary for them to retain half the bed of the river.

What is there in the language of the deed to help the plaintiffs? In my opinion, there is nothing. It was urged that they ought to have the soil of this portion of the river in order that they might repair the bridge; but they carefully provided by the conveyance that they should have a right of way over whatever passes by the conveyance, in order that they might repair the bridge; and, although they have stipulated that nothing in the deed shall interfere with their taking tolls, they have not inserted in the deed any prohibition against the erection of a bridge. If it had been contemplated then that they should have this piece of land in order to prevent another bridge being erected, they would have put in some provision to show that another bridge was not to be made. I am not for one moment saying that it is shown that the parties intended that the half bed should pass; but no contrary intention is expressed or made manifest in such a way as to exclude the presumption. In my opinion, therefore, the presumption must apply, and this deed must be held to pass, not only that which is described and coloured, but the adjoining half of the soil of the river.

It is said that this is a very extraordinary result, because the half bed is a third or a fourth of the whole quantity of land, and the purchasers will get it for nothing. The price was really paid for that part of the land which was not covered by water; that which was covered by water was not available for what was then in contemplation, and it does not seem to have been intended that any price should be given for it. In fact, it was not within the contemplation of the parties then that anything was going to be done on this strip of soil. And although it does add considerably to what vests in the purchasers, it must be remembered that it is vested in them subject to all the rights of upper and lower riparian proprietors, which render the value of the soil of a stream like this unimportant unless some such extraordinary case as this arises, when the value simply depends on the fact that the purchaser wishes to erect a bridge and the vendor wishes to prevent him, and also on the concurrence of the owner of the moiety of the bed of the river opposite to that about which the question arises. The Vice-Chancellor seems to have considered that it was an admitted fact that half of the bed of the river belonged to the plaintiffs; and if that had been so, I should have agreed with him that an injunction should be granted; but I take a different view of the facts, and, in my opinion, the erection of the bridge cannot be prevented on the ground that the half bed of the river adjoining the defendants' land belongs to the plaintiffs.

There were some covenants in the deed on which reliance was placed by the plaintiffs. The bridge of the plaintiffs might want repair, and in the conveyance to Lowden there was a reservation to the plaintiffs' predecessors of a right and privilege

- A "with or without workmen, agents, and others, horses and carts, and with all suitable and requisite materials and implements, of entering from time to time into and upon the said hereditaments and premises expressed to be hereby conveyed, or any part thereof, for the purpose of renewing, altering, repairing, and amending the said iron bridge."
- B The plaintiffs said that the approach to this proposed or intended bridge on land conveyed by the plaintiffs to Lowden—was of such a character that it would interfere with that right of way. As far as one understood the plaintiffs' argument, it would lead to this, that nothing whatever could be done on this land which would in any way prevent a right of way over the whole of it. That is wrong. In my opinion, all that this reservation will give the plaintiffs is a right to require that there shall be a reasonable access left to the bridge, and that the defendants must
- C not entirely obstruct the way.

The access to the new bridge is on pillars, which stand apart at a distance of thirteen feet. In the interval between the pillars nearest the river Aire there is now not a very great headway, because there is some rubbish under it, but when that rubbish is removed there will be a headway of from nine to ten feet. In my

D opinion, it cannot be said that, while there is that headway and that width left, reasonable access is not left by the defendants to the plaintiffs for the repair of this bridge; but the defendants must not assume that they can by their operations so encumber the land as to prevent the plaintiffs from having a reasonable access to the bridge for these purposes.

Then it is said that what the defendants are doing is a breach of the proviso at the end of the deed that

- E "nothing in these presents contained shall affect, prejudice, or interfere with any right of the said John Micklethwait, his heirs and assigns, at present existing, to take rent or toll in respect of and as compensation for all or any person or persons, horses and other animals, carts and other carriages, having occasion to pass and repass on, over, and along the said bridge."
- F It is said that the erection of this new toll-less bridge will take away the passengers, and, therefore, deprive the plaintiffs of their tolls; but it does not in any way affect, prejudice, or interfere with their right to take tolls. That is a very different thing. I think this clause was meant to provide, *ex abundanti cautela*, that the provision with reference to the passing of the bridge by Lowden should not be construed as
- G in any way interfering with the right to take tolls and regulate the tolls as the plaintiffs' predecessors thought fit. But what is being done, even if it does, within the meaning of this clause, interfere with or prejudice the right to take tolls, is not something contained in these presents, but something outside the deed. The defendants propose to do that which is not in any way prevented by the provisions of the deed. In my opinion, it would be wrong to say that, if the building of the bridge does prejudice or affect the right, there is anything contained in the deed
- H to prevent it.

The plaintiffs also allege an intention on the part of the defendants to commit a trespass by making an opening on Fleeta Lane. But, as far as I can see at present from the evidence, the plaintiffs do not make out such a *prima facie* case as to justify our interfering by interlocutory injunction before the case can be tried at the hearing; and there is not such great loss or damage to the plaintiffs at present, even if they should ultimately turn out to be right, as to bring it within the principle that, when that is the case, and the right is not clearly established one way or another, we ought to interfere by an interlocutory injunction. In my opinion, that point fails, and the injunction should be discharged.

LINDLEY, L.J.—I am of the same opinion. **BACON, V.-C.**, has by the order which he has made restrained the defendants from doing four things. In the first place, he has restrained them

"from interfering with or obstructing the rights of the plaintiffs of entering from time to time upon the hereditaments comprised [in the conveyance of 1854], for the purpose of renewing, altering, repairing, and amending the bridge called Newlay Bridge crossing the river Aire."

With reference to that point, it is material to consider what rights the plaintiffs have reserved to themselves by that deed of conveyance. They are rights of entering upon the land for the purpose of repairing their bridge. They have reserved rights of that description by words which I need not stop to read, but the true interpretation of which appears to me to be that the plaintiffs have reserved to themselves, not a right to go anywhere and everywhere over the land for the purpose of repairing their bridge—the clause must receive a reasonable construction—but a reasonable right of access to their bridge over the land for the purpose of repairing that bridge. If there was any evidence that the defendants were in any way infringing or obstructing the plaintiffs in the exercise of that right, this part of the injunction would be right; but in point of fact there is not at this moment any necessity for obtaining access to the bridge for repairs at all, and there is no evidence whatever that the defendants are about to do anything which will permanently obstruct that access. The utmost extent to which the evidence goes is that there is some rubbish under one of the arches of the bridge, which rubbish, so long as it is there, leaves scarcely sufficient headway for reasonable access to the bridge. But that rubbish will not remain there permanently. There is no evidence to show that the defendants intend permanently to obstruct the plaintiffs in their right of access for the purpose of repairing. It appears to me, therefore, that this part of the injunction cannot be sustained.

The second thing which the Vice-Chancellor has restrained the defendants from doing is from interfering with or obstructing the rights of the plaintiffs to take toll in respect of any person passing and re-passing along any part of the road of the plaintiffs over the bridge. The predecessors in title of the plaintiffs, by their deed of conveyance, granted to the purchaser and persons claiming under him a right to use this iron bridge on paying the tolls theretofore taken. There was also a grant to the same persons of a right to use a new road leading to the bridge. Then there is, at the end of the conveyance, a proviso preserving the plaintiffs' right to take the tolls. Let us see what the plaintiffs' right is in that respect, and how far the defendants are infringing it or will infringe it. The plaintiffs' right is not to insist that people should go over their bridge. Their right to toll, as it is called, is simply that, being the owners of that bridge, they can prevent anybody from going over it except on such terms as he can arrange with them. They are not like the owner of a ferry or of a bridge having a monopoly. People are not bound to go over the bridge at all. They may ferry across if they can get access. The plaintiffs' right is simply to say to people who want to go over the bridge: "You shall not cross except on our terms, because the land is ours." How far are the defendants infringing those rights? It appears to me that they are not infringing them in the slightest degree, assuming, as I do for the present purpose, that the defendants will erect a free bridge, which will practically divert a great part of the traffic from the plaintiffs' bridge. If the plaintiffs had a right to have that traffic, if they had a right to exclude people from crossing the river except by this bridge, then the defendants would, in my judgment, be interfering with the plaintiffs' right to toll; but with such right to tolls as the plaintiffs have the defendants are in no way interfering. That part of the injunction appears to me, therefore, to be utterly unsupportable.

The third thing which the Vice-Chancellor has restrained the defendants from doing is

"from erecting or causing, or permitting to be erected, or to remain, any bridge or other building, chain, wire, or other obstruction upon or over the bed of the said river extending along the boundary of the hereditaments comprised in the indenture of Mar. 7, 1854."

A It appears to me that this part of the injunction can only be supported upon the ground that the plaintiffs are the owners of a portion of that part of the bed of the river over which the defendants' bridge will stand. If they were—and the Vice-Chancellor evidently thought they were—then this part of the injunction would be a matter of course, for the defendants in that state of things would be infringing the rights of the plaintiffs, and of course the plaintiffs would be entitled to restrain them from so doing. But the question is whether the plaintiffs are or are not the owners of the southern half of the bed of this river. That depends upon the true construction of the deed of conveyance; and in order to determine what is the true construction of that deed, we must look at the terms of it, and at those circumstances which are legitimate evidence for the purpose of construing it, such as the position of the property, and the circumstances in which the deed was executed, and so on.

C It is obvious to anybody who looks at the deed that there is nothing on the face of it which shows an intention to reserve to the grantor any portion of the bed of this river. The grant is of land delineated in a plan, therein coloured pink, and described by quantity, and as abutting on the north on the river Aire, and neither the colouring on the plan nor the quantity named includes the half bed of the river. When we come to apply the ordinary and well-settled rules of law to that conveyance we find it settled by authority which it is impossible for us to ignore or overrule, that those circumstances as to colouring and quantity do not alone prevent a moiety of the bed of the river from passing. The earliest authority, which I have found by turning to Mr. ELPHINSTONE'S very useful book on the INTERPRETATION OF DEEDS, is a passage in ROLLE'S ABRIDGEMENT (Grant P. pl. 6):

E “Si home grant un message vocatum Falstolfe Place prout undequē includitur aquis; per ceux parolles le soile d'el motes en que le ewe est passera (P. 9 Car. B.R. Enter *Stint v. Morgan*, per curiam resolve sur un trial al barr).”

F From that time down to this the rule has been laid down and acted upon as an ordinary rule of conveyancing and a well-settled law of real property. It has been expressed in various ways by the courts when necessity has arisen to discuss it, and nowhere that I know of better than in *Berridge v. Ward* (2) and *Dwyer v. Rich* (4). Other cases at which I have looked are collected by Mr. ELPHINSTONE, but I think it is needless to refer to them, because they all go one way, and they all show that by such a conveyance as we have to deal with here half of the bed of the river passes to the grantee unless circumstances can be shown which will exclude the application of that rule. The burden lies on the grantor or his successors in title to show those circumstances, and it appears to me that in this case the plaintiffs, as such successors, entirely fail to show any circumstances sufficient to exclude the operation of the general rule. In certain reported cases, to which our attention has been called, the circumstances have been held sufficient. One was the case of the market place at Leeds: *Beckett v. Leeds Corpn.* (5). There was also *Marquis of Salisbury v. Great Northern Rail. Co.* (6), where the road was described in a map with a separate number, and it was quite obvious, when you looked at it, that it was not intended to pass. Then there was *Leigh v. Jack* (3), a case about the dedication of an intended highway, where, as it was pointed out by CORROD, L.J., in his judgment, it would have defeated the intention of both parties if it had been held to pass.

I If the grantor could show in this case any such circumstances, the rule would be excluded, but it is for him to show circumstances sufficient to exclude it, and it appears to me that there are no circumstances here which are sufficient for the purpose. What are the circumstances on which the plaintiffs rely? They rely on their ownership of the bridge, on the fact that the grantor was the owner of the opposite bank of the river, upon the absence of any intention to pass half of the bed of the river, and on the colouring of the map and the quantities. I have considered those circumstances by the light of the authorities, and it appears to me

that, whether you take them separately or in combination, they are not sufficient for the purpose, for one cannot help seeing perfectly well that this point about the bed of the river never occurred to either party. It did not appear to either of them to be of the slightest importance. There was no intention, therefore, to exclude the operation of the general rule, and the general rule applies because it was not intended to exclude it. That the grantor would have excluded it if he had seen what was going to happen is possible enough. It is probable enough that, if he had seen what was going to happen, he would have insisted on the introduction of a covenant not to set up a free bridge. But that is all pure speculation, and, in my opinion, it would be unsettling a perfectly well-known rule of real property law if we held that, upon the materials before us, half of the bed of this river did not pass to the grantee. That being the case, the foundation of the Vice-Chancellor's judgment when he granted the injunction against erecting this bridge fails altogether, and there is no other ground upon which that injunction can be supported.

Then we come to the last point. The Vice-Chancellor has restrained the defendants

“from trespassing upon or otherwise interfering with the enjoyment of the plaintiffs and their tenants of Fleeta Lane situate at Horsforth, in the county of York.”

Whether that part of the injunction can be maintained or not depends upon circumstances which possibly may hereafter be made more clear than they are now. The plaintiffs say that Fleeta Lane is their property. There is a very considerable amount of evidence to show that it is a public highway. The defendants are about to make an opening into that highway, and, the right being in dispute—and I think I may say the balance of the evidence at present being rather against the plaintiffs than in their favour—it is not a case for an injunction. It is possible that the plaintiffs may prove at the hearing that they are right, and that the defendants may find they have erected their bridge without being able to get an outlet from it, and that they have expended their money on a bridge which cannot be used, but I think there is no sufficient case made out in favour of the plaintiffs to justify the injunction on that ground. It appears to me, therefore, that the appeal must be allowed, and the injunction dissolved.

LOPES, L.J.—It is said that an injunction ought to be granted in this case, in the first place, because a moiety of the bed of the river belongs to the plaintiffs, and the defendants are trespassers in erecting a bridge over it. I take it that, if that was made out, it would be good ground for granting this injunction, and it seems to me that the Vice-Chancellor proceeded upon that ground. The matter does not seem to have been argued before him. He seems to have assumed that a moiety of the bed of the river did belong to the plaintiffs. An important question arises, with regard to this part of the case, as to the true construction of the grant to Lowden. Did a moiety of the bed of the river pass to Lowden, or did that moiety remain in the grantor? I am clearly of opinion that a moiety of the river passed to Lowden.

I do not propose to go through the authorities which have already been so fully referred to by COTTON and LINDLEY, L.JJ. I will satisfy myself by stating what I believe, after a careful examination, to be the result of those authorities. It appears to me to be this, that, if land adjoining a highway or a river is granted, the half of the road, or the half of the river, is presumed to pass, unless there is something in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurement of the property, or that which is granted, can be satisfied without including the half of the road or the half of the bed of the river, and although the land is described as bounded by a river or road, and notwithstanding that the map which is referred to in the grant does not include the

A half of the river or the road. That appears to me to be the result of the authorities, and I will shortly apply it to the present case.

In the first place, is there anything in the language of the deed to exclude this presumption? It appears to me there is nothing. There are special reservations to which reference has been made, and I rather infer from them that there was no intention of excluding the presumption, because it appears that the grantor was fully alive to his rights and what he desired to retain; but, notwithstanding that, he makes no reservation whatever with regard to the bed of the river. I think, therefore, there is nothing in the language of the deed to exclude the presumption. Then, is there anything in the nature of the subject-matter to exclude the presumption? I think not. This is a grant of a piece of land. I can see nothing in such a grant to exclude this presumption. Is there anything in the surrounding circumstances to exclude this presumption? It is said that the existence of the toll-bridge of the plaintiffs excludes the presumption, because it was valuable property which belonged to the grantor at that time, which would make it likely that he intended to reserve and keep in his hands the bed of the river. I cannot draw that conclusion. The true state of things appear to me to be, that it never occurred to the mind either of the grantor or grantee that any bridge of this kind would be ever erected; nor, indeed, could this bridge have been erected unless there had been a concurrence on the part of the Cardigan trustees. Therefore, I think, on these grounds, that this part of the case fails, and that half of the bed of the river passed to Lowden.

Then it is said that the injunction ought to be granted because there is a reservation of the right of entry to do certain repairs to the toll-bridge. That raises the question what the true construction of that reservation is. I read it as a reservation of reasonable facilities, as occasion might arise, to do the necessary repairs to the bridge—a reservation of a fairly commodious access to the bridge. According to the evidence, it appears to me that there is still, and will be after the new bridge is made, a fairly commodious access to the old bridge quite sufficient to enable any repairs to be done which may be necessary. I think, therefore, on this ground, that the claim to the injunction fails. Then another ground has been taken. It is said that when this bridge is erected foot passengers will be discharged upon certain land called Fleeta Lane, said to be the property of the plaintiffs, and that that lane will be trespassed upon. It appears to me that the plaintiffs' rights to that lane are most doubtful. I am rather inclined myself to think that the weight of the evidence before us at this time is against any private roadway, and rather in favour of its being a highway, but I desire to express no definite opinion on that. It is sufficient to say that the rights are so doubtful that it would not be right to grant an injunction on that ground. The only other matter is with regard to the proviso at the end of the deed; and I entirely agree with what has been already said with regard to that, namely, that what the defendants are doing is no infringement of the plaintiffs' rights. I think, therefore, that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Beale & Co.; Torr, Janeways & Co.; Ridsdale & Son, for Turner,*
Leeds.

[*Reported by FRANK EVANS, ESQ., Barrister-at-Law.*]

COWARD v. LARKMAN

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson and Lord FitzGerald),
June 18, 19, 21, August 7, 1888]

[Reported 60 L.T. 1; 4 T.L.R. 759]

Will—Construction—General, unlimited, and unqualified gift of income—Right of donee to absolute interest in corpus—Rebuttal of rule—Need to show clear intention—Unqualified and unlimited gift of “free use and occupation of my house”—Right of donee to house absolutely.

The rule of construction by which a general, unlimited, and unqualified gift in a will of the income of real or personal estate is held to carry an absolute interest in the corpus is established beyond dispute. The rule will yield to expressions in the will indicating a contrary intention, but such an intention should be very clearly shown to induce the court to decide that there is an intestacy.

Per LORD HALSBURY, L.C.: The effect of a provision in a will: “I desire that my said wife shall have the free use and occupation of my said house,” being unqualified and unlimited in time, was, according to the rule, to give the house to the testator’s widow absolutely.

Notes. As to the interest taken under a will, see 39 HALSBURY’S LAWS (3rd Edn.) 1080 et seq., and cases there cited.

Cases referred to:

- (1) *Heron v. Stokes* (1842), 4 I.Eq.R. 284; 1 Con. & Law. 270; 2 Dr. & War. 89; reversed (1845), 12 Cl. & Fin. 161; 9 Jur. 563; 8 E.R. 1361, H.L.; 44 Digest 1016, 8731.
- (2) *Blann v. Bell* (1852), 5 De G. & Sm. 658; 21 L.J.Ch. 811; 20 L.T.O.S. 40; 16 Jur. 1081; affirmed, 2 De G.M. & G. 775; 22 L.J.Ch. 236; 20 L.T.O.S. 162; 16 Jur. 1103; 42 E.R. 1075, L.J.J.; 44 Digest 205, 339.

Also referred to in argument:

- Page v. Leapingwell* (1812), 18 Ves. 463; 34 E.R. 392; 44 Digest 667, 5068.
R. v. Inhabitants of Easington (1791), 4 Term Rep. 177; 2 Bott, 515; 100 E.R. 959; 37 Digest 271, 667.
Elton v. Shephard (1781), 1 Bro.C.C. 532; 28 E.R. 1282; 44 Digest 667, 5066.
Philipps v. Chamberlaine (1798), 4 Ves. 51; 31 E.R. 27; 44 Digest 667, 5067.
Haig v. Swiney (1823), 1 Sim. & St. 487; 2 L.J.O.S.Ch. 26; 57 E.R. 193; 44 Digest 668, 5072.
Humphrey v. Humphrey (1851), 1 Sim.N.S. 536; 20 L.J.Ch. 425; 61 E.R. 207; 44 Digest 668, 5079.
Jenings v. Baily (1853), 17 Beav. 118; 22 L.J.Ch. 977; 21 L.T.O.S. 112; 17 Jur. 433; 51 E.R. 977; 44 Digest 668, 5081.
Watkins v. Weston (1863), 3 De G.J. & Sm. 434; 32 L.J.Ch. 609; 8 L.T. 406; 11 W.R. 408; 46 E.R. 703, L.J.J.; 44 Digest 666, 5056.
Whittome v. Lamb (1844), 12 M. & W. 813; 13 L.J.Ex. 205; 3 L.T.O.S. 104; 152 E.R. 1428; 44 Digest 960, 8134.
Rabbeth v. Squire (1859), 4 De G. & J. 406; 28 L.J.Ch. 565; 34 L.T.O.S. 40; 7 W.R. 657; 45 E.R. 157, L.C.; 44 Digest 957, 8105.

Appeal from a decision of the Court of Appeal (COTTON, BOWEN and FRY, L.J.J.), who had varied an order of KAY, J., made on an originating summons taken out to determine a question arising on the construction of the will of T. J. Coward, a solicitor, who died in September, 1886, leaving real and personal estate to the amount of about £30,000.

The testator married the appellant in 1884, and the respondent was his sole heiress-at-law and next-of-kin. The testator by his will, which was executed in March, 1884, gave a legacy of £100 to his wife, the appellant, for her present wants

A and housekeeping expenses, and appointed her sole executrix, and after several other pecuniary legacies the will proceeded as follows :

"I give, devise, and bequeath all the rents and income of all my freehold, copyhold, and leasehold properties at New Barnet, in the county of Herts, unto my wife, Ann Amelia Coward . . . I also give and bequeath to my said wife, Ann Amelia Coward, all the rents and profits of my leasehold houses in the Gordon Road, Peckham . . . I also direct that she shall be entitled to all other the income of my estate and effects, real or personal, and that any moneys which may be in my house, or in the hands of my said wife, may be invested in her name in the said three per cent. Consolidated Bank Annuities, and the interest to arise therefrom may be retained or received by my said wife as part of my income. I also declare my will to be that if any of the legatees herein-before named shall wish to purchase any trifling thing and keep the same as a memento on my account I desire that they shall be at liberty to do so. I desire to be buried in my grave, devised to me in perpetuity by the directors and owners of the Board of Woking Cemetery, and that my said wife shall be at liberty out of the proceeds of my surplus residuary estate to erect any monument to my memory which she may please, not exceeding the sum of £300. I also give and bequeath to my said wife, Ann Amelia Coward, all my household furniture, goods, and effects at Elmsleigh aforesaid for her sole and separate use. And I also desire that my said wife shall have the free use and occupation of my said house, called Elmsleigh, aforesaid. I direct that an inventory of such furniture and effects may be made and kept therewith."

E KAY, J., held that by the terms of the will the whole of the property of the testator passed absolutely to the appellant, subject to his debts and the legacies bequeathed by the will. The Court of Appeal varied that decision, and made an order declaring that the appellant was absolutely entitled to the properties at New Barnet and the houses in Gordon Road, Peckham, to the household furniture and effects in Elmsleigh, and to a life interest in that house, and in the residuary, real, and personal estate of the testator, but that, subject to such life interest, the testator had died intestate as far as Elmsleigh and his residuary, real, and personal estate were concerned.

Sir Henry Davey, Q.C., and *Vaughan Hawkins* for the appellant.
Rigby, Q.C., and *Marcy* for the respondent.

G Their Lordships took time for consideration.

Aug. 7, 1888. The following opinions were read.

H LORD HALSBURY, L.C.—The difficulty of arriving at the meaning of a testator generally arises from the fact that there is no presumption what are his intentions—no such general object as one may find in a statute or in a deed, the general object and intention of which may guide one in arriving at what was the maker's general intention, to which particular expressions or provisions may be subordinate. One is not entitled to speculate in the present case whether the framer of this extraordinary document desired his widow to be his residuary legatee and to possess his residuary estate absolutely for her own benefit, or to possess it merely as tenant for life. The duty of the court is to gather, if it can, within the four corners of that instrument, what the testator's intentions were. To do so in this case is a task of no ordinary difficulty. The Court of Appeal, differing from KAY, J., but not agreed as to the reasons among themselves (and I am not certain that either upon the reasons or in the result your Lordships are unanimous), arrived at the conclusion now under appeal.

What has been called a rule of construction has been prayed in aid. I am a little doubtful whether it is not putting it somewhat too high to describe it as a rule of construction. It is rather a translation of words, and is figuratively represented by saying that the giving of the fruit in an unqualified and absolute manner is a

perpetual gift of the tree. It seems to me a pure matter of language; that if you give income of real or personal estate, and the gift of income is absolute and unlimited, it is impossible to doubt that the corpus must be included in the gift. The testator in this case has undoubtedly given all the rents and income of his property in Hertfordshire, and in Gordon Road, Peckham. There is no qualification or limit in point of time, and it is manifest, therefore, that the appellant is absolutely entitled to the properties in question.

I think, in dealing with Elmsleigh, the testator, who has given to his widow the free use and occupation of it in words unqualified and unlimited in time, has, according to the same rule, given it to his widow absolutely. The free use and occupation of a house seems to be as much within the rule to which I have adverted as the income from an estate. Occupation is not necessarily personal, and, if not personal, I can draw no distinction between the receipt of an income and the occupation of a house. Suppose, instead of a house, it had been a field, and, in an absolute and unqualified manner, a testator had given the free use and occupation of the field, would there have been any difference between a house and a field? I am unable, unless I can gather from some other part of the same instrument that the intention was to limit the gift, to draw any distinction between an unqualified gift of occupation and an unqualified gift of income.

In dealing, however, with the question of the residuary estate a different question arises, and, if I am at liberty from other parts of the will to arrive at the conclusion that the testator did not mean that the gift of the residuary estate should be absolute and unqualified, then, notwithstanding, the use of the words to which, when unqualified, courts have attached a particular meaning, I am bound to give effect to the intention which in that case I shall decide to have been his intention. The words which, I think, in this case entitle me to come to the conclusion that the widow was not entitled to take an absolute and unqualified interest in the residuary estate are the following:

"My said wife shall be at liberty, out of the proceeds of my surplus residuary estate, to erect any monument to my memory which she may please, not exceeding £300."

It has been argued that the words may be only suggestive of what were the testator's desires in respect of the monument to his memory; or, in the alternative, that he did intend to make her believe that she was not at liberty to do as she pleased with the money which, upon the hypothesis then insisted on, would have been her own; and I do not deny that either would be a plausible view. Nevertheless, I think the safer view is that the language is only reconcilable with the notion that the wife could only, out of the proceeds of the surplus residuary estate, spend £300 for the monument by virtue of the authority thus conferred. If that was what he had supposed, that it was necessary to give the wife authority to spend this £300, it could not have been his intention to make the whole of the residuary estate her own. I have come to the conclusion, though I confess not without considerable doubt, that the appellant only takes a life interest in the residuary estate.

No construction of this instrument can be otherwise than conjectural; context, in the proper sense, there is none; no coherent scheme runs through it, and it appears to me, for the reasons I have suggested, that the judgment of the Court of Appeal ought, with the variation as to Elmsleigh, to be affirmed. If the construction of this particular will were alone in question, I am not certain that it would be very material to consider the exact effect of the words used in respect of the house Elmsleigh. One might console oneself with the reflection, even if one did not agree with the construction adopted, that a will conceived in these terms would not be very likely to recur. But I cannot help feeling that the expressions "free use and occupation" have from time to time received a judicial exposition as applied to a devise of realty, and that they are sufficient to convey an estate. It appears to me that s. 28 of the Wills Act, 1837, makes the construction that it

A shall pass the fee simple obligatory. Of course, if any of your Lordships should consider that a contrary intention appears by this will, although I am myself unable to discover it, the decision will in that case only involve the construction of this particular instrument; it will, for the reason I have suggested, involve no greater consequences than the interest of these particular litigants, and will not involve any new rule of construction.

B **LORD WATSON.**—The rule of construction by which a general and unlimited gift of the income of real or personal estate is held to carry an absolute interest in the corpus is established beyond dispute. The present case illustrates the difficulties which may sometimes attend its application.

C The will of the late Mr. Coward is a very peculiar document. First of all, he gives the appellant, his widow, who is appointed sole executrix, a legacy of £100 for her present wants and for housekeeping expenses, and to each of six other legatees the sum of £50 to be invested, in case of their disability at the time of his death, in three per cent. Consolidated Bank Annuities, and paid to them on such disability ceasing. He then bequeaths to his wife "all the rents and income" of his freehold and other properties in Hertfordshire, and also "all the rents and profits" of his leasehold houses in Gordon Road, Peckham. He next directs that

D "she shall be entitled to all other the income of my estate and effects real and personal, and that any money which may be in my house, or in the hands of my said wife, at the time of my death, may be invested in her name in the said three per cent. Consolidated Bank Annuities, and the interest to arise therefrom may be retained or received by my said wife as part of my income."

E That the appellant takes an absolute interest in the Hertfordshire and Peckham properties, by virtue of the rule of construction to which I have referred, is not controverted, because there is nothing in the context of the will which can limit the unqualified bequest of their rents, income, and profits. But the respondent, who is the testator's heiress and next-of-kin, contends that the appellant's interest in all other the income of his real and personal property is limited to an estate

F for life. If the will had contained no other provisions than those I have noticed, the bequest of all other income would have carried to the appellant the corpus as well as the income of the whole residue of the testator's real and personal estates. He proceeds, however, to indicate his wishes in regard to a place of interment, and his desire

G "that my said wife shall be at liberty, out of the proceeds of my surplus residuary estate, to erect any monument to my memory which she may please, not exceeding £300."

He then gives and bequeaths to her all his household furniture, goods, and other effects in or about his freehold dwelling-house at Croydon called Elmsleigh, and, notwithstanding the absolute terms of the gift, he directs that an inventory of such furniture and effects shall be made and kept therewith. He lastly expresses

H his desire that his wife "shall have the free use and occupation" of his said dwelling-house.

I In order to determine whether the rule of construction, which admittedly governs the bequests of the rents and profits of the properties in Hertfordshire and Peckham, must also be applied to these gifts of the income of the residue, and of the use and occupation of the house at Croydon, it is necessary to read them in connection with the whole context of the will, with the view of ascertaining whether it was the testator's intention to give his widow an interest in perpetuity or for life only. If the gifts were meant to be in perpetuity, the rule must be followed; if for life only, there is no room for its application. Such a provision as that which gives the appellant "liberty" to spend a certain amount of the residue upon the erection of a monument, tends to the inference that without such leave she would not have had the power to do so, or at least that such was the understanding and purpose of the testator. It was urged for the appellant that the provision in

question, and others which may be supposed to point in the same direction, indicate the testator's desire not to limit the interest which he had already conferred upon her in the residuary bequest of income, but to impose fetters upon that which he intended to be in all other respects an absolute interest. On the other hand, the respondent argued that the terms of the will, taken as a whole, afford sufficient indication of the testator's intention to restrict her interest in the residue, and in the Croydon house, to the income for the period of her life, and that the operation of the rule is thereby ousted.

The question thus raised for decision upon the construction of the will is one of considerable nicety. KAY, J., held, both as regards the residue and Elmsleigh, that the bequest of income and of use and occupation is unlimited, and that the appellant is therefore absolutely entitled to the whole of the real and personal estate of the testator, subject to his debts and the legacies bequeathed by the will. His judgment was varied by the Court of Appeal, consisting of COTTON, BOWEN and FRY, L.JJ., who came to the unanimous conclusion that the appellant only takes a life interest in the residuary estate and in Elmsleigh. It is settled that a gift of use and occupation passes an estate in the subject of it; but while questions have frequently arisen whether the grantee must use and occupy by himself or may do so by others, it has never been decided that the words import an unlimited gift—that is to say, a gift in perpetuity. I have come to the conclusion that in the present instance the bequest of use and occupation was not intended by the testator to be unlimited, but was meant to be strictly personal to the legatee, and I am accordingly of opinion that the interest of the appellant in the house at Croydon has been rightly declared to be limited to an estate for life.

So far as regards the residuary estate, real and personal, I am not prepared to differ from the learned judges of the Court of Appeal. According to the argument of the appellant, the instrument must be read as if it were an absolute bequest to her of the entire real and personal estate of the testator, subject only to debts and legacies. The whole frame of the will is inconsistent with that contention, and it contains various provisions, all of which point to the inference that the testator neither understood that he was giving, nor intended to give, the respondent any interest in the corpus of the residue. These indications, taken singly, would be inconclusive, but when taken together they appear to me to be sufficient to support the conclusion of the Court of Appeal. For these reasons I am of opinion that the order appealed from ought to be affirmed, with costs.

LORD FITZGERALD.—I also am of opinion that the decision of the Court of Appeal ought to be affirmed. There seems to be no disagreement about the rule referred to by KAY, J., or as stated in terms by COTTON, L.J. SIR EDWARD SUGDEN, speaking forty-six years ago (*Heron v. Stokes* (1)), gives the reason for treating a gift of the produce of a particular fund, whether it be interest or dividends, as a gift of the principal in perpetuity, because it represents the capital; and he adds (4 L. Eq. R. at p. 284):

“If I give the produce of my residuary estate to A. B., this gift of the produce represents the capital from which it is to flow.”

This passage was not necessary for SIR EDWARD SUGDEN's judgment, and I refer to it only as the opinion of a great and accurate judge. It is always, however, subject to this—“unless a contrary intention shall appear by the will.” I adopt this convenient mode of expression so often repeated through the Wills Act. KAY, J., says, with accuracy (56 L.T. at p. 279):

“The rule, as stated by PARKER, V.-C., in *Blann v. Bell* (2), affirmed on appeal, is one which will yield to expressions in the will indicating a contrary intention; such intention, however, should be very clearly shown to induce the court to decide that there is an intestacy.”

The question, then, for determination is whether the testator does indicate by his will that he did not intend that his widow was to take his residuary estate in

A perpetuity. [His LORDSHIP referred to the provisions of the will, and continued:] On the whole, I am of opinion, with your Lordships, that, on examination of the language and provisions of the will, an intention does appear contrary to that alleged by the appellant, and that the testator did not intend the bequest of the residue to give her more than a life interest in its income. The only point in the case on which I have entertained any difficulty has been on this portion of the will.

B "and I also desire that my said wife shall have the free use and occupation of my said house called Elmsleigh aforesaid. I direct that an inventory of such furniture and effects may be made and kept therewith."

I am of opinion that the testator did not intend to give that property which he earlier describes as "my own freehold private residence called Elmsleigh" to his widow absolutely. I desire to say that I express that opinion upon the peculiar context of this will only, and without intending to bind myself to any abstract propositions. The will is peculiar. BOWEN, L.J., observes, as an important matter, on the change in style when you reach what has been called the residuary clause. The will was, in fact, the produce of the mental skill of two attorneys, one of whom was the testator. He had, no doubt, the experience of age, for he was in his eighty-fourth year at the time of his marriage, and the widow swears D "directly after our marriage the testator drew a draft of his will." Some portions of the remainder of the instrument, including the residuary clause and the gift of Elmsleigh, were the composition of another solicitor. On the construction of this particular and peculiar will, and going no further, I concur in the judgment of the Court of Appeal.

Appeal dismissed.

E Solicitors: *T. Lovell; Tucker & Lake.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

F

COWPER ESSEX v. ACTON LOCAL BOARD

G [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord FitzGerald and Lord Macnaghten), February 25, 26, 28, April 8, 1889]

[*Reported 14 App. Cas. 153; 58 L.J.Q.B. 597; 38 W.R. 209; 5 T.L.R. 395; 61 L.T. 1; 53 J.P. 756*]

H *Compulsory Purchase—Compensation—Damage owing to use of land taken—Land taken not immediately contiguous to land respecting which compensation sought—Lands Clauses Consolidation Act 1845 (8 & 9 Vict., c. 18), ss. 49, 63.*

Part of land belonging to the appellant and laid out as a building estate was taken by the respondent local board for the purpose of a sewage farm under the powers of an Act incorporating the Lands Clauses Consolidation Act, 1845. I Two parcels of the land had been let on long building leases containing the usual covenants prohibiting the erection or alteration of buildings without the appellant's consent. At an inquiry under the Act into the question of compensation evidence was given that sewage works, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, were, even when so conducted, distasteful to neighbouring householders and tended to depreciate the value of building land in their vicinity. The land taken was severed from the land of the appellant in question in part by a railway and in part by other land in the appellant's possession.

Held: where part of a proprietor's land was taken from him and the future use of the part so taken might damage the remainder of his land that damage might be an injurious affecting of the proprietor's other land within s. 63 of the Act of 1845, although it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works; the fact that the land taken was not contiguous to the land of the appellant in respect of which compensation was sought, but was severed from it by the railway and other land of the appellant, did not prevent the land in respect of which compensation was sought being land held with the land to be purchased within s. 49 of the Act or "other lands" within s. 63; and therefore, the appellant was entitled to compensation for damage which would arise, not only from the construction of the works, but also from their use.

Re Stockport, Timperley, and Altringham Rail. Co. (1) (1864), 33 L.J.Q.B. 251, approved.

Notes. Considered: *Re London, Tilbury and Southend Rail. Co. & Gower's Walk School's Trustees* (1889), 24 Q.B.D. 326; *London and India Dock Co. v. North London Rail. Co.* (1903), Times, Feb. 6; *R. v. Mountford, Ex parte London United Tramways*, [1906] 2 K.B. 814. Applied: *Horton v. Colwyn Bay and Colwyn U.C.*, [1908] 1 K.B. 327. Considered: *Holditch v. Canadian Northern Ontario Rail. Co.*, [1916] 1 A.C. 536. Followed: *Rockingham Sisters of Charity v. R.*, [1922] 2 A.C. 315. Applied: *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485. Referred to: *Long Eaton Recreation Grounds v. Midland Rail. Co.* (1901), 71 L.J.K.B. 74; *R. v. Middlesex Clerk of the Peace*, [1914] 3 K.B. 259.

As to compensation under the Lands Clauses Acts where land is taken, see 10 HALSBURY'S LAWS (3rd Edn.) 148-152; and for cases see 11 DIGEST (Repl.) 140 et seq. For Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890.

Cases referred to:

- (1) *Re Stockport, Timperley and Altringham Rail. Co.* (1864), 33 L.J.Q.B. 251; 10 Jur.N.S. 614; sub nom. *R. v. Cheshire (Clerk of the Peace)*, 4 New Rep. 167; 12 W.R. 762; sub nom. *Leigh v. Stockport, Timperley and Altringham Rail. Co.*, 10 L.T. 426; 11 Digest (Repl.) 143, 226.
- (2) *R. v. Lister and Biggs* (1857), Dears. & B. 209; 26 L.J.M.C. 196; 21 J.P. 422; 3 Jur.N.S. 570; 5 W.R. 626; 7 Cox, C.C. 342, C.C.R.; 36 Digest (Repl.) 270, 230.
- (3) *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, 228.
- (4) *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, 29.
- (5) *City of Glasgow Union Rail. Co. v. Hunter* (1870), L.R. 2 Sc. & Div. 78; 34 J.P. 612, H.L.; 11 Digest (Repl.) 161, 349.
- (6) *Caledonian Rail. Co. v. Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, 276.
- (7) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 40, 205.
- (8) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 400, 608.
- (9) *Caledonian Rail. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; 46 L.T. 826; 46 J.P. 676; 30 W.R. 569, H.L.; 11 Digest (Repl.) 149, 274.

Also referred to in argument:

R. v. Sheward (1880), 9 Q.B.D. 741; 42 L.T. 363, C.A.; 11 Digest (Repl.) 222, 875.

Holt v. Gas Light and Coke Co. (1872), L.R. 7 Q.B. 728; 41 L.J.Q.B. 351; 27 L.T. 442; 37 J.P. 20; 11 Digest (Repl.) 138, 204.

- A** *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 86 Digest (Repl.) 283, 334.
London, Brighton and South Coast Rail. Co. v. Truman (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 11 Digest (Repl.) 121, 134.
B *Re Penny* (1857), 7 E. & B. 660; 26 L.J.Q.B. 225; 3 Jur.N.S. 957; 5 W.R. 612; 119 E.R. 1390; sub nom. *R. v. South-Eastern Rail. Co.*, 29 L.T.O.S. 124; 11 Digest (Repl.) 156, 310.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), reported 17 Q.B.D. 447, reversing a decision of the Divisional Court (MATHEW and DAY, JJ.), reported 14 Q.B.D. 753.

- C** The appellant was the owner of a building estate at Acton, a portion of which had been compulsorily purchased by the Acton Local Board for the purpose of turning the land they acquired into a sewage farm. The under-sheriff's jury assessed the value of the land taken at £8,737, and they also found that the plaintiff was entitled to a further sum of £4,000 for damage sustained by him by reason of the injurious affection of his other lands which were separated from the part so taken by a line of railway. The Queen's Bench Division discharged a rule for a certiorari to bring up and quash the inquisition, verdict, and judgment, but their judgment was reversed by the Court of Appeal, and the appellant appealed to the House.
- D**

Sir Horace Davey, Q.C., and *C. H. Anderson, Q.C.*, for the appellant.

Sir Richard Webster, Q.C., and *Pollard* for the respondent board.

Their Lordships took time for consideration.

- E** April 8, 1889. The following opinions were read.

LORD HALSBURY, L.C.—For some time I was doubtful whether the question mainly argued in this case properly arose, since the direction of the under-sheriff, if I were to suppose it had been acted upon by the jury, would have raised another, and, to my mind, more serious question than that upon which the respondents in this appeal insist. I should hesitate very much to affirm the proposition that a belief in imaginary injury, though in fact an existing belief and in fact affecting the marketable value of property, furnished any ground either for damages in an action or for compensation under the Lands Clauses Consolidation Act. The under-sheriff appears to have assumed that no possible injury, in the true sense of that word, could arise from the establishment of these sewage works, but that a compensation jury might award a sum of money if they came to the conclusion that a belief, however unfounded, that the sewage works would inflict injury upon the neighbourhood was established to have affected the marketable value of the land in the immediate vicinity of such sewage works. I should hesitate very much to acquiesce in such a view. But we are here discussing a question raised by the issue of a writ of certiorari, which writ, as is expressly provided by statute, can only issue where the jurisdiction has been exceeded, and if the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your Lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone because the jury may have awarded too much, nor because the under-sheriff overstated or understated the result of the evidence given.

- I** On full consideration, I think there was evidence justifying the jury in awarding something. The account of the proceedings before the under-sheriff, imperfect and fragmentary as it is, nevertheless discloses that that part of the argument directed to show that no injury would result rested upon the proposition that, if the works were not carefully and properly conducted, they could be restrained by injunction as often as any annoyance arose to the neighbourhood from the improper mode of conducting them. I think that the liability of a neighbourhood to such even occasional and exceptional annoyances is a real injury to property, and not fanciful or imaginary. It is doubtless attributed to LORD HARDWICKE that he once said

"the fears of mankind could not create a nuisance." But if LORD HARDWICKE ever did say so, it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance: see *R. v. Lister and Biggs* (2). The good sense of mankind recognises the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood, that if and when the sewage works become a nuisance in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance. I have, therefore, come to the conclusion that it was open to the jury to find that the appellant's land not taken by the local board would be injuriously affected by the construction and use of the sewage works.

With reference to the main question I have had less difficulty, since I take it that two propositions have now been conclusively established. One is that land taken under the powers of the Lands Clauses Consolidation Act, and applied to any use authorised by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works. It may seem at first sight a little strange that what is injurious affecting in one case should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use as distinguished from the construction is a particular injury suffered by the proprietor from whom some portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

It is, however, unnecessary to consider the question as if it were *res integra*, since I think that *Duke of Buccleuch v. Metropolitan Board of Works* (3) has established the proposition in such a way as to be binding upon your Lordships. I think it is impossible to explain away that case when the question expressly raised was whether the umpire had awarded damages in respect of the future use of the embankment as distinguished from its construction, and when it was admitted that he had awarded damages in respect of the use of the intended road, and your Lordships affirmed the right to make such an award. As I understand the judgment of the Court of Appeal, it proceeds upon the ground that, assuming injury in fact by the use of the sewage works, and acquiescing in the decision in *Re Stockport, Timperley, and Altringham Rail. Co.* (1), it nevertheless comes to the conclusion that the lands injuriously affected were not "other" lands of the proprietor within the meaning of the statute, because, in the view their Lordships entertained, some portion at all events of the land injuriously affected had been already severed by a railway. I am unable to concur in the construction of the statute which that argument assumes. A person lays out a building estate in which unity of design, correspondence of the lines of building, adaptation of roads, open spaces and the like, all have, or may have, relation to each other. Take the most familiar example. Suppose in the proprietor's building plan the roads were intended to take a particular direction, and by the withdrawal of one piece of land the whole arrangements of the intended building scheme should be dislocated, would it in reason and common sense be any answer to a claim for compensation to say that the piece of land taken is at a distance from and even severed by some other construction from the place where you are going to construct your roads?

A Many other examples might be given—arrangements for sewers, gas, water, and the like, relate to the unity of the estate as one thing, the usefulness and market value of which might be interfered with by the withdrawal of part; and it is in each case a question of fact dependent upon its own circumstances whether what I have called the unity of the estate is interfered with. In this case I think it was properly for the jury, and has been lawfully adjudicated upon by them. For these reasons I am of opinion that the decision of the Court of Appeal ought to be reversed, and that of the Divisional Court restored; that the respondents should pay to the appellant the costs of this appeal and in the court below, and I move your Lordships accordingly.

C **LORD WATSON.**—The appellant is owner of certain lands at Acton, two parcels of which have been let on long building leases containing usual covenants prohibiting the erection or alteration of buildings without his consent. In 1883 the respondents, under a provisional order which incorporated the powers of the Lands Clauses Acts, gave notice to take about five acres of the lands so demised for the purpose of constructing thereon works for the collection and deodorisation of sewage. Compensation was assessed by a jury, who allowed the appellant £8,737 for the purchase of his interest in the land taken, and also £4,000 for all damage sustained, or to be sustained, by reason of the injurious affection of his other lands by the exercise of the respondents' statutory powers. It was admitted on both sides of the Bar that the sum of £4,000 was awarded in respect of damage to the appellant's remaining lands, other than those let on building leases.

E The prospective damage which the jury took into account in fixing that sum can only be ascertained from the evidence submitted to them, and the directions given them by the under-sheriff in his charge. The inference which I derive from these sources is, that the jury, in estimating compensation for injuriously affecting, were mainly influenced by the consideration that sewage works of the character contemplated by the respondents, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, are nevertheless, even when so conducted, distasteful to householders, and tend to depreciate the market value of building land in their vicinity, and also that negligence in the conduct of the works may occasionally give rise to actionable nuisance. It, therefore, appears that a considerable part of the compensation awarded in one lump sum by the second finding of the jury covers damage to arise from the future use of the works for statutory purposes. The respondents are seeking in this suit to quash the verdict G in so far as relates to the second finding, and in the argument addressed to your Lordships they maintained that the jury exceeded their statutory jurisdiction, inasmuch as (i) they took into account damage to arise, not only from the construction of the sewage works, but from their authorised use after completion; (ii) the prospective damage for which they made an allowance was too sentimental and remote to form the subject of statutory compensation; and (iii) the lands in respect of which H they gave compensation were not "other lands," or lands held "with" those taken, in the sense of the Lands Clauses Consolidation Act, 1845.

I In the case of a proprietor from whom nothing has been taken by the promoters, it has been settled by a series of decisions in this House, that, although his land in the vicinity will necessarily be injured by the use of their works, yet it is not thereby "injuriously affected" within the meaning of the Act of 1845; and that he is not entitled to statutory compensation for injury so occasioned. The respondents argued that, upon a sound construction of the Act, the same rule ought to apply in cases where the promoters have acquired part of the claimant's lands for the purposes of their undertaking. I should have regarded the question thus raised as one of great nicety and difficulty, if I had not been of opinion that it has been already determined in *Duke of Buccleuch v. Metropolitan Board of Works* (3). The arbiter in that case allowed a large sum by way of compensation for depreciation in the value of the claimant's mansion which he expected to result from the use for traffic, with its attendant dust and noise, of an embankment and roadway formed

upon land taken from the claimant, and his award was sustained by LORD CHELMSFORD, LORD COLONSAY, LORD WESTBURY, and LORD CAIRNS. A

Although the noble and learned Lords agreed in result, they did not arrive at that result upon the same general construction of the provisions of the Act with respect to compensation. LORD CHELMSFORD and LORD COLONSAY constituted the majority in *Hammersmith and City Rail. Co. v. Brand* (4); but LORD CAIRNS, who constituted the minority, following the opinion which had been expressed by LORD WESTBURY in previous cases, disapproved of the limited meaning which the House, in that case, attached to the words "injuriously affected by the execution of the works." In *Duke of Buccleuch v. Metropolitan Board of Works* (3), LORD CHELMSFORD, in whose opinion LORD COLONSAY concurred, said, with reference to *Brand's Case* (4) and the subsequent case of *City of Glasgow Union Rail. Co. v. Hunter* (5) (L.R. 5 H.L. at p. 458): B

"In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction, of the railway." C

But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains. I do not think that either LORD WESTBURY or LORD CAIRNS appreciated the distinction thus taken. These learned Lords were prepared to hold that injury arising from the "execution of the works" included in all cases, not only injury occasioned by their structural form, but injury to arise from their subsequent use. That difference of opinion is for the purpose of the present case immaterial. The fact remains, that noble and learned Lords, entertaining different views with respect to the construction of the statute, concurred in upholding the landowner's right to compensation, not merely in respect of the construction of works upon land taken from him, but of the subsequent use of these works authorised by statute. In *Caledonian Rail. Co. v. Ogilvy* (6), and also in *City of Glasgow Union Rail. Co. v. Hunter* (5), land had been taken from the claimants for railway purposes, but the use complained of as injurious was not of that part of the railway constructed on the land so taken, and was held in both cases to afford no ground for statutory compensation. D

It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers. The construction of the Act which has been thus adopted by the House had previously been enforced by CROMPTON, J., in the *Stockport Case* (1). I can discover no substantial distinction between the circumstances of this case and the facts which were before the House in *Duke of Buccleuch v. Metropolitan Board of Works* (3). The prospective use, in respect of which compensation has been given, is confined to that portion of the appellant's land which the respondents have acquired from him for statutory purposes; and the kind of depreciation which the jury had in view appears to me to be ejusdem generis with that arising from traffic upon a public thoroughfare. Neither the use of sewage works, nor such traffic, amounts in itself to a legal nuisance, but the existence of either may alter the character of land in the neighbourhood, and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling. I think he suffers substantial and not imaginary injury, although the depreciation may be due in a great measure to an unreasonable antipathy to such works on the part of the purchasing or leasing public. E F G H I

These considerations appear to me to dispose of the arguments of the respondents, with the exception of that which relates to the position of the lands for which com-

A compensation has been awarded. The "other lands" in respect of which an owner who is selling to promoters can claim compensation if they are injuriously affected, are indifferently described in the Act of 1845 as "severed" from the land which is the subject of sale, or as held therewith. I cannot assent to the argument that there can be no severance within the meaning of the Act unless the part taken and the parts left were in actual contiguity. I think the expression "the severing" as it occurs in ss. 49 and 63, read in the light of the context, merely signifies that what the promoters have acquired is separated from, in the sense that it can no longer be treated by the landowner as part of, the subjects which, until its purchase, he held along with it. What lands are to be regarded as "severed" from those taken, is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held "with" each other in the sense of the Act, and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter. But I am prepared to hold that, where several pieces of land owned by the same person are so near to each other, and so situated, that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act, so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

Applying these principles to the facts of the present case, I see no reason to doubt that the lands in respect of which compensation has been awarded by the second finding of the jury were "held with" the five acres taken by the respondents. Their purchase has deprived the appellant of his power to regulate the class of buildings to be erected on these five acres, and has enabled the respondents to construct works, the use of which, the jury have found, will sensibly diminish the value of the lands on the other side of the Hammersmith Branch Railway. It is quite conceivable that railway works may be of such a character that the value of land on one side of them will cease to have any dependence upon the use made of land on the other side. But that is not the case here. For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

LORD BRAMWELL.—I think it convenient to consider first whether the land injuriously affected or which will be injuriously affected by the works of the respondents on the lands taken, is land held with the land taken within the meaning of Lands Clauses Consolidation Act, 1845, s. 63. I think it is. I shall not attempt an exhaustive definition of those words; I should probably fail; I should leave out something that ought to be included, and include something that ought to be left out, and so give rise to future controversies. The words are not the words of art; they are ordinary language, and must be understood with reference to their object. I think the present case is within them. The lands have one owner. I cannot think it matters that they are separated by a railway; I suppose it would hardly be said that one part of a park separated from another part by a railway was not land held with that other part. Here the lands are close; what is done on one part must or might affect what would be done on the other. For example, what I mean is this. Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of opinion that the land in respect of which the claim is made here was land held with the piece taken.

As to the next question, we cannot go into the question of quantum. If there was any damage which the jury could give, their verdict must stand. It is proved, admitted, and is common knowledge, that the sewage works on the land taken will be a nuisance to the lands left—not a sentimental nuisance, but a substantial diminution of the comfort, and a danger to the health of persons dwelling in houses on the land not taken. Whether, if it was of a sentimental character only—as for

example, if the land was taken for a cemetery or a prison, and it was proved that the value of the other land was thereby diminished—the amount of the diminished value could be recovered I do not say either one way or the other. But in this case there is a substantial damage, a lessening of the health and comfort, or will be, to the land left by the taking of the piece, and the exercise of the powers of the Act; and it is admitted that the law is that no action would lie to recover any such damage. Then the case seems within the very words of s. 49, and why is it not? The argument for the respondents, as I understand it, is this: But for the ownership of the piece the appellant could not by action or otherwise recover compensation for damage to this land; if so, there is no reason why he should, because he is owner of the piece; nay, the legislature has designedly left persons without compensation by action or otherwise who are damaged, but none of whose land is taken; therefore, it must be assumed that it meant to leave such cases as the appellant's without compensation, and the injurious affecting in s. 49 means an injurious affecting for which an action would lie if the nuisance was not caused in the exercise of statutory powers, in substitution for which action compensation is given. He would read, therefore, into s. 49 these words, "and for which but for these powers hereby given an action would lie." I see no reason for this. I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity. The legislature could have added these words if it had thought fit.

But further it seems to me most reasonable that the owner of property should not be made to sell for its mere value a piece of his land, the possession of which and the use to be made of it will do to the rest of his land damage to ten times the value of that taken. It seems to me that, according to the reasoning of SIR JAMES HANNEN in *Duke of Buccleuch v. Metropolitan Board of Works* (3), a man ought to be paid a sum which he may reasonably ask, and that a man may reasonably ask the value of what is taken, and a compensation for the damage that will be done on it to what is left. Take the case I put of two houses each worth £50 a year, but the land on which they stand could be made worth £200 a year by their being pulled down and one house built on their sites. Would it not be contrary to all fairness and justice; would it not be robbery and plunder, if one house was taken rendering improvement of the other impossible, to make the owner take compensation for the loss of £50 a year only? I am unable to agree that the legislature meant that persons injured where lands were not taken should have no compensation. It has been so held I know, and by this House, and that decision is binding when the case arises, but for my own part I cannot construe the statute by the help of what I must think a wrong decision.

I do not wish it to be supposed that I have a sort of spite against *R. v. Pease* (7), and that it is a pet point of mine that it was wrong, but in support of my present opinion and with reference to the argument on behalf of the respondents I must make a few remarks upon it. It is very clear how the provisions in the local Act which the court had to consider in *R. v. Pease* (7) came there. By the original Act, 1 & 2 Geo. 4, c. xlv, local and personal, "for making and maintaining a railway or tramroad," etc., the company constituted had by s. 1 power "to make, complete, and maintain a railway." They had no power to act as carriers thereon. Their so doing would have been *ultra vires*. By s. 81:

"All persons shall have free liberty to use the railway with horses, cattle, and carriages, for the purpose of conveying goods . . . and to pass with coals, waggons, or other carriages properly constructed."

By the subsequent Act, which was before the court in *R. v. Pease* (7) it was enacted that

"It shall be lawful for the company or any person authorised or permitted by them to make and erect such and so many locomotive or movable engines, and use and employ the same for the purpose of facilitating the transport of goods. . . ."

A This provision was necessary to enable the company to act as hauliers, and the provisions as to other persons were necessary to give them powers and rights as against the company. If these provisions gave a right to commit a public nuisance or private injury, I feel sure they were not intended to do so. But anyhow this reasoning, even if it justifies a public mischief for the public good, does not justify a private loss and damage.

B But, of course, the statute on which the cases of *Vaughan v. Taff Vale Rail. Co.* (8) and *Hammersmith Rail. Co. v. Brand* (4) depended is the Railway Clauses Consolidation Act, 1845. Did that authorise the commission of a nuisance public or private? I will not repeat the arguments I have already used in *Hammersmith Rail. Co. v. Brand* (4), by all of which I abide, but there are one or two additional remarks I wish to make. In s. 86, which authorises railway companies to act as

C carriers, the words are:

"It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey all such passengers and goods. . ."

D By s. 87 it shall be lawful for the company being owners, etc., of any other railway, for the passage over the railway of any engines, coaches, waggons, or other carriages. But by s. 92 [repealed Statute Law Revision Act, 1959, Sched. 2] it is,

"Upon payment of the tolls . . . all companies and persons shall be entitled to use the railway with engines and carriages."

E Observe the difference. It is lawful for the railway company to use engines, but other companies are entitled. The words as to the incorporated company are permissive and enabling, "it shall be lawful;" as to other companies a right is given, "they are entitled." It is a noticeable thing that, according to the construction put upon this Act, the Festiniog Rail. Co. would be liable for damage done on its own line by engines to neighbouring property, but directly it gets on a line to which the railway clauses apply, it would not be liable. But supposing *R. v. Pease* (7) and *Vaughan v. Taff Vale Rail. Co.* (8) to be rightly decided, I should draw, not the

F conclusion that the respondents wish us to draw, but this, that while the legislature thought that persons whose lands were injured by the operations on other lands of the same ownership which were taken should have compensation, that right should not be extended to other cases, as that would give opportunity for vague and unfounded claims.

G A word as to the authorities. The *Stockport Case* (1) is, I think, in point. I have thought it over, over, and over again, and agree to it. I think also that the *Duke of Buccleuch's Case* (3) is in point. It is, indeed, strange that in that case no reference is made to the *Stockport Case* (1), but I think that the principle is the same. As to *Hammersmith Rail. Co. v. Brand* (4), I own I think it was rightly decided in this House. I said that I thought *R. v. Pease* (7) and *Vaughan v. Taff Vale Rail. Co.* (8) wrong; that the right of action was not taken away, nor

H compensation given. I added that, if the House agreed with those cases, I thought they should affirm the judgment on the footing that if no action lay there must be a right to compensation, and that as the erection of the railway must be followed by its use, therefore, the erection of the works injuriously affected the plaintiffs. The fallacy of the argument is in the last sentence. I am afraid I was influenced by the feeling of the gross injustice and hardship of the case. I think the decision

I in this case should be reversed.

LORD FITZGERALD.—The decision of the Court of Appeal reversing the previous decision of the Divisional Court rested entirely on the ground that the lands alleged to be "injuriously affected" had been on some prior occasion severed from the lands taken by the local board by the construction of a railway, and could not, therefore, be deemed to be "lands held therewith" within the meaning of s. 49 of the Act of 1845, or "other lands of such owner" within s. 63. That question has been satisfactorily disposed of in the several opinions which have been delivered,

in which I concur, and can add nothing with advantage. The decision of the Court of Appeal cannot, therefore, be sustained. But for the supposed distinction in fact between the present case and the *Stockport Case* (1) the decision of the Court of Appeal must have been in affirmance of the judgment of the Queen's Bench Division. A

The notice to treat coming from the Acton Local Board claimed a right to take the plot of 5a, 1r. 85p. B

"for the purpose of providing for the sewerage and the disposal of and utilisation of the sewage of the district of the local board, and the necessary works connected therewith." C

There can be no doubt on the evidence that the immediate consequence was that the adjoining land of the appellant which had been laid out for building purposes, and was separated from the land taken by the local board only by the permanent way of the railway, became at once actually "injuriously affected." The injury was no sentimental grievance, but a solid depreciation in the letting value, taking effect not remotely but immediately. It is said by an expert witness : C

"The mere fact of sewage works coming on that land coloured pink [the land taken] will depreciate the land coloured green 25 per cent. I may say I have experience which confirms that." D

There was abundance of other evidence to the same effect. I am not surprised at it. It would only be by a material reduction in letting value of the land that parties might be tempted to build dwelling-houses in the immediate vicinity of a farm for the reception, disposal, and utilisation of sewage with its real or supposed tendency to create and foster organisms injurious to human health and life. E

There being no doubt that the appellant's land was thus in fact injuriously affected, the question of law is whether the sheriff's tribunal had jurisdiction under the statute (ss. 49 and 63) to assess compensation for the appellant in respect of his lands being thus injuriously affected. It cannot be doubted that the *Stockport Case* (1) is in point on this question of jurisdiction. It was vigorously assailed in the Court of Appeal, and one of the lords justices suggested that the rule laid down in that case ought to be considered by the House of Lords with a view to its being probably overruled. That case has been the subject of much adverse criticism, but it has not been overruled, and up to the present moment the rule laid down by it has regulated right and liability in similar cases. It is said to have been adopted in principle in the *Duke of Buccleuch's Case* (3), and if that is so, your Lordships should follow the latter case. I confess that I have some difficulty in adopting that view of the *Duke of Buccleuch's Case* (3), and prefer considering the *Stockport Case* (1) on its own legal merits. I feel bound to say that, had I been a colleague of CROMPTON, J., at the time, I should probably have come to the conclusion that his interpretation of the statute was correct and in accordance with its language; and now looking back at that decision through the quarter of a century that has since elapsed, and aided by the light of additional experience, I think it was a sound decision, and certainly not now to be disturbed. The anomalies or inequalities that have been pointed out arise from the statute, and not from the *Stockport Case* (1), which follows its very language. I concur in opinion that the decision of the Court of Appeal should be reversed, and that of the Divisional Court restored, with all the consequences. F G H

LORD MACNAGHTEN.—For the purpose of providing for the sewerage and the disposal and utilisation of the sewage of the district of Acton, and the necessary works connected therewith, the Acton Local Board was authorised to put in force the powers of the Lands Clauses Consolidation Act, 1845, with respect to certain lands containing 5a. 1r. 35p. of which the appellant was owner within the meaning of the Act. The appellant had other lands at Acton adjoining the lands required by the local board. His property there was at the time in course of development as a building estate. Part, including the lands required, was let on building leases for I

A a long term of years; part was let on shorter terms for brickmaking purposes; part was in hand. The property was cut in two by a railway running through it. There was apparently a communication of some sort between the lands thus severed; but there is nothing to be found in the evidence on the appeal to explain the nature of the communication or the configuration of the land bordering on the railway.

B A notice to treat, stating the purpose for which the lands were required, was served upon the appellant. No agreement was come to, and the question of disputed compensation was submitted to a jury. The jury assessed the value of the lands taken at £8,737. As to that part of their finding there is no dispute; but they also awarded £4,000 by way of compensation for damage to the appellant's other lands by the exercise of the statutory powers which the local board was putting in force. A portion of the land in respect of which compensation was awarded was

C situated on the same side of the railway as the lands taken, but separated from those lands by a piece of ground which was included in a building lease, and in respect of which no compensation was claimed. The rest of the lands in respect of which compensation was awarded was on the other side of the railway; part was in hand; part was let for a short term of years.

The first objection to the verdict is that the lands in respect of which compensation was awarded were not lands that could be "injuriously affected" within the meaning of the Act, because they had been already severed from the lands required, and were not held therewith for one and the same purpose. It is difficult to see the force of this objection. Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership may conduce to the advantage or protection of the property as one holding. That condition seems to be implied. Otherwise the owner could hardly sustain injury by reason of the execution of the works on the lands taken. If this view be correct, the severance created by the railway was not of itself a bar to the claim for compensation. It was a matter to be taken into consideration; but its effect must depend upon the circumstances of the case, including, in those circumstances, the configuration of the ground, and the difficulty or facility of making communications across the railway. In an ordinary case severance by a railway is not a complete separation, dividing the property into two distinct and independent holdings; and owners of lands affected by a railway are authorised, if they consider the accommodation works made by the railway company insufficient for the commodious use of their land, at any time to make such further works for the purpose as they think necessary, subject, of course, to the conditions prescribed by the legislature.

H The other objection is one of general importance. It was argued that the compensation awarded was given in respect of injury anticipated from the use of the works when executed, and not in respect of injury caused by the construction or execution of the works, and it was said that the jury were not at liberty to take into consideration the purpose or probable effect of the works which the local board was authorised to construct. Speaking for myself, I am not altogether satisfied

I that the decision of this House in the *Duke of Buccleuch's Case* (3) can be treated as determining the question. Upon that point I am rather disposed to agree in the view expressed by LORD BLACKBURN in a subsequent case (*Caledonian Rail. Co. v. Walker's Trustee* (9)). But all the arguments on both sides were so thoroughly discussed in the *Duke of Buccleuch's Case* (3), in its different stages, that it would, I think, be idle for me to do more than state generally the conclusion at which I have arrived.

I think it is impossible to read the Lands Clauses Consolidation Act without seeing that it was the intention of the legislature that full compensation should

be given in all cases where lands are taken under the power of the Act for the purposes of a public undertaking. To give one instance of the extreme care shown in providing compensation, I may remind your Lordships that, if the lands required are subject to a mortgage for a fixed period, the mortgagee is entitled to the costs of re-investment in addition to the sum to be paid to him in respect of his mortgage; if the rate of interest secured by the mortgage be higher than can be reasonably expected on re-investment, he is also entitled to compensation for the loss to be sustained by him by reason of his mortgage money being prematurely paid off. Suppose land let to a builder for the erection of first-class houses, and a mortgage by the lessee for a fixed period, and then suppose that part of the land is required for the purpose of some public undertaking likely to spoil the character of the neighbourhood, the mortgagee would be compensated to the utmost farthing; but if the respondents are right the lessee would be left without compensation. His scheme might be destroyed, his houses might be unsaleable, and he might be ruined, though the Act declares in so many words that he

“shall be entitled to recover from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works.

It may be said that an adjoining lessee or owner from whom no land is taken might suffer in the same way, and that he would be without redress. That is true. But I cannot see why a person whose case is within the spirit and within the very letter of the Act, should be deprived of the full measures of compensation because his neighbour, who is not within the Act at all, is, perhaps, hardly dealt with.

Where land is required for public purposes, the injury, if any, to the owner's adjoining lands depends mainly on the character of the undertaking. There are various purposes for which local boards may be authorised to take lands. They may take lands for pleasure grounds. They may take lands for sewage purposes. But before putting in force any of the powers of the Lands Clauses Consolidation Act, a local board is bound to publish the nature of the proposed undertaking, to define the lands required, and to collect as far as possible the views of all persons interested in those lands. Then comes a public inquiry to be followed in due course by a provisional order, and an Act confirming it. These elaborate provisions, designed apparently for the protection of private as well public interests, would be something of a mockery if a person from whom land is taken is to be told, when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm.

It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will—ignorance, or prejudice, or fancy—the loss to the owner who may want to sell is not the less real; the result to him is not the less practical. In such a case apprehension of mischief is damage of itself; and the depreciation in value must be the measure of compensation. The promoters of an undertaking can only take lands for the purposes authorised by their Act. When the lands are taken the promoters can only use them for those purposes. It is the purpose of the undertaking, and that alone, which justifies its existence. Without the purposes defined and authorised by the special Act the provisions of the Lands Clauses Consolidation Act are a dead letter. And yet it is said that on a question of disputed compensation the arbitrators, or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking, and to make believe that the intended works are some innocent and meaningless folly. I do not think that there is anything in the Act which leads to a conclusion so absurd and so contrary to common sense.

When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences to the other lands of the owner likely to result from the

A execution of the works on the lands required, and any alteration in the character of his property which those works are calculated to bring about. The *Stockport Case* (1) is precisely in point. It has been much criticised, but I think it has stood the test of criticism. In practice I believe it has always been followed, and I think it is perfectly right. I am, therefore, of opinion that the decision of the Divisional Court was right, and that the decision of the Court of Appeal should be reversed.

Appeal allowed.

Solicitors: *Hedges & Brandreth; Alexander Helmsley.*

[*Reported by C. F. MALDEN, Esq., Barrister-at-Law.*]

GREAT WESTERN RAIL. CO. v. BUNCH

D [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Herschell, and Lord Macnaghten), November 24, 25, 29, 1887, February 24, 1888]

[Reported 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128;
52 J.P. 147; 36 W.R. 785; 4 T.L.R. 356]

E *Carriage of Goods—Railway—Passenger's luggage—Carriage as common carrier—Limitation of company's liability—Loss through passenger's default—Need for passenger to prove luggage entrusted to porter within reasonable time of beginning journey.*

A railway company, in accepting a passenger's luggage for carriage in a passenger train, in the compartment with the passenger himself, enters into a contract as common carriers, modified only to the extent that, if loss happens by reason of want of care by the passenger himself who has taken within his own immediate control the goods which are lost, the company's contract as insurers does not apply to loss occasioned by the passenger's own default in failing to use reasonable care: per LORD HALSBURY, L.C.

G A railway company are responsible for luggage delivered to and in the custody of their servants for the purpose of transit whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail and is not merely waiting in order to begin its prosecution at some future time. If luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train that it cannot be reasonably said to be entrusted to him for the purpose of transit with the passenger to its destination, but must be considered as so entrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company will not be liable for its loss. Railway companies have provided cloak-rooms or left luggage offices, which are the proper receptacles for luggage brought to the station in such circumstances: per LORD WATSON and LORD HERSCHELL.

I **Notes.** For the liability of the British Transport Commission under its conditions of carriage in certain circumstances, see 31 HALSBURY'S LAWS (3rd Edn.) 777. para. 1238 and note (g).

Considered: *Steers v. Midland Rail. Co.* (1920), 36 T.L.R. 703. Followed: *Vosper v. Great Western Rail. Co.*, [1927] All E.R.Rep. 702. Referred to: *Welch v. London and North Western Rail. Co.* (1885), 34 W.R. 166; *Soanes v. London and South Western Rail. Co.*, [1918–19] All E.R.Rep. 852; *Jenkyns v. Southampton Steam Packet Co.*, [1919] 2 K.B. 135.

As to the carriage of passenger's luggage, see 4 HALSBURY'S LAWS (3rd Edn.) A 168-171; and for cases see 8 DIGEST (Repl.) 128 et seq.

Cases referred to:

- (1) *Richards v. London, Brighton and South Coast Rail. Co.* (1849), 7 C.B. 839; 6 Ry. & Can. Cas. 49; 18 L.J.C.P. 251; 13 L.T.O.S. 139; 13 Jur. 986; 137 E.R. 332; 8 Digest (Repl.) 135, 869.
- (2) *Talley v. Great Western Rail. Co.* (1870), L.R. 6 C.P. 44; sub nom. *Great Western Rail. Co. v. Talley*, 40 L.J.C.P. 9; 23 L.T. 413; 19 W.R. 154; 8 Digest (Repl.) 131, 845.
- (3) *Butcher v. London and South Western Rail. Co.* (1855), 16 C.B. 13; 24 L.J.C.P. 137; 1 Jur.N.S. 427; 3 W.R. 409; 3 C.L.R. 805; 139 E.R. 658; 8 Digest (Repl.) 135, 870.
- (4) *Bergheim v. Great Eastern Rail. Co.* (1878), 3 C.P.D. 221; 47 L.J.Q.B. 318; 38 L.T. 160; 42 J.P. 324; 26 W.R. 301, C.A.; 8 Digest (Repl.) 131, 846.

Also referred to in argument:

Stewart v. London & North Western Rail. Co. (1864), 3 H. & C. 135; 4 New Rep. 64; 33 L.J.Ex. 199; 10 L.T. 302; 10 Jur.N.S. 805; 12 W.R. 689; 159 E.R. 478; 8 Digest (Repl.) 139, 896.

Appeal by the defendants in the action from a decision of the Court of Appeal (LORD ESHER, M.R., and LINDLEY, L.J., LOPES, L.J., dissenting), reported 17 Q.B.D. 215, reversing a decision of the Divisional Court (DAY, J., A. L. SMITH, J., dissenting), on appeal from a county court.

The action was brought by Mr. Bunch and his wife to recover £18, the value of a Gladstone bag and its contents, which Mrs. Bunch had entrusted to one of the appellant company's porters at Paddington station for safe custody while she went to meet her husband, who was getting her ticket in the booking-office. Mrs. Bunch arrived at the station at 4.20 p.m. on Christmas Eve, 1884, having with her a portmanteau, a hamper, and a Gladstone bag belonging to her husband, intending to go to Bath by the 5 p.m. train. As she alighted from a cab a porter took the luggage on a trolley. She saw the portmanteau and hamper labelled, and told the porter that she wished the Gladstone bag to be put into the carriage with her, the train not being alongside the platform at the time. She asked the porter if it would be safe with him, and he assured her that it would, and that he would guard the luggage and put it into the train. She then went to meet her husband, who was to travel with her, and she came back with him in ten minutes. It was then found that the portmanteau and the hamper had been placed in the luggage van, but that the Gladstone bag had disappeared. The plaintiffs brought their action in the Marylebone County Court, and His Honour Judge STONOR gave judgment for them for £18. On appeal to the Divisional Court, DAY, J., held that the company were not responsible; and A. L. SMITH, J., held that there was evidence to support the finding of the county court judge that the porter was holding the bag on behalf of the company. A. L. SMITH, J., as junior judge, withdrew his judgment, and judgment was entered for the company, with leave to the plaintiffs to appeal. The Court of Appeal, by a majority, reversed the decision of the Divisional Court and restored the judgment of the county court judge.

Sir Henry James, Q.C., and *R. S. Wright* for the appellants.

C. C. Scott for the respondents.

Their Lordships took time for consideration.

Feb. 24, 1888. The following opinions were read.

LORD HALSBURY, L.C.—In this case, the facts have not been specifically found, but the learned county court judge found a verdict for the plaintiffs, and stated that finding, together with the evidence. If, therefore, it is possible to find a verdict for the plaintiffs upon that evidence, the plaintiffs are entitled to maintain their verdict.

A It seems to me that the two contentions, which have been in debate before your Lordships, would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts were here open to review. Your Lordships, in the first place, have to ascertain, not from any written instrument, nor from any express words of contract, what were the contractual relations between the plaintiffs and the defendants. I confess I should have been better satisfied
B if some evidence directed to what was the practice of the particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying that, if there was enough to enable the learned judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision. There are, of course, some facts which both sides have assumed to be proved, and with respect to which it would be
C mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains, the bringing of them to the platform, the arrangements by which the luggage, whether hand luggage or van luggage, was to be
D distributed, were all under the superintendence and direction of the defendant company, are matters as to which no formal evidence is to be found in the report of the county court judge, but are also matters as to which no one has or can suggest any real doubt. I do not think that any of your Lordships entertain any doubt that, if the plaintiffs' luggage were entrusted to the porter for deposit and custody, as distinguished from the physical handing over for the purpose of
E transit, the defendants would not be liable.

The question really in debate is somewhat obscured by the existence of the cloak-room system; and that system, I think, is expressly guarded by the company not permitting any of their servants to undertake the guardianship of any property whatsoever, except under the circumstances and upon the conditions which the company prescribes; but I think the same question would arise, and should be
F decided upon precisely the same principles, if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage. It is worthy of remark that DAY, J., and LOPES, L.J., upon an assumed state of facts at which I think the county court judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. DAY, J., says:

G "If a passenger requires him [the porter] to delay a reasonable time, while, for instance, a passenger takes a ticket, he [the porter] is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger taking the ticket, time being allowed for the little journey to the platform. During all that time he is the agent of the company, as bailee of the luggage which is entrusted to him. He is
H acting in the ordinary discharge of his duty;"

and LOPES, L.J., says:

I "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably—I should say reasonably necessary for this transit" [i.e. the transit of the goods from the cab or outside the station].

The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case as to the question whether the train had been drawn up to the platform or not; and we must now accept it as a fact that neither the van nor the carriages for the passengers were in a position to enable the hand luggage or the van luggage to be placed where they were intended to be deposited for the purposes of the journey. If I were myself to be drawing inferences as to the reasonableness, in point of time of the period of the plaintiff's arrival before

the departure of the train by which she intended to travel, I am not certain how I should decide that question. On the one hand, forty minutes seems a long time before the departure of the train to call upon the servants of the company to take charge of luggage for the purpose of the journey. On the other hand, the fact that it was Christmas Eve, that the railway officials were within a very short time of the arrival of the plaintiff issuing tickets for that journey, and that they were receiving without objection or demur van luggage, with respect to which it is not denied that in so doing they were acting in pursuance of the authority conferred on them by their employers, are all circumstances from which, I think, it might be inferred that the time was not too long. But in truth I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned judge has, in this instance, specifically found that the time of the entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that, with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion. A B C

While I entirely agree that the duty of the porter, as disclosed by the evidence, is either to take the luggage to the cloakroom, if entrusted to him for the purposes of deposit, or to the train if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purposes of the journey, the presence or absence of the train at the platform is a matter within the control of the company, and not of the passenger; and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiff's luggage if the train were at the platform, and beyond it if the train had not come up. Doubtless a company might make a regulation, if they thought fit, to this effect: "We will not receive luggage for a train forty minutes before it starts." Or: "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which they allow to elapse between the arrival of the train at the platform and its departure. It is enough, however, to say that in this case no evidence of any such practice was given. D E F

If a possible inference to be derived from the facts as proved is that what the porter did in this case was the ordinary practice of the company, then I should say it would follow that the mode in which the company carried on its business was to accept the passenger's luggage at the entrance to the station and to take it to its intended destination, whether van or passenger carriage, at the option of the passenger, and that during the period of what LOPES, L.J., describes as "this short transit" it would be in the custody of the company for the purposes of, and as part of, the journey. If the train were at the platform it would, I suppose, in ordinary course, be distributed, some to the van, and some to the passenger carriage, as directed, but when once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand LOPES, L.J., or DAY, J., to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage, the company might be liable for refusing to carry according to their professed mode of carriage, but might not be liable for loss of goods which they refused to carry, but whether the porter would be doing his duty in refusing to take charge of the luggage during the short transit, or acting in pursuance of his master's orders, is the very question in debate. G H I

If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty, the company would be liable. But why am I to assume upon the facts here put in proof that the porter was acting contrary to his duty, and, in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess

A for myself, I should draw the same inference that was drawn by the county court judge; but what the defendants, in order to succeed, must establish, is, that the county court judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favour, and not insisting on her rights as a passenger. I admit that the word "it" grammatically, as the evidence B is reported to us, appears to refer to the bag, but I think what Mrs. Bunch meant was the luggage, both van and hand luggage, upon the trolley. But whatever Mrs. Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination, and I do not think either her question or the porter's reply would have affected the contract relations of the parties.

C The truth is, that in the conduct of business more contracts are made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that, when people hold themselves out as carriers and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers, unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the D cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so; but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with LINDLEY, L.J., that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, E and not for purposes of transit. It is upon this part of the case that I think the finding of the learned judge is conclusive against the defendants when he finds that the time of entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. If once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the Court of Appeal would amount to this—that a passenger bringing F his luggage for carriage a reasonable and proper time before the departure of the train by which the luggage is to be carried, can enforce no liability upon the company in respect of his luggage unless it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious, from the G notices put in evidence, that the cloak-room tickets and receipts import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from that same cloak-room, and if he wishes to travel must again commit it to the custody of the company after he has so taken it out. It would seem, therefore, to involve the proposition that for parcels carried in the passenger carriages the railway company never can be liable at all.

H I do not know that it is absolutely necessary in this case to determine what is the exact contract between the company and the passengers, since the learned judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that, if there was any contract to take care of the bag, there is sufficient evidence of negligence. But I must express my opinion that the views expressed by LORD TRURO, JERVIS, C.J., WILLIAMS, CROWDER, WILLES, KEATING and MONTAGUE SMITH, JJ., do not appear to have had I sufficient weight given to them (see *Richards v. London, Brighton and South Coast Rail. Co.* (1); *Talley v. Great Western Rail. Co.* (2); *Butcher v. London and South Western Rail. Co.* (3)) by the judgment in the Court of Appeal in *Bergheim v. Great Eastern Rail. Co.* (4). All these learned judges appear to me to adopt the view that a railway company, in accepting a passenger's luggage for carriage in a passengers' train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care by the passenger himself, who has taken within his own immediate

control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default. A

In *Bergheim v. Great Eastern Rail. Co.* (4) the Court of Appeal, commenting upon *Talley v. Great Western Rail. Co.* (2), do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley v. Great Western Rail. Co.* (2) the judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey cut open, and its contents rifled, in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment-room at that station. It is obvious that, if the court were right that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it have been contended that the company were not responsible as common carriers because they were carrying for hire in one part of the train and not in another? B C D

If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van or hand luggage, they received for carriage to Bath the van luggage to be put in the van and the hand luggage to be put in the passenger carriage, and I think the learned judge was entitled to infer that their practice, and, therefore, their contract, in receiving hand luggage was to put it into the passenger carriage, or, if the railway company did not then bring up the train to the platform to take care of it until the carriage was drawn up, and in a position to receive the hand luggage, which in my view, the porter, as the agent of the railway company, had accepted and received for that purpose. For these reasons I am of opinion that the judgment of the Court of Appeal was right, and I move your Lordships that that judgment be affirmed, and that this appeal be dismissed, with costs. E F

LORD WATSON.—This appeal brings up for consideration the decision of a county court judge, which the higher courts and this House have no jurisdiction to review, except in so far as it involves principles of law. It is impeached upon this ground mainly, that there was no evidence before the learned judge from which it could be reasonably inferred that, at the time when it disappeared, the respondent's Gladstone bag had been delivered to and was in the possession of the appellant company for the purpose of carriage. The evidence, it is said, points to and only warrants the conclusion that the bag was in the custody of a railway porter as bailee for the respondents. G H

In *Butcher v. London and South Western Rail. Co.* (3) JERVIS, C.J., observed (16 C.B. at p. 22) in reference to luggage which had been conveyed in the same carriage with its owner,

“that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers that their luggage shall be delivered at the end of the journey, by the porters or servants of the company, into the carriages, or other means of conveyance of the passengers from the station.” I

What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest

- A to do so; and in taking charge of luggage for these purposes their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passenger luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit.
- B It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so they exceed the limits of their implied authority, and in that case their possession cannot be regarded as the possession of their employers. If the respondents had gone to Paddington station at noon of Dec. 24, 1884, and had then left their Gladstone bag with a porter in order that it might accompany them on their journey to Bath by the 5 p.m. train, I should have had no hesitation in holding that the appellant company had not become responsible for its safe custody during the interval. In that case it would have been in accordance with well-known practice, and, therefore, an implied term of the subsequent contract between the parties, that the company were not to be liable unless the luggage was duly deposited in the office provided for that purpose. On the other hand, if the respondents had arrived at the station at 4.55 p.m., I entertain as little doubt that the delivery of their Gladstone bag to a porter for the purpose of its being conveyed to the carriage in which they were about to travel would have made the possession of their porter that of the appellant company. Whether passengers' luggage delivered to a railway porter is in his possession for present or merely with a view to future transit is necessarily a question of degree, depending upon the circumstances of the case.
- E Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking-offices, but refreshment-rooms and other conveniences, and passengers who merely avail themselves of such accommodation as incidental to their use of the railway cannot be held to have temporarily ceased to prosecute their journey.

- Bergheim v. Great Eastern Rail. Co.* (4) is a clear authority to that effect. It is impossible to fix any precise limit of time prior to the starting of a particular train within which the company are to be liable for passenger's luggage delivered to their servants for conveyance by it, and beyond which they are not to be so liable. In my opinion, the company are responsible for luggage delivered to and in the custody of their servants for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail and is not merely waiting in order to begin its prosecution at some future time. In the present case the evidence shows that the female correspondent arrived at Paddington station forty minutes before the train by which she and her husband travelled was timed to start; she gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform and went to the booking-office for the purpose apparently either of taking her ticket or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found that the labelled luggage had been placed in the van, and that the porter and the Gladstone bag had both disappeared. In these circumstances I think the county court judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the appellants for the purposes of present and not of future transit, from the time when it was delivered to their porter until its disappearance.
- I In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform the five o'clock train had not come alongside it. That circumstance does not seem to me to be very material, because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be a matter of more

consequence in the present case is that it was Christmas Eve, that there was a great crowd of passengers intending to travel by the train in question, and that the servants of the company, as might have been anticipated, were, at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance in reply that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company.

On the assumption that the appellant company became responsible for the safe keeping of the bag in question, it was argued in their behalf that there was no evidence before the county court judge to justify the inference that its loss was due to their negligence. Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that, in order to entitle them to judgment, the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contract liability for hand luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or are intended to be placed, with the assent of the company's servants in the carriage in which their owner intends to travel, as well as lighter articles, which are generally, if not invariably, carried beside him. It does not admit of question that passengers' luggage duly delivered to the company's servants for carriage in the railway van remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers in cases where the passenger has assumed in whole or in part the custody and control of his own luggage. While they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand luggage is carried, some being of the opinion that it is from first to last a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care; others being of opinion that it is throughout a contract of common carriage, modified by the personal interferences of the passenger. Whichever of these views be accepted, it is manifest that in many instances the resulting liability of the company will be precisely the same; but, according to the second of them, the full responsibility of the company may revive on occasions when from causes incidental to his journey the interference of the passenger ceases for a time, and his hand luggage is committed to the exclusive charge of their servants.

At present the ruling authority upon this point is *Bergheim v. Great Eastern Rail. Co.* (4) where it appears to have been decided by the Court of Appeal, consisting of BRAMWELL, BRETT and COTTON, L.JJ., that the contract of the company with respect to hand luggage is merely to carry with ordinary care. COTTON, L.J., who delivered the judgment of the court, said (3 C.P.D. at p. 225):

"The company, therefore, must, according to ordinary principles, be held liable in respect of the goods as bailees for hire, and contractors to carry, and, therefore, liable for loss or injury caused by negligence, but not otherwise; the company have in fact the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle."

The observations there quoted were directed to the special case of a passenger's luggage, which had been placed, at his request and with the assent of the company, in the carriage in which he was to travel, and the learned judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants, for conveyance to or from the carriage. However that may be, I prefer the principle which appears to me to have been adopted in *Richards v. London, Brighton and South Coast Rail. Co.* (1), and *Butcher v. London and South Western Rail. Co.* (3). I think the contract ought to be regarded as one of common carriage, subject to the modification that in respect of his interference

A with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed with costs.

B **LORD BRAMWELL.**—It is the custom for English railway companies, at all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers, and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies, or a voluntary act on their part, it is immaterial. It is a duty they undertake, at least this company does, and must, like other duties, be performed with skill and without negligence.

C What is this duty? I have said to carry the passenger's luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage-van, smaller packages (often much too large for the comfort of other passengers) are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it, or take personal care of it, or more frequently that he may hasten away with it without waiting for it to be given out of the luggage-van. There is no further duty, or professed duty, that I know of. If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take the luggage on to the platform, and leave it there in charge of the passenger. Of course, if the passenger wants to get his ticket, and says so, the porter must take the luggage on to the platform, and wait and see to it till the passenger has got his ticket, and comes to see to it himself.

E If there is any duty beyond this, it is more than I know of, or ever heard of—I mean any ordinary duty. There can be no duty on the company or the porter, when the train is not at the platform, to take care of the luggage till it comes. If there is an obligation to do this for five minutes, there is an obligation to do it for so many hours. Everyone knows it is not so, everyone knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the train in which it is to be carried. If this is true of luggage to be carried in the luggage van, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage van is not there, the porter is not bound to take charge of the luggage till it comes. Of course, if he says nothing, but takes it, and it is labelled for its destination, and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken charge of it for the journey. The passenger cannot tell whether the luggage van is there, or, if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile.

H So with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But if the porter said of luggage intended for the luggage van: "That van is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretence for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go into the passenger carriage is to go in the same carriage as its owner, the passenger. Suppose a train at the platform, the passenger says: "I want this in the carriage with me;" the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half-an-hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by, or taken to the lost luggage room? I say "No." If he would, on what grounds? He must know that, by not following and taking his

seat, he was attempting to put a burden on the company's servant which he had no right to impose. A

Mrs. Bunch knew that. She did not say: "You must take care of this," or, "I want to go and meet my husband," but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer, or know the law. I agree, but I say that, treating this practically, she knew, everybody knows, that she was asking for a favour—for something for which she had no right. Does anyone believe that, if the porter had said: "I can take your luggage to the luggage van, and it will be taken care of, but you must take care of what is to go with you till you have taken your place"—I say, if he had said this, as he ought to have done, would anyone believe she would have had any right to complain or have been surprised. Always let it be remembered that she knew that it was necessary to get some promise or engagement from the porter other and more than the ordinary engagement of a porter when he takes luggage. B C

A word as to what he said. Of course, it was not a promise or contract by him for himself or the appellants. Certainly there was no consideration for it. All it amounted to was a statement of intention—a holding out of an expectation. "Will it be safe"? "Oh yes, I will look after it." All that this means is: "It will be safe, for I shall look after it." I say then that what the porter said did not impose a duty on the appellants which did not otherwise exist—that no duty existed in the appellants other than to carry the bag to the carriage in which she took her place, if she took it forthwith; that, if she did not take her place, so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own risk. I say she knew this, as is shown by her question to the porter, and by her acceptance of his statement. D E

A word on the judgment below. LORD ESHER, M.R., says (17 Q.B.D. at p. 220):

"Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." F

Be it so, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. LORD ESHER says (*ibid.* at p. 218):

"The question is whether there was evidence upon which the county court judge might reasonably find for the plaintiffs." G

Evidence of what? "Evidence of some fact on which he might reasonably so find"? What fact? We know all the facts. LINDLEY, L.J., says (*ibid.* at p. 226):

"It seems to me a simple case of transit, not of entrusting to the porter in any other sense than that in which everything put into his hands is entrusted to him. It is very true there was some short time during which it would not be necessary for him actually to keep walking or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this: the porter was acting within the scope of his employment in taking the luggage in the way he did from the cab to the train." H I

That is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did not. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes or more, if the husband had not arrived. I agree with LOPES, L.J.: "it was not part of the employment of a porter to take charge of baggage, except during that transit, i.e., from the cab to the train." I mean by that during the time which is fairly and reasonably necessary for that transit.

A I make no remark on the authorities beyond this, that they show a generous struggle on the one hand to make powerful companies liable to individuals, and on the other hand, an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly. I have not used a technical expression, not a word about bailments, etc. I have used plain and practical language. The appellants were under no duty to take care of the bag while Mrs. Bunch went to look for her husband. The porter could and ought to have refused to do so. Had he done so, Mrs. Bunch would have had no cause of complaint. By doing as he did, he could impose no duty on the appellants which did not otherwise exist. Before the respondents can complain of negligence, they must make out a duty of care. They have not done so. Not that I am sure it is a question of negligence. The sum in dispute is small, but I believe the question is of considerable importance. If the appellants are liable in this case, I do not know how they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the appellants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden, as this man was.

D The result is that the appellants are made liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so. I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the county court judge might find as he did—an expression that imports he might have found otherwise. How can that be, when the actual facts are not in dispute nor the conclusion to be drawn from them? I hold that the judgment is wrong and should be reversed.

E **LORD HERSCHELL.**—No appeal lies in this case from any conclusion of fact arrived at by the county court judge. It is only if he has erred in law that his judgment can be questioned. The single point, therefore, which has to be determined is, as it seems to me, whether there was any evidence to warrant the conclusion that the plaintiff's luggage was lost, owing to a breach of obligation on the part of the defendants. It is not necessary for me to state the facts. They have been fully brought before the House by those of your Lordships who have preceded me. I will only say that I do not think that the question put to the porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation towards the plaintiff, in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation, I do not think it was imposed upon them by the statement of the porter.

G I concur entirely in the opinions which have been expressed by the LORD CHANCELLOR and LORD WATSON, and think it necessary to add but little. Although there was a difference of opinion among the judges in the court below, and your Lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the judges who have dealt with the case, and all your Lordships, are agreed that, if luggage is brought to a railway-station and handed to a porter so long before the time appointed for the starting of the train that it cannot be reasonably said to be entrusted to him for the purpose of its transit with the passenger to its destination, but must be considered as so entrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances. On the other hand, I do not understand LORD BRAMWELL to doubt that a porter who receives a passenger's luggage at the entrance of the station for the purpose of conveying it to the train does act as the servant of the company, and that the company is liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van, in case it is lost during its transit to either carriage or van owing to the porter's

negligence. I understand him further to entertain the view that, though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of taking his ticket, the company are nevertheless liable during the time so occupied. A

I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the meantime. Would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he does not come unreasonably early, and does not wait an unreasonable time? Does then the fact that the train by which the passenger is to depart is not at the platform when he arrives make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destination cannot properly be said to have commenced. But I do not think that it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform. It is a matter of common knowledge that the practice of different railway companies, and indeed of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes, after being at the platform, the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very shortly before the time fixed for the departure of the train to know, when he alights at the station and entrusts his luggage to a porter, whether the train is at the platform or not. B C D

The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution; though, as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opinions may differ as to the proper conclusion to be drawn. In the present case Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand, it was Christmas Eve, when the trains were notoriously crowded, and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of these facts. I concur with those of my noble and learned friends who think that the county court judge was warranted in point of law in arriving at the conclusion which he did with respect to them. E F

I have only to add that, although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in preferring the view of this duty to be derived from *Richards v. London, Brighton and South Coast Rail. Co.* (1), to that enunciated in the judgment of the Court of Appeal in *Bergheim v. Great Eastern Rail. Co.* (4). G H

LORD MACNAGHTEN.—I concur in the motion which has been proposed. Everybody who travels by railway knows that, as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody, too, knows that, while in the ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is common practice for passengers to take the lighter articles of luggage, or "hand luggage" as it is called, into the carriage with themselves. This practice is recognised by the railway companies, who provide suitable receptacles for hand luggage in passenger carriages; and it is a practice as much for the convenience of railway companies as it is for the convenience of passengers. I

It was contended by the appellants that in receiving a passenger's luggage railway porters, though in the service of the company, and forbidden to accept any payment

A from the public, must be acting on behalf of the passenger and as his agents, and that this relation continues as regards van luggage until it is labelled for the journey, and as regards hand luggage until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van luggage is altogether distinct and different from the contract as regards hand luggage—that, in fact, there are two separate contracts, and that, whatever
B may be the case as regards van luggage, the railway company comes under no liability of any sort as regards hand luggage until it is placed in the passenger's carriage.

I cannot think this view correct. The service rendered by railway porters in receiving passengers' luggage, in taking it to the platform and putting it into the train, are part of the ordinary facilities for passenger traffic which the public
C nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to perform. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey,
D and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract.

E The contract is the ordinary contract of common carriers—a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would
F fall upon them. But for all that the contract is one contract, and in ordinary course, except so far as it may be modified by the acts or conduct of the passenger, it remains in force during the continuance of the journey from its commencement to its end. If the reasoning in *Bergheim v. Great Eastern Rail. Co.* (4) seems to lead to a different conclusion, with all deference I am unable to concur in it. I prefer the view expressed by WILLES, J., in *Talley v. Great Western Rail. Co.* (2).

G Your Lordships are familiar with the evidence in the present case, and I do not propose to repeat it. It is enough, for the present, to say that on Dec. 24, 1884, Mrs. Bunch went to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 p.m. train to Bath; that on her arrival at the station the luggage was received by a porter in the employment of the company, and taken by him to the platform for the purpose of the journey, and
H that the Gladstone bag was last seen on the platform with the same porter a few minutes afterwards. From that time all trace of the bag is lost. The porter and the bag vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe in passing that, so far as the public was concerned,
I there was apparently nothing to distinguish the casual helper, of whom little if anything is known, from the regular and trusted servants of the company.

On these bare facts standing alone it seems to me that there would be evidence upon which the county court judge might reasonably find for the plaintiff, even if it were held that the company was not under the liability of common carriers as regards the lost bag. But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case and from Mrs. Bunch's conduct that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the

station too soon; that she came before the train was drawn up; that she broke the journey, if the journey is to be taken as having begun, and left the bag in the charge of a porter who was then not acting as the servant of the company within the scope of his authority as such, but acting as her agent in his individual capacity, and that, if this is not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake. It seems to me that there is no substance in any of these objections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public is to come in good time; and, considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas Eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define, within the extreme limits on both sides, the proper time for arrival; everything must depend upon the circumstances of the particular case. But, among those circumstances, the least important, as it seem to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time, and a matter over which the passenger has no control, and of which he can have no notice before he comes to the station.

Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten, parting with a travelling bag on which they set any store, would ask the same question, and in ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems almost absurd to me to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western Railway Co., and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag. Nor can it, I think, be said that Mrs. Bunch broke the journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is, at least, a very common incident in railway travelling for persons who intend to travel in company, whether they be members of the same family or not, to meet by appointment in the railway-station from which they mean to start; and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place.

It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right, and under all circumstances, to consider the company responsible for the safe keeping of his luggage before it is put into the train. A passenger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question, however, arises here. The lost bag was not left unguarded owing to the exigencies of traffic, or neglected by the porter who took it in consequence of conflicting duties. But I desire to say that, for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants and taken to the platform lies there at the risk of the passenger if he is not ready forthwith, or the moment he has got his ticket, to step into the train. It was said that, if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend that, if all travellers acted precisely alike—if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined—there would be no little confusion, and perhaps some consternation,

A among the railway officials. Whatever may be the result of your Lordships' judgment, there is no fear that it will have the effect of making everybody act alike; some passengers will still give more trouble at the station than others, but no one will give any more trouble because of it. Things will go on just as usual. The fidgety and the nervous will still come too soon; the unready and the unpunctual will still put off their chance of arrival till the last moment; and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed.

B In the result, therefore, I am of opinion that the majority of the Court of Appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is
C not a contract in writing defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing
D so much as petty and vexatious restrictions and regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is, and is known to be, the ordinary and everyday practice of railway companies. A narrow, technical, and jealous view of the rights of individual passengers might, perhaps, enable railway companies to escape liability in some few cases. I much doubt whether it would tend to their advantage in the long run.

E *Appeal dismissed.*

Solicitors: R. R. Nelson; Ingle, Cooper & Holmes.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

F

G

Re BROGDEN. BILLING v. BROGDEN

[COURT OF APPEAL (Cotton, Fry and Lopes, L.JJ.), April 16, 17, 19, 20, 21, 23, May 2, 8, 1888]

[Reported 38 Ch.D. 546; 59 L.T. 650; 37 W.R. 84; 4 T.L.R. 521]

H

Trustee—Duty—Recovering and applying trust fund—Discretion as to performance of duty—Trust money payable to trustee at specified time—Demand for payment immediately on money becoming due—Duty to take proceedings—Onus of proving proceedings would be fruitless.

I

A trustee has a discretion as to the mode and manner, and very often as to the time, in which or at which he shall carry his duty into effect, but his discretion is never an absolute one. It is always limited by the dominant and guiding duty of recovering, securing, and duly applying the trust fund, and no trustee can claim any right of discretion which does not agree with that paramount obligation.

The duty of a trustee to whom trust money becomes payable at the end of a specified period is to demand payment of the money immediately after the expiration of that period, and, if payment is not made, to take proceedings to recover the amount due.

If the circumstances are such that the trustee has formed a well-founded belief that, if he took proceedings they would prove fruitless, and, accordingly,

he does not do so, the onus is on him to prove that fact, and it is not for the cestui que trust to prove that the trustee could have got the money.

Notes. Considered: *Re Hurst, Addison v. Topp* (1890), 63 L.T. 665. Applied: *Re Greenwood, Greenwood v. Firth* (1911), 105 L.T. 509. Referred to: *Re Chapman, Cocks v. Chapman* (1896), 45 W.R. 67; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162.

As to the duties of trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 966-978; and for cases see 43 DIGEST 847 et seq.

Case referred to:

(1) *Clough v. Bond* (1838), 3 My. & Cr. 490; 8 L.J.Ch. 51; 2 Jur. 958; 40 E.R. 1016, L.C.; 24 Digest (Repl.) 716, 7043.

Also referred to in argument:

Clack v. Holland (1854), 19 Beav. 262; 24 L.J.Ch. 13; 24 L.T.O.S. 49; 18 Jur. 1007; 2 W.R. 402; 52 E.R. 350; 24 Digest (Repl.) 723, 7087.

Grove v. Price (1858), 26 Beav. 103; 53 E.R. 836; 43 Digest 850, 2978.

Barnard v. Pumfrett (1841), 5 My. & Cr. 63; 10 L.J.Ch. 124; 41 E.R. 295, L.C.; 24 Digest (Repl.) 754, 7417.

Lazonby v. Rawson (1854), 4 De G.M. & G. 556; 3 Eq. Rep. 89; 24 L.J.Ch. 482; 24 L.T.O.S. 175; 1 Jur.N.S. 289; 3 W.R. 34; 43 E.R. 624, L.C.; 24 Digest (Repl.) 757, 7443.

Hawkins v. Day (1573), Amb. 160, 803; 1 Dick. 155; 3 Mer. 555, n.; 27 E.R. 107, L.C.; 24 Digest (Repl.) 711, 6977.

Hiddingh (Hairs) v. De Villiers Denyssen, Hiddingh v. Denyssen, Denyssen v. Hiddingh (1887), 12 App. Cas. 624; 56 L.J.P.C. 107; 57 L.T. 885, P.C.; 23 Digest (Repl.) 325, 3930.

Learoyd v. Whiteley (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 36 W.R. 721; 3 T.L.R. 813, H.L.; 43 Digest 856, 3038.

Stiles v. Guy (1849), 1 Mac. & G. 422; 14 Jur. 355; 41 E.R. 1328; sub nom. *Stiles v. Guy*, 1 H. & Tw. 523; 19 L.J.Ch. 185; 14 L.T.O.S. 305, L.C.; 24 Digest (Repl.) 725, 7109.

Tebbs v. Carpenter (1816), 1 Madd. 290; 56 E.R. 107; 24 Digest (Repl.) 747, 7338.

A.-G. v. Chapman (1840), 3 Beav. 255; 10 L.J.Ch. 90; 49 E.R. 99; 24 Digest (Repl.) 756, 7436.

Corporation of Clergymen's Sons v. Swainson (1748), 1 Ves. Sen. 75; 27 E.R. 901, L.C.; 24 Digest (Repl.) 756, 7434.

David v. Frowd (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 39 E.R. 657; 24 Digest (Repl.) 856, 8513.

Curtis v. Blow (1831), 2 B. & Ad. 426; 9 L.J.O.S.K.B. 260; 109 E.R. 1201; 24 Digest (Repl.) 627, 6214.

Appeal from a decision of NORTH, J., in an action against the trustees of a marriage settlement seeking to make them liable to replace trust funds which had been lost.

John Brogden, a contractor living at Manchester, carried on a large business in partnership with his sons, Alexander, Henry, and James Brogden. By his will, dated Oct. 25, 1867, John Brogden gave £10,000 to the trustees of the settlement of his daughter, the wife of the defendant Samuel Budgett; a legacy of £20,000 with interest at 4 per cent. to be paid to his daughter Mary Jane Brogden (afterwards the wife of W. Billing) thus—£17,250 immediately, and £2,750 after the death of his wife Sarah Brogden; and a legacy of £10,000 to his son George Brogden; and the testator directed that no part of the legacies of £10,000, £20,000, and £10,000 should be demanded or claimed, or any proceedings taken for having them secured, or any accounts taken, until after the expiration of five years from his death, except in case of default by his trustees and executors in payment of the interest thereof. He further directed that, if at the time of his decease he should

A be engaged in any partnership in which his sons or any of them were also engaged, all money belonging to him and embarked or remaining in such partnership should be allowed to remain in the hands of such partnership for so long of the period of five years next after his death as any of his sons should continue in such partnership and should require such money to remain, but so that his trustees or executors be paid by the partnership, or credited in their books with interest on all such
B money at 4 per cent. He appointed his wife and his three sons executors of his said will. On the marriage of Mrs. Billing a settlement was executed, dated Dec. 17, 1867, by which the testator covenanted with Samuel Budgett, Alexander Brogden, and James Brogden, the trustees of the settlement, to pay them £10,000 upon the trusts of the settlement within five years after his death, and an annuity of £300 in the meantime. By a codicil to his will, dated Dec. 17, 1867, the testator
C revoked the legacy given to his daughter Mrs. Billing to the extent of £10,000.

The testator died on Dec. 9, 1869, being still in partnership with his three sons. Almost all his property was invested in collieries and iron works belonging to the business carried on by him and his partners. After his death the business was carried on under the name of Brogden & Sons.

On Mar. 15, 1873, the executors passed their residuary accounts, which showed
D a clear balance of £12,000, after providing for the payment of the debts and legacies, including the legacies mentioned, and the plaintiffs, Mrs. Billing and her infant children, alleged that on the expiration of five years from the testator's death his estate was amply sufficient to pay the sum of £10,000 secured by his covenant with the trustees of the marriage settlement and also the sum of £7,250, part of the legacy under his will. On Dec. 12, 1869, and repeatedly afterwards,
E Mr. Billing urged the defendant Samuel Budgett to insist on the payment of those sums, and in consequence Budgett applied several times to the firm on the subject. He appeared, however, to have been unwilling to press his co-trustees for immediate payment in case it might injure the firm. The firm having offered certain securities for the sum due, Messrs. Ingle, Cooper & Holmes, the defendant's solicitors, wrote on Mar. 18, 1875, to Alexander Brogden as follows:

F "Mr. Samuel Budgett has consulted us to-day on the mode proposed to be adopted for the satisfaction of the late Mr. Brogden's covenant to pay £10,000 to the trustees of the settlement, either during his lifetime or within five years after his death, and the investment of the money. Mr. Budgett is very anxious to meet your views, and impressed this upon us strongly, but we are
G compelled to advise him that, in our opinion, the proposed arrangement is not within the scope of the trustees' powers. The investment clause permitting an investment

'upon stocks, funds, shares, debentures, mortgages, or securities of any corporation, company, body municipal, commercial, or otherwise incorporated by Act of Parliament, or by private charter, or otherwise in the United
H Kingdom, etc.,'

does not, in our opinion, authorise an investment by the trustees upon mortgage of such shares. It clearly points to a bona fide investment in their own names in such shares, subject to variation with the consent of Mrs. Billing during her lifetime. Moreover, the proposed arrangement is in fact so entire and indivisible that we do not see that, if it were impeached, it would ever be
I held that the bequest of the £10,000 under the circumstances was a satisfaction of the testator's covenant."

On May 27, 1875, Samuel Budgett wrote to Mrs. Billing:

"In reply to William's letter, I am very anxious to do all in my power to secure a settlement of your trusts, but it places me in a very unpleasant position with your brothers. The last I heard was from my brother James in reference to Sarah's [Mrs. Samuel Budgett] intentions, but the firm were considering what was the best to be done, but that it would take some time to

arrive at a definite settlement. I have prepared a letter pressing for a settlement, but could not make up my mind to post it. I saw Mr. Holmes, the solicitor, again last week in reference to it, but I do not like leaving the matter in their hands."

On June 29, 1875, Samuel Budgett wrote to Messrs. Ingle, Cooper & Holmes :

"As I am leaving home for the Continent for a short time, I should be obliged by your again applying to Messrs. Brogden & Sons personally as trustees for the amounts due to Mrs. W. Billing under the marriage settlement, and under the will of the late J. Brogden. And I shall thank you to take such steps as you deem best to obtain a definite statement as to the time and mode of payment, having respect as far as possible to the good feeling existing between us."

On June 29, 1875, Samuel Budgett wrote to Mrs. Billing :

"As I am off to foreign lands, I have instructed Messrs. Ingle, Cooper & Holmes again to apply to each of your three brothers for the payment of your claims, and I trust they may take such steps as may secure at least a definite proposal from them, though I do not feel prepared to proceed to extreme measures."

On Aug. 4, 1875, James Brogden informed Mrs. Billing that the firm had agreed to deposit certain Dutch South Eastern Railway bonds and other securities with Mr. Johnston, their book-keeper, to hold for the executors of John Brogden's will, to cover the sums due to the trustees of the Billing and Brogden settlements. The defendant Samuel Budgett was informed of this, but he took no further steps in the matter, and the bonds were eventually returned by Mr. Johnston to the firm.

On April 20, 1876, Messrs. Brogden offered to deposit £15,000 bonds of the Dutch South Eastern Railway Co. and 250 paid-up shares in the Ulverston Mining Co. as security for the money due to Mrs. Billing's trustees, but Samuel Budgett declined this security. In May, 1876, Budgett commenced an action for the administration of the testator's estate, but in September, 1876, proceedings in the action were stayed with the consent of Mr. and Mrs. Billing upon Alexander, Henry, and James Brogden depositing with Budgett as temporary security for the payment of the three sums of £10,000, £7,250, and £2,750, the title deeds of a leasehold colliery belonging to them called Merthyr Dare Colliery. By an indenture, dated Sept. 22, 1876, to which all the executors of John Brogden were parties, it was recited that the executors had received assets more than sufficient to pay the sums payable to the trustees of Mrs. Billing's settlement, under his covenant, and under his will and codicil, and it was witnessed that the title deeds of the colliery should be deposited with Samuel Budgett as security for the payment of those sums with interest at 6 per cent., and that a legal mortgage should be granted of the colliery if required, but that nothing therein contained should prejudice the rights of the trustees of Mrs. Billing's settlement against the executors as to the testator's assets. In November, 1876, a joint-stock company called the Bwlfa and Merthyr Dare Colliery Co. was formed, which purchased the Merthyr Dare Colliery Co. from Messrs. Budgett, and in October, 1877, Samuel Budgett gave up the title deeds of the Merthyr Dare Colliery to the company in exchange for £27,000 in debentures of the company. Mr. Billing consented to this, being apparently convinced that the firm could not at that time pay the money in cash. The firm of John Brogden & Sons ultimately became insolvent, and was dissolved and wound-up by a judgment in an action in the Chancery Division dated July 26, 1880. The sums due from the testator's estate were never paid; and the debentures of the colliery company turned out to be a very insufficient security.

The present action was brought by Mrs. Billing and her infant children against Alexander and James Brogden as executors of the will of John Brogden, and also against them and Samuel Budgett as trustees of her marriage settlement, seeking to make the defendants jointly and severally liable for the non-payment of the

A sums of £7,250 and £10,000. Mrs. Brogden, the testator's widow, on whose death the further sum of £2,750 was payable, was living at the time of the commencement of the action, but died in the course of the proceedings. Alexander and James Brogden being insolvent, the main object of the action was to make Samuel Budgett liable. In his defence he pleaded that he had been guilty of no default or neglect, but had pressed for the payment of the sums due in every reasonable way, but at the expiration of five years from the testator's death it was found impossible, owing to the depression of trade and other causes, to realise the assets of the testator's estate, which were embarked in the business, at anything like their full value, and that it was for the advantage of all parties interested in the estate, and especially of Mrs. Billing and her husband and children, that the realisation of the assets of the testator should not be forced. He insisted that from that time to the present it had been impossible to recover the sums due, and that he had taken every step which could reasonably have been taken to obtain payment. The action was heard by NORTH, J., who made a declaration that the defendants Alexander, James, and Henry Brogden committed a breach of trust in not paying, and that the defendant Samuel Budgett committed a breach of trust in not enforcing payment of, the debt of £10,000 and the legacy of £7,250 at the expiration of five years from the date of the testator's death, and that they were jointly and severally liable to make good the sums, with interest thereon at 4 per cent., so far as the interest had never been kept down. The defendant Budgett appealed.

Sir Horace Davey, Q.C., Warrington, Q.C., and Ingle Joyce for the defendant. *Mulligan* for the defendant A. Brogden.

Rigby, Q.C., and Hopkinson for the plaintiffs.

E **COTTON, L.J.**, after shortly stating the will of John Brogden and his death, continued: What was the duty of the trustee, Mr. Budgett? It was his duty, in my opinion, at the expiration of that five years to call for payment and to take reasonable means of enforcing payment if the executors did not pay the debt and the legacy, and there having been a postponed period during which no steps were to be taken against the partners or against the executors, it was the more his duty, at the expiration of that period, to assume that the executors had done what it was their duty to do, by preparing for paying the debts and paying the legacies of the testator. Although, as a rule, the executors have a year for winding-up the estate and paying all the debts, and for making provisions for legacies, yet, when that is the case, at the end of the period they have had already the time to prepare for making the payments which it was their duty to make, whether in the way of debts or in the way of legacies, and it is their duty then to be prepared to pay at once. In my opinion, in the present case, it became the duty of Mr. Budgett to take active measures immediately after the expiration of the five years—that is immediately the legacy became payable and immediately the debt became payable.

H We must, therefore, consider what he did. The five years expired at the beginning of December, 1874. I do not suggest that during the remainder of that month of December he should have taken any legal proceedings. That would be hardly to be expected; but what, in my opinion, he ought to have done, if not in December, 1874, early in the year 1875, was to have demanded payment, and if payment was not made, then he ought to have taken effectual proceedings in order to recover payment both of the legacy and of the debt. I do not say it was his duty to recover them, because that assumes that he could do so, but, in my opinion, it was his duty to demand payment of them, and to take effectual proceedings for the purpose of recovering them. What did he do? On Dec. 12, 1874, Mr. Billing, who was anxious, subject to what I shall hereafter mention, to recover payment of the sum settled on his wife and children, wrote to him urging him to see about getting payment of these sums of money. He did nothing as far as one can see—nothing in the way of taking any proceedings at all—till sometime in March, 1875. On Mar. 18, 1875, he had an interview with Mr. Alexander Brogden, who was the eldest son and the senior surviving partner in the firm, and apparently had the

command which his position gave him. There is a letter from Mr. Holmes, a solicitor, of Messrs. Ingle, Cooper & Holmes, who was consulted by the defendant, which throws a light on the steps which he then took. We find that in this correspondence of which I shall only read a very small portion, but which was very much commented upon, and which forms a great part of the comment on each side of the conduct of the defendant, Mr. Holmes writes a letter on Mar. 18, 1875, to Mr. Alexander Brogden. [His LORDSHIP read the letter (see p. 929 ante) and proceeded:] In my opinion, this points to what was the great blot in the proceedings taken by Mr. Budgett. He did not say: "You must pay." He was willing to enter into negotiations if it would be advisable to do so for the purpose of giving security. What seems to have been proposed—we have not got very satisfactory evidence as to what took place at the interview—was that he should have a charge upon certain shares, in order to secure the money. But I gather from that letter that he did not direct Mr. Holmes to demand the payment. He did not say: "Do not make any doubt about it; have payment. If you cannot have payment then let the partners see that I am determined, as being the only independent trustee, to do my duty, and to enforce payment from them by such means as are open to me." We come to two other letters, which are the only ones I shall read, namely those from Mr. Budgett to Mrs. Billing of May 27, 1875, and from Mr. Budgett to his solicitors of June 29, 1875. [see p. 930 ante].

I do not at all say that I have a suspicion that Mr. Budgett acted from any self-interested motives. I think it was suggested that his wife had a legacy left to her, and her interests were looked after better than Mr. Billing's interests. I have no such suspicion. What I think is that it was natural that he should be unwilling to take any active proceedings against his brother-in-law; he trusted him in the belief that this firm, which then stood in good credit, was a perfectly solvent firm, and that the money was safe; and, that being so, he did not take those proceedings which it was his duty to take to make them understand that it was his duty to obtain payment, and he must obtain payment from them. He took the course he did, and he takes the risk of whatever the consequences may be.

In October, 1875, proceedings were taken, but not by him. They were taken by his brother, who was a trustee for Mrs. Budgett. As I say, I do not suggest that that was done to get her a benefit rather than Mrs. Billing, but that left the control of the proceedings not in Mr. Budgett's hands, and when a settlement was made in March of the following year it was a settlement only to give security for the legacy and the debt which was due to his brother, the trustee for his wife. In May, 1876, he does take proceedings, and does not get any security which can excuse him for the loss of the money, if he is answerable for it, because he took that security in October or September, 1876, which was the security of a leasehold colliery, and, although it is possible that, if he had at once realised that security in the then state of the market, he might have got money enough to pay everything of which he was trustee, yet it was a leasehold colliery, there was a difficulty about the rent, the landlord took proceedings, there had to be a large sum paid in order to retain the colliery, and when it was realised it realised a sum insufficient to provide for the payment of these sums for which Mr. Budgett was trustee.

That being so, it is said that a trustee who has acted as he did, not without consulting his solicitor, has never been held liable for what must be considered as an error of judgment. In my opinion, that is not the true way to state the case. If he had determined to get payment, if he had applied for payment in such a way as to show that he meant to have it, and had consulted solicitors as to the best mode of proceeding, there might have been an error of judgment. But the conclusion to which I come, having regard to those letters, is that he did not do his duty in requiring payment—demanding it, and taking what he was advised were the best means of enforcing payment at least till the period of October, 1876—a late period, when we consider the state of the market as regards coal and iron. In regard to that the evidence is that in 1874 coal was in a very good state, collieries were very valuable property. But, although they were good in 1875, and not quite

A so good in 1876, both coal and iron then went rapidly down, and, although in 1874 and 1875 there was that good state of coal and iron, unhappily at a later period that was not the case. That decides the first question with regard to which the rule is well laid down by LORD COTTENHAM in *Clough v. Bond* (1), that where a trustee does not do that which it is his duty to do, *prima facie* he is answerable for any loss occasioned thereby.

B Then comes this question: If any loss is occasioned thereby, on whom does it lie to show that no good would have resulted if he had taken proceedings? Is that for the *cestuis que trust* who are seeking to make Mr. Budgett liable; or is it for Mr. Budgett to show that no good would have resulted? Is it for the *cestuis que trust* to show that he could have got the money, or for Mr. Budgett to show that he could not have got it if he had taken such proceedings as it was his duty to take? In my opinion, it is not for the *cestuis que trust* seeking to make the trustee liable to show that, if he had done his duty, he would have got the money for which they are seeking to make him answerable. It is the trustee who is seeking to excuse himself for the consequences of his breach of duty. It was his duty to take active proceedings, if necessary, earlier—to take active proceedings by way of action at law, if necessary; and, if the trustee is to excuse himself, it is for him to show that, if he had taken proceedings, which was what I think was his duty, no good would have resulted from it. Once show that he has neglected his duty, and *prima facie* he is answerable for all the consequences of that neglect. In this case the result of his neglect has been that only a very small sum could be recovered from the security which he took in the year 1876.

That being so, has the trustee made out that, if he had taken proceedings against the executors he would not have got any good from it? In my opinion, he has not made that out, and my reason for thinking so is this. At the time of the expiration of the five years, and certainly during the early part of the year 1875, probably up to the autumn of that year, the firm of Brogden & Sons was in very good credit. Immediately before the expiration of the five years, coal and iron had both been, as regards the vendors, in a very satisfactory state. Coal was at an extraordinarily high price, and iron was good in the market. Not only were the firm in good credit, but the partners during those years which immediately followed December, 1874, were drawing out very large sums. I think Alexander drew out £26,000; the other partners did not draw out so much, but they drew out very large sums. They had large credits at their bankers, and, although, undoubtedly, they did owe money to their bankers, their drawing account stood in such a state that they had considerable sums which they could call out. Not only this, they had securities which they could have dealt with, and which could have been profitably dealt with at that time.

There is another matter which one must deal with. The £7,250 was the legacy and the £10,000 the debt. It was contended by counsel for the defendant that, if he had recovered the £7,250, the legacy, that could have been recovered by various persons who, interested in various trust funds, were creditors of the testator, and, therefore, it would be wrong, by holding Mr. Budgett liable to give Mrs. Billing and her children a better position than that of the general creditors. There are a good many matters to be considered there. The executors had undoubtedly admitted assets. They had been for a long series of years paying interest to the legatees in respect of the debt. They had paid £5,000 to the testator's widow although that apparently had been lent back to them and remained in their hands. But they had admitted assets. It cannot be contended that, with the knowledge they must have possessed of the testator's affairs, the payment of the interest by them during these five years, which they paid in order to prevent the money being called for at once, was not an admission of assets.

I Then a question has been raised whether, if the legatee got payment on an admission of assets, and if he got judgment *de bonis propriis* of the executors, that could be recovered by a creditor in consequence of there being assets. If that were really out of the property of the executor, and not out of the goods of the

testator, I do not see how any creditor could have recalled that, because the right of a creditor is to follow the assets, and it is only on that footing that he gets payment of a legacy, or calls back a legacy that has been paid when the assets prove insufficient. There has been a serious question as to on whom the burden lay of proving that the legacy so obtained from the executors was a payment out of the assets of the testator or out of the property of the executor himself. But that is not the only question. We must not only be satisfied that as a matter of law under these circumstances a legacy paid could be recovered, but we must also be satisfied that if payment of this £7,250 had been made, the creditors would have taken proceedings to get back the sum which had been so paid. There were creditors, no doubt, in respect of trust funds to a very large amount, but the matter was not in any way entered into at the trial of this action to show that these were really to be considered as creditors of the testator, nor to show that there had been no dealings with the other partners so as to exonerate the testator's estate, and hold the other partners—the executors here—personally liable in exoneration of the testator's estate.

We find in fact that although those creditors were not paid in full, although there was a transaction between them and the partners in which they released them—apparently treating them as their only debtors—yet no proceedings have ever been taken to recover any of the sums which had been paid by the executors to those who were interested under the testator's will, nor anything done by those creditors to indicate an intention or a wish on their part to take such proceedings to recover from any person who took by bounty from the testator any sum of money because they were creditors. In my opinion, therefore, that contention fails as regards the legacy, and we must deal with the legacy on the same footing as the debt which was secured by the covenant of the testator. I have, therefore, come to the conclusion that the decision of NORTH, J., must be affirmed. It is an unfortunate position, no doubt, for Mr. Budgett, and I quite think that he believed that the firm were perfectly solvent, and that he was incurring no risk in letting the money remain with them. He ought not to have trusted them. As he did that, and his expectations and those of the family have turned out to be wrong, and he has not shown that no good would have resulted from his performing his duty by pressing for payment, and if necessary by taking proceedings to enforce payment, he must be held liable.

FRY, L.J.—We have not in this case to consider whether Mr. Budgett throughout acted for what he thought the best; nor whether he did as much for Mrs. Billing and her family as he did for his own wife and his family; nor whether he behaved with kindness to the Brogden family after they were involved in the difficulties of which we have heard so much in the course of this discussion. We have to consider two distinct questions. Did he perform with due diligence the specific duty which he had undertaken to do by becoming the trustee of Mrs. Billing's marriage settlement, and by becoming a trustee of the legacy given to her by her father's will? And, is it shown that, if he had performed that duty in the present case, no good result would have followed to the *cestuis que trust*? It has already been pointed out by the lord justice that both these sums of money, amounting to £17,250, became payable on Dec. 9, 1874, and for five years before that date it had been known that at that date those sums would become payable. It was further known to Mr Budgett that he was joined in these trusts with two gentlemen, both of whom had adverse interests. While it was the duty of the trustee to demand payment, it was probably the interest of the Messrs. Brogden, who were his co-trustees, to delay the payment. Therefore, it appears to me, looking at all the circumstances of the case, that the duty of the trustee to exercise activity and diligence in getting in the trust fund was more than usually clear on that Dec. 9, 1874. It is not in the least like the case of a fund, which becomes payable on the death of a father, where it is obvious that the breaking up of a family, and the sentiments and the feelings which are invoked by such an event may well

A account for some delay. Here Mr. Brogden had been dead for five years before the legacy became payable, and all persons concerned knew it had become payable on that date.

B It has been urged upon us that, if a trustee does as much for his cestui que trust as he does for himself, he has performed his duty. I cannot accept for one moment that view of the duty of trustees. A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time in which or at which, he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty—the dominant duty—the guiding duty—of recovering, securing, and duly applying the trust fund; and no trustee can claim any right of discretion which does not agree with that paramount obligation. Mr. Budgett appears not to have seen clearly the duty which he had assumed, and, instead of endeavouring to perform the duty, he endeavoured to arrive at some settlement with Messrs. C Brogden which would save them from the obligation of paying the money, and which I have no doubt Mr. Budgett thought was a more desirable arrangement for Mrs. Billing and her family than the actual receipt of the money and the investment in some security which would bring in a lower rate of interest than Messrs. Brogden were willing to pay.

D It has been urged upon us that Mr. Budgett early, or without great delay, consulted a firm of skilful and experienced solicitors, and that is perfectly true. But the instructions he gave to them were not to get the money, but to make such an arrangement as shall be acceptable to Messrs. Brogden. There, again, it appears to me that Mr. Budgett was entirely forgetful of the paramount duty under which he ought to have acted at the time.

E I do not follow the history of this case, because it has been already stated with sufficient fullness by COTTON, L.J. The dates which are the important ones are shortly these. Although Mr. Billing immediately after Dec. 9, 1874, urges activity on Mr. Budgett, he does nothing until March, 1875, and even then he does nothing effective. When proceedings are commenced, they are not commenced by Mr. Budgett himself, but by his brother. When these proceedings are ended by a compromise, the claim of Mrs. Billing is left out of the compromise, and it is not until F May, 1876, that Mr. Budgett begins legal proceedings against Messrs. Brogden, and those proceedings, I think, do not even then begin against Messrs. Brogden with the intention really to recover speedily the money. They were settled in September, 1876, by an unfortunate compromise, in which Mr. Budgett took security for the property.

G That is the short history of the case. In that short history Mr. Budgett has not, as it appears to me, shown diligence in the duty he assumed. But then it is said by Mr. Budgett that no loss has accrued to the cestuis que trust by reason of his want of diligence, and he says that, if he had been diligent, no greater good would have come to the Billing family than has come to them. In my judgment, the burden of sustaining any such argument as that rests distinctly upon the trustee who sets it up. When the cestui que trust has shown that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the cestui que trust has made out, in my judgment, a prima facie case of liability upon the trustee, and if the trustee desires to repel that by saying that, if he had done his duty, no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee. Has Mr. I Budgett shown that, if he had used due diligence at or immediately after December, 1874, he could not have done that which it was his duty to do, namely, recover the cash from the persons who were liable to pay it? In my judgment, he has not proved that. On the contrary, the conclusion at which I arrive is that, if he had once made Alexander Brogden believe that he meant to have the money, the money he would have had without undue delay.

Another objection has been stated which relates only to the legacy and not to the sum of £10,000 under the covenant. It is said that if Mr. Budgett had sued for these moneys and had recovered them, the large creditors of the firm would

have taken proceedings to recover back from the legatees the sums paid. That is an experiment which Mr. Budgett might very well have tried. But, instead of trying the experiment and getting the money and seeing whether it would have been got back, he asks us to conclude that it would have been got back. In the first place, there arises the legal inquiry upon which I do not intend to express any opinion or any conclusive opinion. It is this. The executors had undoubtedly admitted assets. In all probability they would have admitted assets in the action brought by Mr. Budgett against them before the judgment. If there had been a judgment *de bonis propriis* for the recovery of the proper moneys from the executors, could a legacy so paid have been recovered back by the creditors of the testator? The inclination of my mind is strong to think that the inquiry in every case must be: Was the legacy so paid part of the assets of the testator? If it was, it can be recovered by the creditors; if it was not, it cannot be so recovered. I repeat that I do not found my decision upon this legal point, because we have to consider whether Mr. Budgett has in point of fact shown us that in all reasonable probability the legacy would have been recovered if it had been paid. There is, to my mind, cogent evidence to show that the creditors were not active in insisting upon their debts as against the legatees; and I think, therefore, that Mr. Budgett has failed in proving that, if he had recovered the legacy from the executors, it would have been recovered back from him by the creditors. My conclusion is that NORTH, J., was perfectly right, and that this appeal fails.

LOPES, L.J.—The object of this suit is to impose liability on a trustee. Breach of trust is alleged, but it is free from any suggestion of dishonesty or bad faith. I do not propose to deal with the facts of the case, which have been already fully disposed of by my Lords. I shall be satisfied by stating shortly what I believe to be the law which applies to a trustee circumstanced as the defendant Mr. Budgett was in regard to these *cestuis que trust*—I mean a trustee whose duty it was to obtain payment of trust moneys at a specified time.

Such a trustee, in my opinion, is bound at the expiration of the specified time to demand payment of the trust moneys, and, if that demand is not complied with within a reasonable time, to take active measures to enforce its payment, and if necessary to institute legal proceedings. I know of nothing which would excuse such action on the part of a trustee unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated.

Applying those principles to the present case, I come to the conclusion that Mr. Budgett committed a breach of duty in not taking more active and strenuous measures than he did to obtain payment of the trust funds in question. Fearful of the disruption of family relations, he seems to have been naturally unwilling to incur the odium which would attach to that firm and determined course which he ought to have adopted. It is said that he was actuated by a feeling that enforcing payment of the moneys of which he was a trustee would bring about a failure of the firm, and cause the interposition of other creditors, whose claims conjointly with his own would lead to the bankruptcy of the Brogdens. I have arrived at this conclusion. The state of the business in 1875, the large sums received by the firm and paid out by the firm at that time, together with other matters which have been alluded to, lead me to think that, if proper pressure had been brought to bear at that time, the trust moneys would have been paid to Mr. Budgett.

A distinction was made between the debt—I mean the moneys due under the covenant—and the legacy. It is said that, if the legacy had been paid, the creditors might have compelled the legatee to refund. I think it is unnecessary to consider the difficult questions of law which have been argued upon this subject. I can find no evidence in the case which would justify me in coming to the conclusion that, if the legacy in question had been paid, any attempt to obtain the refunding

A of the legacy in question would ever have been made. I am reluctantly, therefore—I say reluctantly because I believe that Mr. Budgett acted throughout in good faith and honesty—compelled to hold that the decision of NORTH, J., ought to be affirmed, and that Mr. Budgett must be held liable.

Solicitors: *J. Parker Dixon for Needham, Parkinson & Slack, Manchester; Ingle, Cooper & Holmes.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

Re YATES. BATCHELDOR v. YATES

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), March 8, 10, 1888]

[Reported 38 Ch.D. 112; 57 L.J.Ch. 697; 59 L.T. 47; 36 W.R. 563;
4 T.L.R. 388]

Bill of Sale—Trade machinery—Fixtures on land subject to mortgage—No reference to machinery in mortgage deed—Need for mortgage to be registered—Sale of “mortgaged property or any part thereof”—Powers of mortgagee—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), ss. 4, 5—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 19 (1) (i).

By an indenture dated Aug. 16, 1886, it was witnessed that, in consideration of £950 lent by F., Y. as beneficial owner granted and conveyed “all that piece of land, with the dwelling-house and buildings thereon erected, situate in E,” to hold the same unto and to the use of F. in fee simple. At the date of the mortgage there was annexed to the land certain trade machinery, but this was not mentioned in the mortgage. The mortgage deed contained a provision that the power of sale contained in s. 19 of the Conveyancing Act, 1881, should be exercisable by the mortgagee.

Held: (i) an ordinary mortgage of land, which did not assure trade machinery attached to the land (being “personal chattels” within s. 5 of the Bills of Sale Act, 1878) as such, or give a licence to take possession of it as such, was not an “assurance of personal chattels” within s. 4 of the Act, and, accordingly, the mortgage was not void for want of registration under the Bills of Sale Acts; (ii) neither the terms of the mortgage, nor the power conferred on a mortgagee by s. 19 (1) (i) of the Conveyancing Act, 1881 [re-enacted by s. 101 (1) (i) of the Law of Property Act, 1925], to sell “the mortgaged property or any part thereof,” enabled the mortgagee to sever the machinery from the land and sell it separately.

Notes. Considered: *Climpson v. Coles* (1889), 23 Q.B.D. 465; *Re Lusty, ex parte Lusty v. Official Receiver* (1889), 60 L.T. 160. Applied: *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600. Distinguished: *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686. Followed: *Johns v. Ware* (1899), 68 L.J.Ch. 155. Considered: *Re Rogerstone Brick and Stone Co., Southall v. Wescomb*, [1918–19] All E.R.Rep. 644. Referred to: *Stevens v. Marston* (1890), 60 L.J.Q.B. 192; *West London Syndicate v. I.R. Comrs.*, [1898] 2 Ch. 507; *Born v. Turner*, [1900] 2 Ch. 211; *Re Chaplin and Staffordshire Potteries Waterworks Co.’s Contract*, [1922] 2 Ch. 824; *Hunter v. Hunter*, [1936] A.C. 222.

As to the subject-matter of bills of sale, see 3 HALSBURY’S LAWS (3rd Edn.) 274 et seq.; and for cases see 7 DIGEST (Repl.) 34 et seq. As to a mortgagee’s right of possession and to sell the mortgaged property, see 27 HALSBURY’S LAWS (3rd Edn.) 277 et seq.; and for cases see 35 DIGEST 394 et seq. For the Bills of Sale Act, 1878,

see 2 HALSBURY'S STATUTES (2nd Edn.) 557, and for the Law of Property Act, 1925, see *ibid.*, vol. 20, p. 427.

Cases referred to:

- (1) *Re Burdett, Ex parte Byrne* (1887), 36 W.R. 128; reversed (1888), 20 Q.B.D. 310; 57 L.J.Q.B. 263; 58 L.T. 708; 36 W.R. 845; 4 T.L.R. 260; 5 Morr. 32, C.A.; 7 Digest (Repl.) 60, 322.
- (2) *Re Wilde, Ex parte Daglish* (1873), 8 Ch. App. 1072; 42 L.J.Bcy. 102; 29 L.T. 168; 21 W.R. 893, L.J.J.; 7 Digest (Repl.) 38, 199.
- (3) *Re Joyce, Ex parte Barclay* (1874), 9 Ch. App. 576; 43 L.J.Bcy. 137; 30 L.T. 479; 38 J.P. 708; 22 W.R. 608, L.J.J.; 7 Digest (Repl.) 39, 203.
- (4) *Mather v. Fraser* (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur.N.S. 900; 4 W.R. 387; 69 E.R. 895; 7 Digest (Repl.) 37, 186.
- (5) *North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 35 Ch.D. 191; 56 L.J.Ch. 609; 56 L.T. 755; 35 W.R. 443; 3 T.L.R. 206, C.A.; affirmed sub nom. *Manchester, Sheffield and Lincolnshire Rail. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; 58 L.J.Ch. 219; 59 L.T. 730; 37 W.R. 305; 4 T.L.R. 728, H.L.; 7 Digest (Repl.) 4, 6.

Also referred to in argument:

Re Townsend, Ex parte Parsons (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest (Repl.) 55, 286.

Davies v. Rees (1886), 17 Q.B.D. 408; 55 L.J.Q.B. 363; 54 L.T. 813; 34 W.R. 573; 2 T.L.R. 633, C.A.; 7 Digest (Repl.) 57, 300.

Re O'Dwyer (1886), 19 L.R.Ir. 19; 7 Digest (Repl.) 132, *939.

Kerrison v. Cole (1807), 8 East, 231; 103 E.R. 330; 12 Digest (Repl.) 328, 2542.

Meux v. Jacobs (1875), L.R. 7 H.L. 481; 44 L.J.Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526, H.L.; 7 Digest (Repl.) 34, 173.

Re Armitage, Ex parte Moore and Robinson's Banking Co. (1880), 14 Ch.D. 379; 49 L.J.Bcy. 60; 42 L.T. 443; 28 W.R. 924; 7 Digest (Repl.) 40, 207.

Hawtrey v. Butlin (1873), L.R. 8 Q.B. 290; 42 L.J.Q.B. 163; 28 L.T. 532; 21 W.R. 633; 7 Digest (Repl.) 38, 197.

Southport and West Lancashire Banking Co. v. Thompson (1887), 37 Ch.D. 64; 57 L.J.Ch. 114; 58 L.T. 143; 36 W.R. 113, C.A.; 35 Digest 303, 526.

Doe d. Chandler v. Ford (1835), 3 Ad. & El. 649; 1 Har. & W. 378; 5 Nev. & M.K.B. 209; 5 L.J.K.B. 25; 111 E.R. 561; 21 Digest (Repl.) 342, 915.

Appeal from a decision of the Vice-Chancellor of the Palatine of Lancaster.

In and prior to the month of August, 1886, Hugh Yates carried on business in Liverpool as a builder and contractor. He was owner in fee of a piece of land (part of which was used as a yard and another part as the site of a dwelling-house and a workshop) situate at Everton. On Aug. 16, 1886, Yates mortgaged his property in fee to a Mrs. Rosalie C. Frost to secure £950 and interest. The mortgage deed, which contained no recital whatsoever, was made between Hugh Yates (thereinafter called "the mortgagor"), of the one part, and Mrs. Frost (thereinafter called "the mortgagee"), of the other part, and it witnessed that, in consideration of £950 paid by the mortgagee to the mortgagor, the mortgagor covenanted with the mortgagee to pay the same on Feb. 7 then next, with interest at 5 per cent. from Aug. 7, 1886, and also to pay subsequent interest so long thereafter as the principal or any part thereof remained due. The indenture further witnessed as follows:

"The mortgagor as beneficial owner grants and conveys to the mortgagee all that piece of land, with the dwelling-houses and buildings thereon erected situate in Everton in the city of Liverpool and on the north side of the road leading from Liverpool aforesaid to the village of Everton aforesaid now called Everton Brow . . . which said piece of land messuages and hereditaments form part of a line or row called Everton Crescent and is now numbered 17 Everton

A Crescent aforesaid to hold the same unto and to the use of the mortgagee in fee simple."

B Then followed a proviso for redemption in favour of the mortgagor, his heirs and assigns, and a covenant by him with the mortgagee that he would during the continuance of the mortgage keep the buildings therein comprised in good and substantial repair and insured against loss by fire in a certain sum, and would, on demand, deliver the policy and receipts for premiums to the mortgagee, and it was agreed and declared that the powers contained in s. 19 of the Conveyancing Act, 1881 [see now s. 101 of the Law of Property Act, 1925: 20 HALSBURY'S STATUTES (2nd Edn.) 427], should be exercisable at any time after Feb. 7 next, without its being necessary to serve the notice required by s. 20 of that Act, and also that s. 17 and s. 18 (1) of the Act, should not apply to the premises during the continuance of this security [see Act of 1925, s. 103, 93, and 99 (1) respectively].

C The mortgagor died in January, 1887, and shortly afterwards proceedings were taken by creditors in the Court of Chancery of the County Palatine of Lancaster for the administration of his estate. One Wade was appointed receiver, and entered into possession of the mortgaged property. Mrs. Frost having pressed for payment of the interest, an agreement was come to under which the receiver became her quarterly tenant, at a rental of £56 per annum, of part of the mortgaged property, in possession of which he remained, notwithstanding the tenancy had been terminated on Oct. 4, 1887, by a notice given by the receiver on June 17, 1887. The receiver paid two quarters' rent in respect of his occupation. In the month of October, 1887, Mrs. Frost exercised her power of sale, and sold the property comprised in the mortgage deed to a Mr. Bridge. By a deed dated Oct. 4, 1887, the property mortgaged to Mrs. Frost in August, 1886, was conveyed by her to Mr. Bridge in fee by the same description as that in the mortgage to her. At the time of the mortgage to Mrs. Frost in August, 1886, and at the date of the sale by her to Mr. Bridge in October, 1887, there were upon the land comprised in the mortgage certain articles of trade machinery within the definition of that term in s. 5 of the Bills of Sale Act, 1878, which, though not mentioned in the mortgage deed and not expressed to be thereby dealt with, would pass to the mortgagee by virtue of the mortgage and would, upon the sale of the property to Bridge, pass to him. On Oct. 5, 1887, the purchaser Bridge and his mortgagees claimed this trade machinery, on the ground that, being affixed to the land and not being fixtures movable at will, it passed by virtue of the mortgage to the mortgagee. The receiver, acting on behalf of the general creditors of the estate of Yates, not only challenged the right of Mr. Bridge and his mortgagees to the trade machinery, but contended that, having regard to the decisions prior to the Bills of Sale Act (1878) Amendment Act, 1882, the machinery would pass by the mortgage deed to the mortgagee; that by virtue of s. 4 of the Bills of Sale Act, 1878, the mortgage in question was in fact "an assurance of personal chattels"; and that, having regard to the provisions of the Act of 1882, and especially s. 9 thereof, such mortgage ought to have been in the form given in the schedule to that Act, and, not being in that form, was absolutely void.

H Questions were raised before BRISTOWE, V.-C., on a motion by Mr. Bridge in an action to administer the mortgagor's estate, that, notwithstanding the appointment of a receiver, Bridge might be at liberty to enter into possession of and into receipt of the rents of the hereditaments and premises comprised in the mortgage of Aug. 17, 1886, and that the receiver might be ordered to give up and withdraw from possession thereof accordingly, and also to pay to the applicant double rent for holding possession of the premises over the expiration of his tenancy thereof, or mesne profits and damages; or that the applicant and his mortgagees, or either of them, might be at liberty to institute and prosecute an action against the receiver and the plaintiff for the purpose of recovering possession of the premises, and that the receiver might be ordered to pay to the applicant the proceeds of sale

of such fixtures as had been sold. The learned Vice-Chancellor held that a mortgage in fee of land with no reference whatever to fixtures, chattels personal, or trade machinery of any kind, did not require registration, and that it was not void or impeachable because it did not comply with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; this was a good and valid mortgage, and Mr. Bridge and those claiming under him were entitled as purchasers from Mrs. Frost, the mortgagee, to the lands and hereditaments comprised in the mortgage, with such rights as they, derivatively holding from Mrs. Frost, were entitled to enforce. The receiver appealed.

Cozens-Hardy, Q.C., and *Arkle* for the receiver.

French, Q.C., and *Maberley* for the plaintiffs in the administration action, the purchaser from them, and his mortgagees.

Cur. adv. vult.

Mar. 10, 1888. **COTTON, L.J.**—This is an appeal from a decision of the Vice-Chancellor of the Palatine of Lancaster, the appellants asking us to declare that an instrument of mortgage was a bill of sale, and that the receiver in the action should account for the proceeds of certain parts of the trade machinery which he has sold and disposed of, on the ground that the bill of sale as regards them was bad. The respondents, who are the plaintiffs and the purchaser from them, claim, under a mortgage of Aug. 16, 1886, which was given by Mr. Hugh Yates, the person whose estate is being administered in the action. It was a mortgage in fee of certain property, on which there happened to be some trade machinery, but, on the face of it, it was merely a mortgage in fee of the land and the buildings upon it. It does mention the buildings, although that, of course, was unnecessary, because a mortgage of land would carry all buildings and fixtures on it. No power of sale is actually inserted in the instrument, but the mortgage is so drawn that the power of sale in the Conveyancing Act, 1881, is given to the mortgagee.

It was contended in the first place by counsel for the receiver that the instrument was a bill of sale of the trade machinery, and that, as it was by way of security for money, and did not comply with the requirements of the Bills of Sale Acts, it was altogether void in respect both of the trade machinery and the freehold property. But since the case was first argued before us, there has been a decision in the other branch of the Court of Appeal, in *Re Burdett, Ex parte Byrne* (1), that where an instrument assigns trade machinery, which are deemed to be personal chattels by s. 5 of the Bills of Sale Act, 1878, and also other fixtures, which do not come within the Act of 1878, then, if the bill of sale is not in the statutory form, it is void only as regards the fixtures which the Act says are to be considered as chattels, and valid as to the other fixtures. Therefore, when counsel for the receiver re-argued the case, he gave up the contention that, if this was a bill of sale within the meaning of the Act of 1878, the instrument was bad altogether because it was not in the form required by the Act of 1882; but he argued that it must be treated as void as to the trade machinery, which the Act declares to be personal chattels, and that is the question we have to consider.

The Bills of Sale Act, 1878, under which the questions we have now to decide arises, provides (by s. 3) that the Act shall apply to every bill of sale, whether absolute or subject to any trust, whereby the grantee has power to seize or take possession of any "personal chattels" comprised in or made subject to any bill of sale. Section 4 provides that "bill of sale" shall include assignments and other assurances of personal chattels, "personal chattels" being defined (by sub-s. (2)) as meaning

"goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include . . . fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed."

A Then comes s. 5, which causes all the difficulty in this case—a difficulty which is occasioned by the legislature saying—as it sometimes does—that a thing is something which it is not. Section 5 provides that

B “trade machinery shall, for the purposes of the Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act,”

and that :

“For the purposes of this Act—‘trade machinery’ means the machinery used in or attached to any factory or workshop,”

exclusive of the things particularly mentioned in the section.

C There was a great deal of discussion about the latter part of that section, but I think the true interpretation was put on it by counsel for the receiver, who said that the effect of it was only to exclude those dispositions of trade machinery declared by the Act to be personal chattels which would be excluded from the previous definition of bills of sale given in s. 4, and would not operate as a bill of sale on any person chattels. In my opinion, any instrument which purports to dispose of trade machinery in the way indicated by the Act will operate, as regards that, as a bill of sale if it would so operate as regards other personal chattels. It is suggested, however, that this mortgage could not be considered as an assignment of the trade machinery inasmuch as it does not purport to assign it at all, and the trade machinery, if it passes at all, only does so as part of the land conveyed. Section 7, which is very material, and undoubtedly does, as is indicated by s. 4, draw a broad distinction between trade fixtures and other fixtures, provides :

E “No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.”

F That undoubtedly points, as s. 4 does, to a broad distinction between trade machinery and fixtures other than trade machinery, but I think the real effect of the section is to exclude from the operation of the decision of *Ex parte Daglish* (2) and *Ex parte Barclay* (3) those trade fixtures which are not trade machinery and which come within the protection given by s. 7. I do not think that section points out how we ought to deal with the question whether this mortgage of land can be deemed, as regards the trade machinery which is upon it, an assignment of personal chattels or in any way a bill of sale.

G H I I have now gone through the material sections, and we have to consider whether this mortgage is, within the meaning of this Act, an assignment or other assurance of personal chattels, or a power or authority to take possession of personal chattels, within s. 4, and whether by this instrument the mortgagee has, within s. 3, power, either with or without notice, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale. On both points I am against the receiver. What we have is a conveyance of land, and although that does give a right to all fixtures on the land, including this trade machinery, yet it does so, not as an assurance of that trade machinery, or of those things which the Act says are to be considered as personal chattels, but merely as conveying and assigning all the land by which everything so fixed to the freehold passes. Nor, in my opinion, does it enable the mortgagee, within the meaning of s. 3 to seize or take possession of these personal chattels. It enables him to take possession of the land, and when he does that he has possession, as part of the land, of the trade machinery which has passed to him as part of the land. He takes possession of

the trade machinery in no other way than by taking possession of the land to which it is affixed. In my opinion, it would be wrong to hold a conveyance of this character to be a bill of sale. The instrument being simply a conveyance by way of mortgage of the fee simple in the land, that can in no way be considered such an instrument as is pointed at and hit by the Bills of Sale Act, 1878—that is, such an instrument as passes the machinery with a right to seize and take possession of it separately from the land, and not merely as part of the land conveyed by the mortgage.

In my opinion, by a mortgage like this (and I now deal with the mortgage more particularly) no right is given to the mortgagee to sever these fixtures from the land. He would only have the right to sever the fixtures, and deal with them separately if there was a power of sale which expressly authorised him to do so. This is a mere ordinary mortgage, referring, it is true, to the use of the land, the workshop, and the yard, but not in any way dealing either with the house, or with the workshop, or the machinery, as anything to be separated from or severed, or capable of being severed, from the freehold to which it is affixed. I think it is clear there is no power to deal with the fixtures separately unless some express authority is given by the power of sale in this instrument. Independently of recent legislation, mortgagees cannot, under an ordinary power of sale not giving express authority to do so, sell minerals apart from the surface. That can now be done, but it could not be done before, any more than trustees can sell the minerals as separate from the fee, and, in my opinion, no mortgagee in the absence of a power given to him on a fair construction of the power of sale could give a good title to a purchaser from him of fixtures which he had severed from the land. He might, subject to a court of equity stopping him, sell, but that would be only a transfer of a redeemable interest. He has no power to treat fixtures as severable from the land under the mere ordinary power to sell the land contained in his mortgage.

Then we come to the Conveyancing Act, 1881, and I may say now that we had this case re-argued because it had occurred to a member of the court that possibly the power of sale given to mortgagees by this Act might be treated as giving them an authority to sever the trade machinery and fixtures for the purposes of separately selling them, and, therefore, bring the case within the principle of *Ex parte Daglish* (2), and also within the Bills of Sale Act, 1878. But, in my opinion, that is not the true construction to be put on the statutory power of sale. The words which raised the doubt are in s. 19 (1) (i) of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 101 (i)], which gives the mortgagee

“A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof . . . either together or in lots.”

It was suggested that that might give power to sever the machinery and sell it separately from the land. In my opinion, that is not so. What is conveyed by this mortgage is a considerable piece of land, about 70 yards long and 37 feet wide, and a house, a yard, and a workshop. What, as a matter of fair construction, is the meaning of this power of sale? Is it that the mortgagee may sever that which is part of the land, the fixtures, and sell them separately from the land? It was admitted by counsel for the plaintiffs that, if there was a house, it might be sold in flats. I think he made an admission rather too much against himself, because, in my opinion, this power would not enable the mortgagee to break up the state of things which then existed, and it would not enable him to sell the fixtures as severed from the land on which they were. It would not enable him to sell the minerals, as separated from the remainder of the fee, though, in my opinion, it might be fairly construed in this way, that, though what is conveyed is a piece of land with a yard and a workshop, he might break that up into lots, if it was advisable so to do, and sell the land, house, workshop, and yard separately.

It was argued by counsel for the receiver that, having regard to s. 6 of the Conveyancing Act, 1881 [Law of Property Act, 1925, s. 62], one ought to consider

A and deal with this instrument as if it had expressed on its face everything that passes by a conveyance of the land, namely, as if it had expressly mentioned the workshop, the yard, and trade machinery. It is true that the section does, in order to prevent verbosity, say that a conveyance of land shall be deemed to include all those things, including fixtures, named in the section which are sometimes set out by conveyancers, but which really sufficiently pass by a mere conveyance of the land, and it was said that we ought to construe this power of sale as if it extended to a separate sale of everything mentioned in the section. But, although undoubtedly the Act does say what is to be the effect of a mere conveyance of land, as a matter of construction, whether these words mentioned are put in or not, the effect of putting in the words may be very different, because, if these words were all put in the mortgage, a power to sell the property mortgaged or any part thereof might be said to mean that some of this trade machinery might be sold separately. But when the words in s. 6 are not used, I think it would be putting a wrong construction on the terms of the power of sale to say that it authorised the mortgagee to do that which, without the power of sale, he could not do, viz., break up that which was conveyed to him, and sell the trade machinery separately and distinct from the land to which it was affixed, and by the conveyance of which land it passed to the mortgagee.

That is my opinion of this case upon the mere construction of the Act and the mortgage, and independently of authority. But I think the decisions of *Ex parte Daglish* (2) and *Ex parte Barclay* (3) on the Bills of Sale Act, 1854, which is not, it is true, quite in the same terms, have a very considerable bearing on the true construction of the power of sale, and a very considerable bearing on the question, whether this ought to be considered a bill of sale within the first definition of s. 4 of the Act of 1878, whether it comes within the description referred to in s. 3 of the Act of 1878 or not. The definition of a bill of sale in the Act of 1854, s. 7, included, besides assurances of personal chattels, "powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." The definition of personal chattels in that Act included all fixtures. In the Act of 1878 the words "personal chattels" do not include all fixtures, but they do include the trade machinery we are considering. In *Ex parte Daglish* (2) there was a mortgage, the power of sale of which authorised the mortgagee in express terms to sell the fixtures separately from the land. The lords justices there said in effect: "This may not be an assignment of fixtures so as in that way to be a bill of sale within the Act of 1854, but the power of sale enables the mortgagee to take possession of and seize these things as severed from the land, and, therefore, it comes within the definition of bill of sale given by the Act, and the Act applies to it." In *Ex parte Barclay* (3) there was a mortgage of land with fixtures on it, and a power of sale authorising a sale of the property or any part thereof, and there both JAMES and MELLISH, L.JJ., held that it was not a bill of sale, because, although it passed the chattels, it passed them only as chattels annexed to and forming part of the land which was demised; that that was not an assignment of chattels within the meaning of the Act; and that the power of sale did not authorise the mortgagee to deal with the chattels separately from the freehold. JAMES, L.J., said (9 Ch. App. at pp. 580, 581):

"The question here is, whether there really has been any separate sale of the fixtures or any separate licence or authority to take the fixtures and sell them. . . . I do not think that, under the power to sell the chattels as fixtures, the mortgagees would have a right to go in and dismantle the house, and take away the fixtures and sever them from the property."

That is the conclusion at which I have arrived with regard to the statutory power of sale in the present case—that on the terms of it the mortgagees would not be authorised to go in and sever this trade machinery and sell it as something separate and distinct from the land to which it is affixed. In the same case MELLISH, L.J., said (*ibid.* at p. 582):

"I think that when a lessee who has put in trade fixtures, and is, according to the ordinary law, entitled to remove those fixtures as against his landlord, mortgages the premises with the fixtures upon them, the test whether the mortgage, so far as regards the fixtures, requires to be registered under the Bills of Sale Act, is whether he gives power to the mortgagees to sever the fixtures on the premises, and to deal with them and sell them separately."

That case, in my opinion, lays down this principle, that where there is a mere conveyance of land, which conveyance by itself gives a right to the mortgagee to all the fixtures upon it, including the trade machinery, that is not to be considered as an assurance of personal chattels (notwithstanding that the Act of 1878 does make trade machinery personal chattels) within the Act, or in any way a bill of sale which requires to be registered. It was said that *Ex parte Barclay* (3) turned on this, that there was a mere mortgage by way of demise. But that contention will not hold good. The position of a mere tenant for a term of years is, as regards trade fixtures, different from that of the owner in fee simple, but as regards the question whether this mortgage of the fee is to be considered as an assignment of the chattels upon it when the only right given to those things (which are not really chattels and cannot be transferred by delivery) is by the conveyance of the land, I think that case has an important bearing on the question which arises here. Not that I found my opinion on that authority, but, having expressed my own opinion as to what is the true construction of the Act and the effect as regards this instrument, I ought not to omit to notice cases which have a very material bearing on the points before us.

In my opinion, it would be wrong to say that such a mortgage as this was a bill of sale of the trade machinery, even although the Act does declare that trade machinery is to be considered for the purposes of the Act personal chattels. In my opinion, the decision of the Vice-Chancellor was right, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The case is an important one, because it raises the question: What are the rights of mortgagees of cotton and other mills?—a very important question in the north of England, where the mortgaged property often includes valuable trade machinery.

The practical question we have to decide is whether a mortgagee of a mill, under a mortgage framed like the one before us, can seize and sever, and sell apart from the land, the trade machinery on it. If he could do so, it strikes me that, as regards trade machinery, it would be impossible to avoid the conclusion that this was a bill of sale and void because it was not registered. In order to dispose of that question, we must carefully examine the mortgage. Like other mortgages it consists of two distinct parts: First, there is the assignment or conveyance, upon conditions and subject to a proviso for a redemption, and then there is the power of sale. The two portions must be considered separately. For the purpose of the Bills of Sale Act it is necessary to ascertain the character of the instrument as a conveyance or assignment. Can anybody say, with any accurate use of language, that a mortgage of land in fee simple is an assurance of personal chattels? It appears to me impossible, notwithstanding that the land in legal acceptance carries with it things which, though affixed to it, can be moved, and when moved are personal chattels. Nor does trade machinery which follows the land become personal chattels for the purpose of considering the question whether there is an assignment or a conveyance of it. It follows as portions of the land, not as personal chattels at all, and, if you look at this conveyance, you cannot from first to last find anything about personal chattels. If you can import into the conveyance all the general words found in s. 6 of the Conveyancing Act, 1881, still you cannot come to the conclusion that this is an assurance of personal chattels in the correct acceptance of the word. It is a mortgage of land—nothing more, nothing less.

- A Pausing there a moment, I think the point is so covered by authority as to be clear beyond all question. It is precisely the same point as was raised and decided by WOOD, V.-C., in *Mather v. Fraser* (4), which was a decision on the Bills of Sale Act, 1854. That case has been followed by many others, and, although the language of the Bills of Sale Act, 1878, varies considerably from the language of the Act of 1854, it appears to me that the observations in *Mather v. Fraser* (4) are
- B just as applicable to the one Act as they are to the other.

Then arises another point, which is totally distinct, viz.: What is the effect of this power of sale? The power of sale which the mortgagee possesses here is conferred upon him by s. 19 of the Conveyancing Act, 1881. That section provides:

- C "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely): A power, when the mortgage money has become due, to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract. . . ."

- D This part of the case turns upon the true effect of the excess power "to sell the mortgaged property or any part thereof." What is the mortgaged property in this case? It is land. "Any part thereof" is any part of the mortgaged property which is land, and it appears to me we should be putting a forced construction on this language if we held that a mortgagee of land could sell, not part of the land, but a chattel as distinct from the land. It appears to me that would not be
- E warranted by the words, or by the ordinary practice of conveyancers.

- I am fortified in that observation by a precedent, in MR. DAVIDSON'S valuable work on CONVEYANCING (4th Edn.), vol. 2, part 2, p. 369, of a mortgage of a mill and machinery. There the power of sale expressly authorises the mortgagee to sell the fixtures "either together with the buildings or land to or upon which the same shall be fixed or stand or be, or separately and distinct therefrom." That
- F shows pretty well what the understanding of conveyancers is, and it appears to me that a mortgagee of land in this form has the trade fixtures and so on, as part of his security, and he can sell the land wholly or in part, but he cannot sever the fixtures and sell them separately. It appears to me the power does not reach to that extent, and if the mortgagee of a mill like this wants to have the power of selling the trade machinery apart from the rest of the mortgaged property, he
- G must have a bill of sale. That appears to me to be a practical solution of the whole question, and I have come to the same conclusion as COTTON, L.J., that the Bills of Sale Acts do not touch this security in any way.

- BOWEN, L.J.**—I am of the same opinion. There is a mortgage in fee of land with buildings upon it, the mortgagee having the power of sale given by the Conveyancing Act, 1881. Upon and attached to the land are certain fixtures and trade machinery, and, inasmuch as the Bills of Sale Act, 1878, declares that trade machinery is to be personal chattels, the question has arisen whether, as the trade machinery necessarily passes under the mortgage in fee of the land to the mortgagee, this was or was not a bill of sale of such trade machinery. If it was a bill of sale of such trade machinery, so much of it as operated in that character would
- H be bad. The remainder of the mortgage would, no doubt, still be valid, as was pointed out by a recent decision, which seems manifestly right, of the Court of Appeal: *Re Burdett, Ex parte Byrne* (1). We have to inquire, therefore, in the present case, whether this is a bill of sale of trade machinery. In order that it may be a bill of sale of trade machinery (assuming for the purposes of the inquiry that trade machinery is to be treated as personal chattels under the Act), it must be an assurance of such trade machinery within the Act, or a licence to take possession of it in the sense in which an assurance is defined with regard to other personal chattels, and in the sense in which a licence to take possession is defined.
- I

That raises neatly the point whether the mortgagee of such premises can, under a mortgage drawn in this general form, seize and sever the trade machinery. A

This question divides itself into two branches: first, suppose there was no power of sale given by the Conveyancing Act, 1881, or framed in language substantially similar to the power given by that Act, what would be the law?; and, secondly, is any difference to be made having regard to s. 19 of the Conveyancing Act, 1881? B
With regard to the first question, as to an ordinary mortgage of land on which there is trade machinery without a special power of sale, I entertain no doubt that such a mortgage is not a bill of sale of trade machinery, unless it assures the trade machinery as such or gives a licence to take possession of it as such. The material provisions of the Bills of Sale Act, 1878, begin with s. 3, which defines the scope and area of the Act, and provides that the Act is to apply to certain bills of sale, whereby powers are given to the holder or grantee. That is a very important section as indicating the area over which the Act is to prevail; but, be it observed, it leaves for further definition what is a bill of sale, because it merely says the Act is only to apply to every bill of sale of a certain character. To find out what a bill of sale is we must pass to s. 4. The language of that section is precise, and has received elucidation from a recent judgment of this court: *North Central Waggon Co. v. Manchester, Sheffield and Lincolnshire Rail. Co.* (5), in which we pointed out that the essence of a bill of sale was that it must be an assurance of a personal chattel, or a licence to seize, or take possession of it, within the meaning of s. 4. C

But then comes a further section, s. 5, which introduces the real difficulty here as to trade machinery, because it enacts that for the purposes of the Act trade machinery is to be deemed that which it is not otherwise, and which no lawyer would recognise it to be, namely, a personal chattel. One cannot help marvelling at the modern method of draftsmanship which introduces into these interpretation clauses subject-matters which in the common parlance of lawyers could not otherwise possibly be brought within them. According to the modern system, an Act of Parliament might be passed with regard to dairy farms, which, after a number of regulations as to how cows are to be marked, would go on to say that for all purposes of the Act a horse was to be deemed a cow. That is the modern system of draftsmanship; and when courts of justice have to construe such Acts the difficulties are almost insuperable. But I think the words in s. 5, as to a disposition of trade machinery, were intended only to exclude from the Act such dispositions as, if they related to ordinary personal chattels, would not be within the Act. Assuming for the purposes of the Act that trade machinery is personal chattels to all intents and purposes, we still have to come back to s. 4, and find out whether this is an assurance of trade machinery in the sense in which the term "assurance" is used as to a personal chattel. It cannot be treated as such an assurance, for it does not seem to give any right to the mortgagee to sever the trade machinery from the land. The trade machinery simply follows the conveyance of the land, as the shadow follows the substance. D

But we have to consider what is the effect of a power of sale given by the Conveyancing Act, 1881, and, no doubt, a serious question arises whether the power of sale given by that Act of 1881 (having regard to its special terms, which enable mortgagees to break up into lots and to sell in lots the mortgaged property or any part thereof) enables a person who takes a mortgage, in the ordinary form, of land on which there are fixtures, to sever the fixtures and sell them separately on the ground that they are "a part" of the mortgaged property. I cannot think that is the meaning of the section, or that those who drew it intended that anything might be sold as a part of the mortgaged property because it was subjected to the mortgage. I cannot believe for a moment that it was intended to give to the mortgagee of a house a power to sell the chimneys without selling the rest of the house, or to sell the fixtures or mantelpieces on the ground that they were part of the house. They are part of the house in the sense that they follow the land as a necessary concomitant of it in a conveyance of the land, but they are not part of the house for the purposes of this section. The subject-matter of the particular conveyance E F G H I

A or mortgage has, of course, to be considered in applying the Conveyancing Act, 1881, and you must, having regard to the subject-matter which is mortgaged, see what power the term "power to sell in part" really gives you, but when a workshop with machinery in it is mortgaged, I do not think the mortgagee can sell the machinery apart from the shop any more than he can sell the chimneys of the house separately. Some light is thrown in that direction by the provisions as to timber in s. 19 (4), which seems to show that, but for the special subsection, it would not have been in the power of a mortgagee to sell the timber of the estate, although the timber would pass as an incident of the land.

B For these reasons it seems to me to be plain on the construction of the Act that the decision of the court below was right. I agree that, if a mortgagee desires to have the power to sell trade machinery separately, he must have a bill of sale of the trade machinery which would give him the power to sell and deal with it as trade machinery. With regard to what has fallen from COTTON, L.J., as to the previous decisions, I wish to add nothing, and indeed I should have added nothing upon the main portion of this case if it were not that the matter is one of some importance.

Appeal dismissed.

D Solicitors: *Pritchard, Englefield & Co.* for *Barrell, Rodway & Co.*, Liverpool;
J. H. Lydall for *T. & T. Martin, Webb & Hime*, Liverpool.

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

E

F LEE v. NEUCHATEL ASPHALTE CO. AND OTHERS

[COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), February 5, 6, 9, 1889]

[Reported 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321;

5 T.L.R. 260; 1 Meg. 140]

G *Company—Dividend—Profits available for dividend—Company working wasting property—No provision in articles requiring directors to form fund for renewal or replacing of property—Payment as dividend of surplus obtained by working property over working cost.*

H A company may be at liberty to pay a dividend out of its profits although it cannot show that its available property at the time of declaring the dividend is equivalent to its nominal or share capital. Where nominal or share capital is diminished in value, not because of any improper dealing with it by the company, but by reason of causes over which the company has no control or by reason of its inherent nature, that diminution need not, in the absence of express provision in the articles, be made good out of revenue. If a company is formed to acquire and work a property of a wasting nature (e.g., a mine or quarry), so that that part of the capital of the company is gradually diminished, and retains assets sufficient to pay its debts, there is nothing in the Companies Acts to prevent any excess of money obtained by working the property over the cost of working it from being divided among the shareholders as dividend. Paying this surplus to the shareholders as dividend is not a return to them of the capital of the company in any such sense as is forbidden by the Acts. An article of a company owning wasting property, which provided that the directors "shall not be bound to form a fund or otherwise reserve moneys for the renewal or replacing" of the property held not to be illegal.

Notes. Followed: *Bolton v. Natal Land and Colonization Co.*, [1892] 2 Ch. 124. A
 Considered: *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239.
 Applied: *Wilmer v. McNamara*, [1895] 2 Ch. 245; *Re Kingston Cotton Mill Co.*,
 [1896] 1 Ch. 331. Considered: *Bond v. Barrow Hæmatite Steel Co.*, [1900-3]
 All E.R.Rep. 484; *Ammonia Soda Co. v. Chamberlain*, [1916-17] All E.R.Rep. 708;
Stewart v. Sashalite, Ltd., [1936] 2 All E.R. 1481. Referred to: *Wood v. Odessa*
Waterworks Co. (1889), 42 Ch.D. 636; *Lubbock v. British Bank of South America*, B
 [1892] 2 Ch. 198; *Re London and General Bank* (1894), 72 L.T. 227; *Re National*
Bank of Wales, [1895-9] All E.R.Rep. 715; *Re Barrow Hæmatite Steel Co.* (1901),
 9 Mans. 35; *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Alianza Co.*
v. Bell, [1905] 1 K.B. 184; *Re Spanish Prospecting Co.*, [1908-10] All E.R.Rep.
 573.

As to the payment of dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq.; C
 and for cases see 9 DIGEST (Repl.) 627 et seq.

Cases referred to:

- (1) *Guinness v. Land Corpn. of Ireland* (1882), 22 Ch.D. 349; 52 L.J.Ch. 177;
 47 L.T. 517; 31 W.R. 341, C.A.; 9 Digest (Repl.) 629, 4199.
- (2) *Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475; 20 L.T.
 591; 17 W.R. 694; sub nom. *Re Mercantile Trading Co., Ex parte Official* D
Liquidator, 38 L.J.Ch. 698, L.J.J.; 9 Digest (Repl.) 524, 3454.
- (3) *Davison v. Gillies* (1879), 16 Ch.D. 347, n.; 50 L.J.Ch. 192, n.; 44 L.T.
 92, n.; 9 Digest (Repl.) 637, 4243.
- (4) *Dent v. London Tramways Co.* (1880), 16 Ch.D. 344; 50 L.J.Ch. 190; 44 L.T.
 91; 9 Digest (Repl.) 644, 4280.
- (5) *Trevor v. Whitworth*, ante p. 46; 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. E
 457; 36 W.R. 145; 3 T.L.R. 745, H.L.; 9 Digest (Repl.) 650, 4321.
- (6) *Re County Marine Insurance Co., Rance's Case* (1870), 6 Ch. App. 104; 40
 L.J.Ch. 277; 23 L.T. 828; 19 W.R. 291, L.J.J.; 9 Digest (Repl.) 637, 4242.
- (7) *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch.D. 502;
 55 L.T. 598; 35 W.R. 116; 3 T.L.R. 46; sub nom. *Re Oxford Building*
Society, Ex parte Smith, 56 L.J.Ch. 98; 9 Digest (Repl.) 631, 4211.
- (8) *Leeds Estate, Building and Investment Co. v. Shepherd* (1887), 36 Ch.D. F
 787; 57 L.J.Ch. 46; 57 L.T. 684; 3 T.L.R. 841; 36 W.R. 322; 9 Digest
 (Repl.) 632, 4216.

Also referred to in argument:

- Re Almada and Tirito Co.* (1888), 38 Ch.D. 415; 57 L.J.Ch. 706; sub nom. *Re* G
Almado and Tirito Co., Allen's Case, 59 L.T. 159; 36 W.R. 593; 4 T.L.R.
 534; 1 Meg. 28, C.A.; 9 Digest (Repl.) 324, 2035.
- Coltness Iron Co. v. Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145;
 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 143, 546.
- Bloxam v. Metropolitan Rail. Co.* (1868), 3 Ch. App. 337; 18 L.T. 41; 16 W.R.
 490, L.C.; 10 Digest (Repl.) 1248, 8795.
- Re Direct Spanish Telegraph Co.* (1886), ante p. 709; 34 Ch.D. 307; 56 L.J.Ch. H
 353; 55 L.T. 804; 35 W.R. 209; 3 T.L.R. 240; 9 Digest (Repl.) 150, 877.
- Lambert v. Neuchatel Asphalte Co., Ltd.* (1882), 51 L.J.Ch. 882; 47 L.T. 73;
 30 W.R. 913; 9 Digest (Repl.) 637, 4244.

Appeal from a decision of STIRLING, J., in an action brought by the plaintiff Lee, I
 on behalf of himself and all the other ordinary shareholders of the company other
 than the defendants, against the company and the directors of the company, claim-
 ing a declaration that the company did not, in the year ending Dec. 31, 1885, earn a
 profit of £17,140 13s. 2d., or any profit available for the payment of a dividend of
 9s. per share, or any dividend; an injunction to restrain the defendants from paying
 any dividend in respect of the profits of that year, or until there should be profits
 properly applicable for that purpose; and, if any such dividend should be paid, a
 declaration that the directors should be declared jointly and severally liable to
 repay the amount to the company.

A The company was incorporated on July 9, 1873, under the Companies Act, 1862, to acquire as from July 1, 1873, under the terms of an agreement of July 17, 1873, a concession granted by the government of the canton of Neuchâtel of the exclusive right of getting and selling bituminous rock and mineral products from the Val de Travers Rock in a certain defined area then held by the Neuchâtel Rock Paving Co., and the mines, works, business, property, and assets of that company, and also
B the sub-concessions held by four other companies, and the business, property, and assets of those companies. The capital of the company was £1,150,000, divided into 35,000 preferred shares, and 80,000 ordinary shares of £10 each respectively. Shortly after its formation the concessions and entire assets of the selling companies were transferred to the defendant company. The purchase money was paid by the defendant company, under the agreement of July 17, 1873, not in cash, but in fully
C paid ordinary and preferred shares. This absorbed all the 80,000 ordinary and 33,700 of the preferred shares. These shares were allotted and issued to the selling companies, and with a nominal exception no other shares in the company were ever issued.

Article 97 of the articles of association of the company provided that the net profits of the company should be applied—first, in paying a dividend of 7 per cent. per annum on the preferred shares in proportion to the amount for the time
D being paid up thereon; and, secondly, in paying a like dividend on the ordinary shares, and that the surplus of such net profits should be distributed by way of dividend rateably among all the shareholders in such proportion as aforesaid, but without preference or distinction. The articles also provided that no distribution of profits, except an interim dividend not exceeding 7 per cent. on the preferred
E and 4 per cent. on the ordinary shares, should be made without the consent of a general meeting, whose decision was to be final in case of any dispute as to the amount of net profits. Article 100 provided that the directors might, before recommending any dividend on any of the shares, set aside and invest out of the net profits of the company such sums as they thought proper as a reserve fund to meet contingencies, or equalise dividends, or repair or maintain the company's works,
F but should not be bound to form a fund or otherwise reserve moneys for the renewal or replacing of any lease, or of the company's interest in any property or concession. Article 126 provided that in case of a winding-up, or distribution of the assets of the company, the holders of ordinary shares should be entitled to participate in such assets rateably with the holders of the preferred shares, the intention being that the priority conferred on the preferred shares should be confined to dividends,
G subject to any exceptional claims which might be maintained by the holders of fully paid-up shares.

The original concession granted to the selling companies had been for twenty years from Dec. 15, 1867. In 1877 the defendant company and the government arranged new terms for the working, which were ultimately adopted on Jan. 2, 1878. By these terms (i) the duration of the concession was extended twenty years, so
H that it would not expire until Dec. 14, 1907; (ii) the area for the workings was very considerably enlarged; (iii) as a consideration for the new terms the company was to make a present payment of 200,000 francs (£8,000), and to pay a royalty of 6 francs per ton of asphalté taken out of the mine, provided that, if the annual working at 6 francs a ton did not produce 150,000 francs in the year, the company were to pay that sum as a minimum royalty or dead rent. These new terms were
I considerably to the advantage of the company, so much so that as a result of the working between January, 1878, and the end of December, 1885, the government of Neuchâtel received £39,000 less than it would have received had the terms remained as they were in 1873. The company had worked the mines from the date of its formation down to the date of action brought, and was still working them. The portion of the workings which had been worked up to the end of 1876 had been developed, and about 230,000 tons of workable asphalté had been taken from it, leaving about 840,000 tons available for extraction. The extended portion, which was still undeveloped, was estimated to yield 500,000 tons. According to the

annual reports and accounts of the company, it appeared that from July 1, 1874, to June 30, 1875, there was a loss, but that in all the other years down to Dec. 31, 1878, the receipts had exceeded the expenditure, but no part of such surplus was distributed among the shareholders. For the year ending Dec. 31, 1879, and the subsequent years, there was an excess of receipts over expenditure, and dividends were declared for the year 1879 at 2s., and for the years 1881, 1882, and 1883 at 5s. per share. In 1884 the profit and loss account showed a balance on the credit side of £39,359, but no dividend was declared for that year, that sum being dealt with as follows: £1,000 was written off in respect of the £8,000 paid on getting the new terms in 1877 (which sum the directors had resolved should be written off at the rate of £1,000 a year), and the remainder was written off the cost in shares of the original concession and other assets taken over by the company on its formation. The accounts for the year 1885 showed an excess of receipts over expenditure of £17,140 13s. 2d., out of which after setting aside £1,000 for the reduction of the £8,000, it was recommended by the directors, and resolved by a majority of the shareholders at a general meeting, that a dividend at the rate of 9s. a share should be paid on the preferred shares, which would only leave a balance of about £800 to be carried over.

The present action was brought to restrain the payment of such dividend. The plaintiff brought evidence to show that the concession held by the company was a wasting asset, which had during 1885 and the preceding years become depreciated as compared with its value in 1877 or 1878, both by effluxion of time, and in consequence of the amount of rock that had been dug out and sold; that in no year had sufficient allowance been made for such depreciation; and that in the realisation of the assets taken over by the company on its formation there had occurred a loss amounting to £32,736. His contention was that no money of the company ought to be applied in paying a dividend until those losses had been made good. The plaintiff was the holder of 628 ordinary and sixteen preferred shares in the company. One of the defendants, Mr. Varley, had been appointed to represent the preferred shareholders. STIRLING, J., dismissed the action, and the plaintiff appealed.

Rigby, Q.C., and Upjohn for the plaintiff.

Sir Horace Davey, Q.C., and Beale, Q.C., for the defendants.

COTTON, L.J., stated the facts, dealt with two questions of fact which do not call for report, and continued: The third point was, to my mind, the only one which occasioned any difficulty. It is said that the concession is a wasting property, and that, as it is a wasting property, dividing its annual proceeds is dividing part of the capital assets of the company, which are represented by this concession. That was pressed upon us, and that is a difficulty, because it is established, and well established, that you must not apply the assets of the company in returning to the shareholders what they have paid up on their shares, or in paying what they ought to have paid up on their shares. But we must consider exactly how the case stands. There is nothing in the Act which says that dividends are only to be paid out of profits. There is a provision to that effect in Table A, and that rather favours the view that the matter of how profits are to be divided and dealt with, and out of what fund dividends are to be declared, is a matter of internal regulation. But still there is this firmly fixed, that capital assets of the company are not to be applied for any purpose not within the objects of the company, and paying dividend is not the object of the company, the carrying on the business of the company is its object. If this property was property of another nature, property which would not be reasonably or properly consumed in providing profit, the case would stand in a very different position. If there was a permanent property which would not be reasonably or properly so consumed, but the fruit of which only would be used in providing profit, then, if the directors were to sell, or the shareholders were to authorise a sale of that, and then to declare a dividend out of the proceeds, that would clearly come within *Guinness v. Land*

A *Corpn. of Ireland* (1), for it would be applying the capital of the company to a purpose which was not authorised.

But here, for the purpose of getting the profit, there is necessarily a consumption year by year of part of the capital of the company. Then what is to be the result? I think, that in such a case as this, even without reference to the particular provision of art. 100, the question whether what has been done is really a division of capital by way of dividend, must be considered in a reasonable and sensible way. As was said in *Re Mercantile Trading Co., Stringer's Case* (2) (4 Ch. App. at p. 488):

C "If it is made to appear that for the purposes of fraud, or for any other improper motive, a company has declared and paid a wholly delusive and improper dividend, and has thereby in effect taken away from its creditors a portion of the capital which was available for the debts of those creditors, I entertain no doubt the court would have full jurisdiction, and would exercise it by ordering the repayment of the money so improperly paid."

D If here it could be shown that this dividend had been declared from improper motives, fraudulent motives, or with the intention, not of dividing profit, but of dividing and returning capital, I think the court ought to interfere, as it ought, in my opinion, to do in any case where there is any such improper dealing, either by directors or by the majority of the shareholders of the company. But if the court sees that the directors and the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, then in what is really a matter of internal arrangement (if it is done honestly and does not violate any E of the provisions of the articles), the court is very unwilling to interfere, and, in my opinion, ought not to interfere, with the discretion exercised by the directors, who have the management of the company, or with the powers exercised by the company within the articles.

F Of course, if a power given by the article goes beyond what can be given to the company or to the directors, then the court must interfere; but, in my opinion, the only thing here to be considered is: Is this really a division of the capital assets of the company under the guise of making and declaring a dividend? In my opinion, in this company as in other companies, the directors and others who have the control, ought to consider whether in a fair, reasonable way what they are going to divide is to be considered as profits, but in considering that they may well have regard to the articles. There is no such necessity, as was contended for G counsel for the plaintiff, to set apart every year a sum to answer the supposed annual diminution in the value of this property from the lapse of time.

H Reference was made to two decisions of SIR GEORGE JESSEL which I think are to be explained so as in no way to conflict with the decision of STIRLING, J., in this action: *Davison v. Gillies* (3) and *Dent v. London Tramways Co.* (4). Those two decisions are entirely consistent with one another, and entirely depend on the directions contained in the articles of association, not on the general law. In *Davison v. Gillies* (3) there was in the articles a direction that profits should be ascertained after making provision for the reparation of the tramway, and the Master of the Rolls said that, when profits are to be divided by the directors, it must mean the net profits, and that no dividend could be declared until provision had been made for the depreciation in the tramway and in the plant of the company. In *Dent v. I London Tramways Co.* (4), where the preference shareholders were to have their dividend for each year paid to them out of the profits of that year only, he held that they were entitled to be paid out of the profits of the year after setting aside sufficient for the maintenance of the tramways during that year only; and, therefore, he directed that provision should be made out of the profits of the year, not for the entire depreciation from the neglect to repair the tramway, but for the depreciation attributable to that year. That, in my opinion, entirely explains how those two decisions were come to, which counsel for the plaintiff contended were not consistent with one another. They favour the view which I entertain, that in

considering whether this is to be treated as honest division of profit or as a division of capital under the guise of declaring a dividend, the court will have regard to the directions of the articles, although, of course, if those articles authorise not a mere division of profit but a division of capital (using "capital" in the proper sense of the word, by which I mean permanent assets, and assets not to be expended in providing for the profit earned by the company), such a provision will be ultra vires and void. Here there was not a division of capital under the form of a declaration of dividend by a scheme or plan for dividing assets of the company, the declaration of dividend was in accordance with the articles, and not contrary to the general law, and the court ought not to interfere. In my opinion, therefore, the appeal fails.

LINDLEY, J.—I have come to the same conclusion. The actual point to be decided appears to me to be comparatively easy. The difficulty in the case arises from the invitation made to us by counsel for the plaintiff to lay down certain principles the adoption of which would, in my judgment, paralyse the trade of the country. This company was formed in 1873, and it may be stated shortly was formed for the purpose of working a concession, which may be called a lease, of some asphalte mines or mineral property in Switzerland. The original lease was afterwards extended, and the company may be treated as having been formed for the purpose of acquiring a lease which will run out in 1907. It is obvious with respect to such property, as with respect to various other properties of a like kind, mines and quarries and so on, every ton of stuff which you get out of that which you have bought with your capital may, from one point of view, be considered as embodying and containing a small portion of your capital, and that, if you sell it and divide the proceeds, you divide some portion of that which you have spent your capital in acquiring. It may be represented that that is a return of capital. All I can say is, if that is a return of capital it appears to me not to be such a return of capital as is prohibited by law.

In order to make this out it is necessary to look through the Companies Acts. I have done so, and that not for the first time, and I cannot find any provision in the Acts which prohibits anything of the kind. The sections referring expressly to capital are very few. The two most important are s. 8 and s. 12 of the Act of 1862. Section 8 [s. 2 (4) (a) of the Companies Act, 1948; 3 HALSBURY'S STATUTES (2nd Edn.) 452] says that when a company is registered as a company limited by shares, the memorandum of association must state the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. Then s. 12 says that the capital so referred to in the memorandum may be increased or converted into stock, but the conditions contained in the memorandum shall not be otherwise altered. That prohibits what is called a reduction of capital. Under s. 26, certain returns are to be made, and in the returns so to be made must be specified, among other things, the amount of the capital and the number of shares into which it is divided, the number of shares which have been issued, and the number which have been forfeited, and the amount of calls made on each share, and the total amount of calls received [Companies Act, 1948, Sched. 6, Pt. I]. In ss. 28 and 34 [Companies Act, 1948, s. 62] there is further provision that any alterations made in the capital pursuant to the Act are to be notified to the registrar. In the Act of 1867 provision is made for reducing the capital, and that was amended in 1877 by being applied to a reduction of capital when part of the capital was lost [Companies Act, 1948, s. 66 et seq.].

What I have stated is the whole of the enactments relating to capital which are to be found in the Companies Acts. If you look further you find next to nothing about profits or dividends. There is nothing at all in the Acts about how dividends are to be paid, nor how profits are to be reckoned; all that is left, and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept; what is to be put into a capital account, what into an income account, is left to men of business. Counsel for the plaintiff asked us to say there was in these articles a provision as to division

A of profits which was contrary to law. If he can make that out, he wins, but, if he cannot make it out, he loses. He saw that plainly enough. That raises a curious question, because putting it into plain language, he is asking us, at the instance of the ordinary shareholders, to break faith with the preference shareholders. He invites us to do it because he says the bargain into which the two classes of shareholders have entered cannot be upheld in point of law. But he admits that if the bargain is to stand as entered into he is in the wrong.

B We must be careful before we say that a contract is illegal or invalid in point of law, and I now propose to address myself to that question. This company having been formed for the purposes to which I have alluded, the articles contain clauses about distribution of profits. Article 97 says:

C "The net profits of the company shall be applied and divided as follows: First, a dividend at the rate of 7 per cent. per annum shall be paid on the preferred shares in proportion to the amount for the time being paid up, or deemed to have been paid up, thereon."

It goes on to deal with payment of dividends on the ordinary shares. Article 98 says:

D "No such distribution of profits shall be made without the consent of a general meeting."

Article 99:

"In case of any dispute as to the amount of net profits the decision of the company in general meeting shall be final."

E Then art. 100 contains a provision which carries the case against the plaintiff unless it is illegal. It says:

F "The directors may, before recommending any dividend on any of the shares, set aside out of the net profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company or any part thereof, and the directors may invest the sum so set apart as a reserve fund, or any part thereof, upon such securities as they may select; but they shall not be bound to form a fund or otherwise reserve moneys for the renewal or replacing of any lease, or of the company's interest in any property or concession."

G Let us see what that means. We are dealing with a lease for a limited number of years, which is a wasting property, and while it is wasting, the capital spent in acquiring it is wasting. The article says, in so many words, that although in every year the capital may be wasted by working out the mine so that at the end there may be nothing left, yet this company is formed on the principle that it shall not be obliged to replace, year by year, that which is so wasted. Counsel says that is contrary to law. Let us see whether that is made out. Having stated shortly H what are the provisions of the Acts of Parliament relating to this matter, I may safely say that the Companies Acts do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound-up, and I think this omission is quite reasonable. The capital may be lost, and yet the company may be a very thriving concern. As I pointed out in the course of the argument, and I repeat I now, suppose a company is formed to start a daily newspaper. Supposing it sinks £250,000 before the receipts from sales and advertisement equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced the £250,000 which has been sunk in building up a property which, if put up for sale, would, perhaps, not yield £10,000?

That is a business matter left to business men. If they think their prospects of success are considerable, so long as they pay their creditors there is no reason why they should not go on and divide profits, so far as I can see, although every

shilling of the capital may be lost. It may be a perfectly flourishing concern, and the contrary view I think is to be traced to this, that there is a sort of notion that the company is debtor to capital. From an accountant's point of view it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this—that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or another. But supposing at the winding-up of the concern the capital is all gone, and the creditors are paid, and there is nothing to divide, who is the debtor? No one is debtor to anyone. If there is any surplus to divide, then, and not before, is the company debtor to the shareholders for their aliquot portions of that surplus. But the notion that a company is debtor to capital, although it is a convenient notion, and does not deceive mercantile men, is apt to lead one astray. The company is not debtor to capital, and the capital is not debtor to the company. A
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Having shown that the Acts do not require the capital to be made up if lost, I cannot find anything in them which precludes payment of dividends so long as the assets are of less value than the original capital. If they are so, it becomes a question of prudence for mercantile men whether they will wind-up or not. I have already pointed out that the Act says nothing to make the loss of the capital a ground for winding-up, and I have already pointed out that it says nothing about profits. The Acts do not say that dividends are not to be paid out of capital, but there are general principles of law according to which the capital of a company can only be applied for the purposes mentioned in the memorandum of association. That is a fundamental principle of common law, and if any purposes are expressly or impliedly forbidden by the statutes, the capital cannot be applied for those purposes, even though there may be a clause in the memorandum that it shall [see 6 HALSBURY'S LAWS (3rd Edn.) 397 and cases there noted]. That was pointed out by the House of Lords in *Trevor v. Whitworth* (5), and particularly in the elaborate speech of LORD MACNAGHTEN, in which he expressed an opinion, although the point was not before him for decision, that if a company put into the memorandum of association a clause authorising it to spend its capital in buying up its own shares, such a contract would be ultra vires. That was only an expression of opinion by the learned Lord, but I cannot help thinking that those who have studied the Acts of Parliament as carefully as he has can entertain no doubt of the soundness of the principle. It does not follow because you have a clause in your memorandum that you can do what the clause says you may do, though whatever you find as the object in the memorandum it is legitimate to carry out unless it is forbidden by law. D
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Now we come to consider how the Companies Act is to be applied to the case of a wasting property. If a company is formed to acquire and work a property of a wasting nature, for example a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it from being divided among the shareholders, and this, in my opinion, is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished. If it is said that such a course involves payment of dividend out of capital, the answer is that the Act nowhere forbids such a payment as is here supposed. The fact is, you cannot get out of the Act any prohibition against paying dividends out of capital except by having reference to the general principles to which I have alluded, which general principles cannot be stretched, to my mind, to such a length as counsel for the plaintiff would have them stretched. G
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It appears to me that the proposition that it is ultra vires to pay dividend out of capital is very apt to mislead, and must not be understood in such a way as to prohibit honest trading. If you treat it as an abstract proposition that no dividend can be properly paid out of moneys arising from the sale of property bought by capital, you find yourself landed in consequences which the common sense

A of mankind would shrink from accepting. On the other hand, if the working expenses exceed the current gains, you cannot divide your capital under the head of profits when there are no profits in any sense of the term, as was done, for example, in *Re County Marine Insurance, Rance's Case* (6), *Re Oxford Benefit Building and Investment Society* (7), and *Leeds Estate, Building and Investment Co. v. Shepherd* (8). If those cases are studied, it will be seen, I think, with sufficient clearness that that is really what is meant. You must not have fictitious accounts. If your earnings are less than your current expenses, you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend. But it is, I think, a misapprehension to say that dividing the surplus after payment of the expenses of the produce of your wasting property is a return of capital in any such sense as to be forbidden by the Act. *Re Mercantile Trading Co., Stringer's Case* (2) may be usefully referred to on this subject.

C As regards the mode of keeping accounts, there is no law prescribing how they shall be kept. There is nothing in the Acts to show what is to go to capital account or what is to go to revenue account. We know perfectly well that business men very often differ in opinion about such things. It does not matter to the creditor out of what fund he gets paid, whether he gets paid out of capital or out of profit, net or gross. All he cares about is that there is money to pay him with, and it is a mere matter of book-keeping and internal arrangement out of what particular fund he shall be paid. Therefore, you cannot say that the question of what ought to go into capital or revenue account is a matter that concerns the creditor. The Act does not say what expenses are to be charged to capital and what to revenue. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on these matters. If they do, the regulations must be observed; if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat their creditors.

F In the present case the articles say there need be no such fund, and, consequently, the capital need not be replaced; nor, having regard to these articles, need any loss of capital by removal of bituminous earth appear in the profit and loss account. It appears to me that our decision is perfectly consistent with the view taken by the Master of the Rolls in *Davison v. Gillies* (3) and *Dent v. London Tramways Co.* (4). They both turned on the articles with which he had to deal. I feel there is a little difficulty in reconciling the two, but they do not touch this case. I hope I am not inadvertently, certainly I am not intentionally, laying down any rule which would lead people to do anything dishonest either to shareholders or creditors. In my opinion, the appeal fails entirely, and the judgment of the court below must be affirmed with costs.

H **LOPES, L.J.**—After the very full and exhaustive judgments that have been delivered I shall content myself with expressing my views very shortly. Indeed, I should think it unnecessary to do more than express my concurrence, except that the questions raised in this case are very important.

I It is said by the plaintiff that a company is not at liberty to pay a dividend unless they can show that their available property at the time of declaring the dividend is equivalent to their nominal or share capital. In my opinion, such a contention is untenable. Where nominal or share capital is diminished in value, not by means of any improper dealing with it by the company, but by reason of causes over which the company has no control, or by reason of its inherent nature, that diminution need not, in my opinion, be made good out of revenue. In such a case a dividend may be paid out of current annual profits, out of profits arising from the excess of ordinary receipts over expenses properly chargeable to the revenue account, provided there is nothing in the articles of association prohibiting such an application, and provided it is done honestly. It appears to me that if a contrary

view were adopted it might be successfully contended that where, owing to extraneous circumstances, the capital is increased in value, that increase might be dealt with as revenue or profits, and go to increase the dividend. This is contrary to all practice, and I think contrary to principle. The capital and the revenue accounts appear to me to be distinct and separate accounts, and, for the purpose of determining profits, accretions to and diminutions of the capital are to be disregarded.

But it is said that where the capital is in its nature of a wasting character, depreciated by effluxion of time or exhaustion of materials, as in the case of mines or leaseholds, then a sum must be laid aside to meet the gradual depreciation, and until such sum is laid aside there is nothing in the nature of profit divisible among the shareholders. In the case now before the court one of the articles provides that the directors may, before recommending any dividend, set aside and invest out of the profits such sums as they may think fit, as a reserve fund, but the article goes on to say that they are not obliged to reserve moneys for the renewal or replacing of any lease, or of the company's interest in any property or concession. Unless this article is *ultra vires* no question arises, for the article expressly exonerates the directors from creating a reserve.

Is, then, this article *ultra vires*? I think not. I know of no obligation imposed by law or statute to create a reserve fund out of revenue to recoup the wasting nature of capital. Subject to any provision to the contrary contained in the articles, I believe the disposition of the revenue is entirely in the hands and under the control of the company. Provided there is by the company no infraction of the capital, and nothing in the articles to the contrary, the disposition of the revenue is a matter of internal arrangement. The capital in an undertaking like this is in its inherent nature wasting. The scheme of this undertaking is that there should be a gradual exhaustion of material; the wasting is the business of the company, and without such gradual exhaustion there would be no revenue. I am unable to see in this case that either capital, or the produce of capital, has been dealt with in a way which is not authorised.

With regard to *Davison v. Gillies* (3) and *Dent v. London Tramways Co.* (4), it appears to me that the Master of the Rolls decided those cases with regard to the articles of association of the companies. I think, therefore, that this appeal should be dismissed.

Solicitors: *Clarke, Woodcock & Ryland; Makinson, Carpenter & Son; Bompas, Bischoff, Dodgson & Coxe.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

A

COSSMAN v. WEST

COSSMAN v. BRITISH AMERICA ASSURANCE CO.

[PRIVY COUNCIL (Lord Bramwell, Lord Hobhouse, Lord Macnaghten, Sir Barnes Peacock and Sir Richard Couch), July 12, 13, 14, November 15, 1887]

B

[Reported 13 App. Cas. 160; 57 L.J.P.C. 17; 58 L.T. 122;
4 T.L.R. 65; 6 Asp.M.L.C. 233]

Insurance—Marine insurance—Total loss—Sale under decree of competent court—Consequence of peril insured against—Need for notice of abandonment.

C

To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale on condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser; or it may not require repair. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been annihilated. In such a case no distinction can be drawn between a sale upon capture and a sale under the decree of a Court of Admiralty for the expenses of salvage services, and there is no need for notice of abandonment.

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Notes. Considered: *Fooks v. Smith*, [1924] 2 K.B. 508. Referred to: *Sailing Ship Blairmore Co. v. Macredie*, [1898] A.C. 593; *Polarian Steamship Co., Ltd. v. Young*, [1914-15] All E.R.Rep. 116.

As to total loss, see 22 HALSBURY'S LAWS (3rd Edn.) 142 et seq.; and for cases see 29 DIGEST (Repl.) 296 et seq.

Cases referred to:

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(1) *Mullett v. Shedden* (1811), 13 East, 304; 104 E.R. 387; 29 Digest (Repl.) 298, 2256.

(2) *Stringer v. English and Scottish Marine Insurance Co., Ltd.* (1859), L.R. 4 Q.B. 676; 10 B. & S. 770; 38 L.J.Q.B. 321; affirmed (1870), L.R. 5 Q.B. 599; 10 B. & S. 783; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar.L.C. 440, Ex. Ch.; 29 Digest (Repl.) 298, 2257.

G

(3) *Holdsworth v. Wise* (1828), 7 B. & C. 794; 1 Man. & Ry.K.B. 673; 6 L.J.O.S.K.B. 134; 108 E.R. 919; 29 Digest (Repl.) 310, 2337.

(4) *Parry v. Aberdeen* (1829), 9 B. & C. 411; Dan. & Ll. 228; 4 Man. & Ry.K.B. 343; 7 L.J.O.S.K.B. 260; 109 E.R. 153; 29 Digest (Repl.) 311, 2343.

(5) *Roux v. Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest (Repl.) 307, 2322.

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(6) *Mellish v. Andrews* (1812), 15 East, 13; 104 E.R. 749; 29 Digest (Repl.) 328, 2490.

(7) *Green v. Royal Exchange Assurance Co.* (1815), 6 Taunt. 68; 1 Marsh. 447; 128 E.R. 958; 29 Digest (Repl.) 328, 2483.

(8) *Idle v. Royal Exchange Assurance Co.* (1819), 8 Taunt. 755; 3 Moore, C.P. 115; 129 E.R. 577; on appeal, 3 Brod. & Bing. 151, n.; 29 Digest (Repl.) 326, 2467.

I

(9) *Robertson v. Clarke* (1824), 1 Bing. 445; 8 Moore, C.P. 622; 2 L.J.O.S.C.P. 71; 130 E.R. 179; 29 Digest (Repl.) 305, 2308.

(10) *Cambridge v. Anderton* (1824), 2 B. & C. 691; 1 C. & P. 213; 4 Dow. & Ry.K.B. 203; Ry. & M. 60; 2 L.J.O.S.K.B. 141; 107 E.R. 540; 29 Digest (Repl.) 296, 2232.

(11) *Farnworth v. Hyde* (1865), 18 C.B.N.S. 835; 34 L.J.C.P. 207; 13 W.R. 613; reversed (1866), L.R. 2 C.P. 204; 36 L.J.C.P. 33; 15 L.T. 395; 12 Jur.N.S. 997; 15 W.R. 340; 2 Mar.L.C. 429, Ex. Ch.; 29 Digest (Repl.) 307, 2325.

- (12) *Cory v. Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp.M.L.C. 109, H.L.; 29 Digest (Repl.) 252, 1890. A
- (13) *Thornely v. Hebson* (1819), 2 B. & Ald. 513; 106 E.R. 453; 29 Digest (Repl.) 319, 2416.
- (14) *De Mattos v. Saunders* (1872), L.R. 7 C.P. 570; 27 L.T. 120; 20 W.R. 801; 1 Asp.M.L.C. 377; 29 Digest (Repl.) 283, 2128. B

Consolidated Appeals from two decisions of the Supreme Court of Nova Scotia in actions upon policies of marine insurance, in which the appellant was plaintiff and the respondents were defendants.

The actions were tried before MACDONALD, C.J., without a jury, and he gave judgment for the plaintiff in both actions, but his decisions were reversed by a majority of the judges of the full court. C

Romer, Q.C., and *R. M. Bray* for the appellant.

Graham, Q.C., and *Jeune* for the respondents.

Nov. 15, 1887. **SIR BARNES PEACOCK.**—These are consolidated appeals from two judgments of the Supreme Court of Nova Scotia in actions in which the appellant was the plaintiff. The action against West was upon a time policy of insurance at the Ocean Marine Assurance Association, dated Nov. 28, 1881, for \$4,000, upon the barque *L. E. Cann*, a British ship valued at \$10,000, from Nov. 28, 1881, to Nov. 28, 1882. The perils insured against were, among others, perils of the seas, barratry of the master (unless in case of loss on goods or specie when the master was the consignee or supercargo thereof), and of mariners, and all other perils, losses, or misfortunes that should come to the hurt, detriment, or damage of the vessel, or any part thereof, subject to the conditions and provisions contained in or referred to by clauses in the policy, none of which affects the present case. It was stipulated that no particular average or partial loss, unless in case of general average, was to be paid unless the same should amount to 5 per cent., etc. The policy was underwritten for \$100 by West, the defendant in the suit, who was a member of the Ocean Marine Assurance Association, and is the respondent in the first appeal. The policy on freight was effected by the appellant on Jan. 31, 1882, and was for \$3,000 on freight at and from Mexico to New York upon all kinds of lawful goods and merchandise laden or to be laden on board the *L. E. Cann*. The policy contained the following words: D

"The said goods and merchandise hereby insured are valued at \$6,000." E

Their Lordships understand this policy to be a policy on freight of goods laden or to be laden valued at \$6,000. The perils insured against, so far as this case is concerned, may be treated as substantially the same as those in the other policy. The policy was affected with the British American Assurance Co., the defendants in the second action and the respondents in the second appeal. F

In the policy on the barque it was provided that all losses and damage which should happen to the vessel should be paid within sixty days after proof made and exhibited of such at the office of the association. In the policy on freight it was stipulated that all losses and damages which should happen should be adjusted in accordance with English practice and usage at Lloyd's, and should be paid within sixty days after proof of loss and adjustment, and proof of interest in the said freight. Each of the policies was effected in the name of the plaintiff, and was stated to be on behalf of whom it may concern; and in the policy on freight it was added, "In case of loss to be paid to him," i.e., to the plaintiff. In neither policy was there any exemption of liability on the part of the insurers on account of charges, if any, which might be incurred for salvage. G

A charterparty, dated Jan. 6, 1882, expressed to be made between Brooks, master of the British barque, *L. E. Cann*, then lying in the harbour of Vera Cruz, of the first part, and Mr. Antonio Granes, of the second part, was put in evidence in the second action. By that charterparty the master agreed to the freighting and chartering of the whole of the vessel, with the exception of the cabin and necessary H

A room for the crew, and storage for provisions, sails, and cables, unto Granes for the voyage from Vera Cruz and Tucolota to New York, and it was agreed that the vessel should load at Vera Cruz one part of the cargo, and after signing bills of lading should proceed to Tucolota for loading the balance of the cargo, and thence to New York. Granes engaged to furnish a cargo of assorted produce, the charterer to have the privilege of loading cargo for other parties, and captain to sign bills of lading for same without prejudice to the charter, and Granes was to pay for the use of the vessel during the voyage the lump sum of \$6,000 payable at New York in the United States currency or gold, and to advance sufficient money to the master at current rate on New York for ship's ordinary disbursements, that amount to be insured by charterer's agents at owner's risk, and to be deducted from the freight with insurance and 5 per cent commission. The plaintiff claimed for a total loss in each case. The pleas set up several defences. The most material of them were, that there was not a total loss; that no proof, or no sufficient proof, of the loss was made before action brought; that there was concealment of material facts as to the condition of the vessel; and that the respondent was induced to subscribe the policy by the fraud of the appellant. In the action on the policy there was also a denial of interest as alleged.

D The following facts appeared in the evidence. In November, 1881, the *L. E. Cann* was at Vera Cruz. Her captain was W. W. Brooks, who had commanded her since 1879 or 1880, and had acquired a one-sixteenth share in her from the appellant, the bill of sale being made to Ephraim Brooks, an uncle of W. W. Brooks. The interest of W. W. Brooks in the *L. E. Cann* was always kept insured by him, and in February, 1882, he wrote to his agents desiring that his interest in freight should also be insured for \$500. This was, however, not done, because the insurance on freight was ordered early in 1882 by the appellant for Brook's interest as well as his own.

F At Vera Cruz, W. W. Brooks, as he himself gave evidence at the trial, made an arrangement with a Spaniard named Campos, who transacted the business of the vessel, that Campos should ship a bogus or sham cargo, and that Brooks should make away with the vessel. Accordingly, a cargo was shipped worth only 40 per cent. of that represented by the bills of lading, and a draft for \$1,709.40 was given by a man named Villa, with Campos' knowledge, to Edmund Miller, Brooks' father-in-law, for him, the arrangement being that Brooks was to receive \$2,000 at Vera Cruz on signing bills of lading, \$2,000 on signing bills of lading at Tucolota in Mexico, and \$2,000 more when the protest was presented. Granes was a party to these proceedings, and went with the *L. E. Cann* to Tucolota, which place the *L. E. Cann* reached from Vera Cruz in January, and at Tucolota gave Brooks a further draft for \$2,000 in favour of Edmund Miller, and put on board further cargo of much less value than appeared on the bills of lading. On Mar. 30, 1882, the *L. E. Cann* left Tucolota, and on April 27, 1882, in the Gulf Stream, Brooks having previously signalled a passing schooner, the *George W. Lockner*, went on board of her with all his crew, deserting the *L. E. Cann*, and proceeded in the *George W. Lockner* to Philadelphia, where they arrived on May 4. The *L. E. Cann* was, when deserted by her crew, rapidly filling with water. There can be no doubt that this was mainly caused by about fifteen auger holes having been bored in her on both sides, and the ceiling cut away over the auger holes.

I The *L. E. Cann* did not, however, sink, and on May 24 she was found by the *Resolute*, belonging to the Baker's Salvage Co., and was, with the help of the *North America*, a vessel belonging to the Insurance Co. of North America, towed to Lynnhaven Bay. The Baker Salvage Co. afterwards took her to the Port of Norfolk. On examination of the vessel there the auger holes and the cutting away of the ceiling already mentioned was discovered. In August, 1882, the vessel was hauled up on the ways at Grave's ship yard at Norfolk. She was then (subject to the damage she had sustained in several respects from the storms) found to be sound. A suit for salvage was brought by the Baker's Salvage Co. in the District Court of the United States for the Eastern District of Virginia (the

Insurance Co. of North America having waived their claim for salvage), and under orders of the Court of Admiralty in July and August, 1882, the *L. E. Cann* and cargo were sold, producing \$3,183 net, and the said proceeds were paid to the Baker's Salvage Co., it being stated in the later order that it appeared to the court that the actual cost of the salvage service amounted to at least \$5,000. The vessel was subsequently repaired and put into good condition. A

The actions were both tried before the Chief Justice of the Supreme Court, who gave a verdict for the plaintiff, without stating any reasons. In *Cossman v. West* he said: B

"I think the plaintiff has made out a case entitling him to judgment. I find there is a total loss by the perils insured against under the policy, and assess the damages at \$100, with interest \$14; total \$114, for which judgment will be entered;" C

and judgment was entered accordingly. In the action on the policy on freight, the Chief Justice said: D

"The plaintiff has made out a case entitling him to recover for a total loss of freight under the policy declared upon. I find a judgment, therefore, for the plaintiff, and assess damages at \$3,000, with interest \$295; total \$3,295, for which judgment will be entered." D

Judgment was entered accordingly.

It should be mentioned that the plaintiff was wholly exonerated from any participation in, or knowledge of the disgraceful fraud on the part of Brooks, the master. Indeed, the Chief Justice stated that the villainous conduct of the master could not affect the owner, who was admittedly innocent of any collusion with his rascality. E

A motion was made to the full court to set aside the verdicts and judgments. After argument, the learned judges were divided in opinion, the majority holding that, as no notice of abandonment had been given, there was only a partial loss, and in each case the finding and judgment of the Chief Justice was set aside and reversed, and judgment entered for the defendants with costs, including the costs of the trial and the costs of the appeal. The Chief Justice adhered to his original opinion, and held that there was an actual total loss both of the ship and of the freight. The present appeals have been preferred against the decrees founded upon the judgments of the majority of the judges. The principal questions in each case are whether there was an actual total loss, and whether sufficient preliminary proof of loss was given. F

There seems to be no doubt that, after the abandonment of the barque by the master and crew, and when the owner first received notice thereof, the vessel was in such a hopeless condition that the risk and expenses of endeavouring to save her were such that no prudent uninsured owner would have incurred them. There was, consequently, a constructive total loss, and the plaintiff might, when he first received notice of the loss, or within a reasonable time afterwards, have given notice of abandonment to the underwriters, in which case he could have recovered for a total loss. It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. G

To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser; or it may not even require repairs. If it is lost to the H I

A owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: *Mullett v. Shedden* (1). In that case saltpetre, which had been insured, was seized in the course of the voyage, and condemned. It was thereupon taken out of the ship and sold under a decree of condemnation for the benefit of the captors. The sentence of condemnation was afterwards reversed on appeal, and the property ordered to be restored, or its value paid, for the use of the owner on payment of the expenses, on behalf of the captor and of His Majesty in the office of Admiralty in both courts. It was held that the assured might recover as for the total loss, without notice of abandonment. In the course of the argument LORD ELLENBOROUGH remarked (13 East, at p. 309):

C "The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it."

BAYLEY, J., said (*ibid.* at p. 309):

D "No circumstance has happened since the seizure to make the original detention less than a total loss."

In delivering judgment LORD ELLENBOROUGH, C.J., said (*ibid.* at p. 309):

E "Then, as to the point of abandonment, if instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

F *Stringer v. English and Scottish Marine Insurance Co., Ltd.* (2) was referred to by the learned Chief Justice in the court below. In that case goods were insured on a voyage against, among other perils, "takings at sea, arrests, restraints, and detainment of all kings, etc." While on the voyage, the ship and cargo were seized by an American cruiser and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged a lawful prize. The owners at that time elected to treat the seizure as a partial loss. On June 16, 1864, the Prize Court gave judgment against the captors, and ordered restitution. On July 1 the captors appealed. On Sept. 12 the owners, who then for the first time knew that an appeal had been preferred, gave notice of abandonment, which the underwriters refused to accept. Subsequently, the owner informed the underwriters that the Prize Commissioner had offered to the court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the Prize Court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The plaintiffs and the defendants declined to take either of these steps, and on May 25, 1865, the ship and cargo were sold by order of the court. It was held by the Court of Queen's Bench that the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled; that the appeal did not amount to such a change of facts as would justify the assured in changing their election; and that the assured could not, by their notice of abandonment, make the loss by the seizure and detention a total loss. But it was further held that the depositing of the full value of the goods in paper currency or the giving of bail for them were acts which a prudent uninsured owner would not have adopted to prevent a sale, and that the sale, therefore, occasioned by the seizure, caused a total loss, for which the plaintiffs were entitled to recover.

In delivering the judgment of the court, BLACKBURN, J., gave a clear and comprehensive view of the law. Speaking of the time when the cargo was detained under the seizure and the suit instituted in the Prize Court to have it condemned, he said (L.R. 4 Q.B. at p. 687):

"It is clear that at this time the cargo was, by one of the perils insured against, entirely out of the control of the assured under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances the assured had a right to elect whether he would retain the property in himself and treat the loss as a partial one or abandon it to the underwriters and claim for a total loss."

Having then proceeded to discuss the question whether a notice of abandonment had been given in time, and held that it had not, he went on to say (*ibid.* at p. 690):

"But we think the sale by the Prize Court stands on a very different footing. If the Prize Court in America had wrongfully condemned the goods and they had been sold under that sentence, the case would have been identical with that of *Mullet v. Shedden* (1), where the very point decided was that by the sale the property was wholly lost to the owner, and, therefore, the necessity of any abandonment was altogether done away. . . . But in the present case the sale was not under a condemnation, but because the assured did not give security to prevent the sale. The defendants (the underwriters) had the fullest notice of what was about to happen, and had ample opportunity to interfere and give security to prevent the sale; still the assured, if he by any means such as he could reasonably be expected to use could have prevented the sale, was bound to use them, and if the sale was directly occasioned by his default, though remotely by the seizure, he cannot recover against the underwriters on account of that sale. But the assured was not bound to use unreasonable exertions in order to preserve the thing insured, and if the giving of bail or deposit would have exposed them to expense, or risk of expense, beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure."

Having then examined the evidence, his Lordship concluded (*ibid.* at p. 692):

"We come, therefore, to the conclusion of fact that the assured could not, by any means which they could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss. Even then the assured were not bound to do so. If they had thought it was more for their interest still to claim the proceeds of the sale in the hands of the American court as their money, and come upon the underwriters only for the partial loss, they might do so. It is clear as a matter of fact that they elected to come upon the insurers for an indemnity for a total loss, and that by so doing the insurers, when they have indemnified them, will be entitled to be subrogated for them and to get what they can out of the hands of the Americans for their own benefit."

His Lordship then cited authorities in support of that right on the part of the insurers.

The case was carried to the Exchequer Chamber by writ of error on a Special Case, and the judgment was affirmed. KELLY, C.B., in delivering his judgment, stated that, in his opinion, the Court of Queen's Bench were not only perfectly justified in coming to their conclusion, but that they could not have come to any other conclusion than that no prudent owner would have given the security necessary to prevent the sale. He proceeded (L.R. 5 Q.B. at p. 603):

A "Such being the circumstances of the case, the decree for sale and the sale itself having taken place under circumstances in which there was no default on the part of the owner of the goods, we have to consider whether that sale justified the plaintiffs in treating the case as one of total loss. I am of opinion that the decree for the sale of the goods, and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever re-possessing himself of the goods in specie, entitled the plaintiff to treat the case as one of total loss. This loss of the goods arises, though not directly, out of the original capture (which was of itself, if so treated, a total loss), through a series of consequences, viz., the institution, the different steps, and the continuance of the suit until the decree was pronounced. The sale was, if I may use the expression, a completion of the total loss."

C MARTIN, B., observed (*ibid.* at p. 606):

D "When the sale took place, the property in the goods was taken out of the owner, so that it became impossible for him to take the goods under his original ownership to the port of discharge, and upon that taking place the goods, I will not say were totally lost, because I have complained of that being an ambiguous expression, but were taken entirely out of the owner's dominion and control, and were absolutely taken away from him, and, in my judgment, after that event took place, the word 'abandonment,' in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was that there was, in my judgment, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy."

F In *Holdsworth v. Wise* (3) and *Parry v. Aberdeen* (4) there was an abandonment, and it was held that the subsequent recovery of the vessel did not convert that which had become a total loss by reason of a notice of abandonment into a partial loss. In *Roux v. Salvador* (5) it was held by the Court of Exchequer Chamber that, where goods were so injured by the perils of the sea that they would have been destroyed by putrefaction before they could arrive at their destination, and were consequently sold, the assured was at liberty to treat the loss as a total loss, without giving notice of abandonment. In that case, which is a leading one, LORD ABINGER, C.B., in a very lucid and learned judgment, pointed out the distinction between a total and a partial loss, gave a clear and exhaustive exposition of the law, and laid down the principles upon which the whole doctrine of abandonment in our law was founded, and the consequences resulting from it. He said (3 Bing.N.C. at p. 285):

H "It is indeed satisfactory to know that however the laws of foreign States may differ from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the letter of his contract to pay the sum insured."

I His Lordship pointed out intermediate cases, in which notice of abandonment would be necessary before the assured could treat the loss as a total one. Elsewhere in dealing with the case then before the court, his Lordship said (*ibid.* at p. 281):

"In the case before us the jury have found that the hides were so far damaged by perils of the sea that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced a total

destruction of them before their arrival at the port of destination became as inevitable as if they had been consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us therefore that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods. They never could arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end."

Referring to *Mellish v. Andrews* (6), he said (*ibid.* at p. 287):

"In the language of LORD ELLENBOROUGH, it is an established and familiar rule of insurance that when the thing insured exists in specie and there is a chance of its recovery there must be an abandonment; a party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is, in fact, an average or a total loss, as the case may be."

Referring to *Mullett v. Shedden* (1), he says (*ibid.*):

"In that case the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured."

Again, his Lordship proceeds (*ibid.* at p. 288):

"Both these cases are direct authorities that no abandonment is necessary when there is a total loss of the subject-matter insured, to which may be added the cases of *Green v. Royal Exchange Assurance Co.* (7); *Idle v. Royal Exchange Assurance Co.* (8); *Robertson v. Clarke* (9); and *Cambridge v. Anderton* (10). This last is on all-fours with the present, and is an express decision that when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for instance, has become a wreck or a mere congeries of planks, and has been bona fide sold in that state for a sum of money, the assured may recover for a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of a jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss, and if there be an insurance the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to remark, however, that the assured may preclude himself from recovering for a total loss if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money."

Nothing can be clearer than the doctrine thus enunciated. It has been always acted upon, and was followed in *Farnworth v. Hyde* (11), and in many other cases. The last-mentioned case was overruled in the Exchequer Chamber, but merely upon a question of fact. The principle of law was not impugned. On the question as to the necessity of notice of abandonment, the Court of Exchequer Chamber expressly stated that they left the authority of the decision of the court below untouched, neither confirmed nor weakened.

It would be impossible to comment upon all the cases which were referred to in the course of the argument before their Lordships. Many of them were wholly inapplicable to the present case. For instance, *Cory v. Burr* (12), in which, in consequence of the barratrous act of the master, the ship was seized, it was held that the seizure and not the act of smuggling was the cause of the damage, and that, as "seizure" was excepted from the perils insured against, the insurer

A could not recover against the underwriters. In that case the barratrous act of the master in taking the goods on board would not have caused any loss or damage if the vessel had not been seized, but as seizure was excepted from the perils, there was no loss by a peril insured against. If in the present case the policy had excepted all charges, if any, which might be incurred for salvage (an improbable exception, no doubt), the case would have had a bearing upon the present; but

B there was no such exception, and consequently no similarity between the two cases.

The cases above referred to of *Roux v. Salvador* (5) and *Stringer v. English and Scottish Insurance Co.* (2) are decisive upon the present case, unless a valid distinction can be drawn between a sale upon capture and the sale under the decree of the Court of Admiralty for the expenses of salvage services. Two cases were cited to show that there is such a distinction; *Thornely v. Hebson* (13) referred to by

C THOMPSON, J., in the court below, and *De Mattos v. Saunders* (14). In *Thornely v. Hebson* (13) it was held, under the particular facts of the case, that the sale of a ship under a decree of a foreign Admiralty Court for salvage did not constitute a total loss. In that case, however, it appeared that the value of the vessel, even under a forced sale, exceeded the amount of the claim of the salvors, and that the owners were near enough to have acted in the business, and that it was not

D proved that they had used all the means in their power to prevent the sale. It is to be inferred from what fell from the learned judges that if they had done so and were not in default in not preventing the sale they might have recovered for a total loss. ABBOTT, C.J., said (2 B. & Ald. at p. 518).

"If, in this case, it had appeared that the owners had used all the means in their power, and were unable to have paid this salvage, it would have been very different; but that is not so."

E

So BAYLEY, J. (*ibid.*):

"Where a ship is captured she is taken possession of by persons adversely to the owner, and so it is in the case of barratry; but here the ship was taken possession of by persons acting not adversely but for the joint benefit of the owners, and the latter were never dispossessed of the vessel."

F

In that case it appears that the crew of the *William* were on board the *Hyder Ali*, from which the volunteer salvors were permitted to go on board the vessel which was saved by their exertions. The vessel, although the crew had left her, could not be treated as a "derelict" and out of the possession and control of the master, so long as he was keeping by her in the *Hyder Ali*. In another part of his judgment

G BAYLEY, J., says (*ibid.* at pp. 518, 519),

"The sale [under the decree for salvage] in order to constitute a total loss, must have been found to have been necessary and wholly without the fault of the owners. Here a ship originally worth £1,200 is sold for £315 only. It appears that the owners were near enough to have acted in the business at the time."

H

HOLROYD, J., also considered that the taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and, therefore, did not dispossess them, and that the custody of the vessel was in the salvors till the salvage was paid, but that the legal possession was still in the owners. His Lordship added (*ibid.* at p. 519):

I

"I also think that the sale will not amount to a total loss if it was in the power of the owners to prevent it, and it lies upon them to show that they could not do so."

In referring to this case in *Stringer v. English and Scottish Marine Insurance Co.* (2), MARTIN, B., says (5 Q.B.D. at p. 607):

"HOLROYD, J., pointed out, as indeed did all the judges, that to hold that to be a total loss would be holding that which was really a partial loss to be a total

loss, because the assured had not taken a step to prevent the sale which he ought to have taken."

The present case differs materially from *Thornely v. Hebson* (13), for here the salvage greatly exceeded the value of the property saved, and no prudent uninsured owner would have paid the salvage in order to redeem the ship. Besides, the proceedings in the Admiralty Court were against the ship, which was within its jurisdiction, and the plaintiff, the owner, was not, as in *Thornely v. Hebson* (13), near enough to have acted. He was in Nova Scotia, and the ship was at Norfolk, and the Admiralty Court in Virginia, and it did not even appear that he had notice of the proceedings in the Admiralty Court. He was not bound to follow his ship, in its then state in the hands of the salvors, wherever they might please to take it. Certainly the owner of the ship was not bound to redeem the cargo, which did not belong to him, in order that he might have a chance, a very remote one, that he might be able to send it to its destination by another vessel. Furthermore, the insurers, by their agents, were present at Norfolk; they had notice of all the proceedings, and the Ocean Assurance Co., the insurers of the ship, had informed the owner in their letter of June 8, 1882, that they had sent their marine inspector to look into the matter and report, and they did not report before the sale of the ship. They might (as stated by BLACKBURN, J., in *Stringer's Case* (2)), if they had pleased, have redeemed the ship and cargo. For the reasons above advanced, it appears clear that the owner was not in default in not preventing the sale of the ship and cargo by giving bail, or paying the salvage expenses.

In *De Mattos v. Saunders* (14) it was held that a partial loss of cargo caused by perils of the sea was not converted into a total loss by a sale under a decree of a Court of Admiralty, in a suit instituted by salvors against the ship and cargo for the recovery of sums claimed for salvage services. The case was decided upon the ground that the acts and proceedings in the Admiralty Court were not, under the circumstances in that case, the natural consequence of a peril insured against. WILLES, J., in delivering the judgment of the court, observed (L.R. 7 C.P. at p. 579):

"The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors, and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequence of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in a Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss, which would be absurd. There was no natural connection between the sea damage here and the sale under the decree of the Court of Admiralty. The cases cited of hostile seizure and condemnation by a prize court have no application. In such a case, the original seizure is *prima facie* a total loss; all that follows is only the necessary consequence of the seizure. It appears from the case that there was a considerable partial loss of the salt occasioned by perils of the sea. For the purposes of this cause we may call it either a total loss of part or a partial loss of the whole cargo; but whatever it is called it is not a loss within the policy so long as any substantial part of the salt remains, because of the memorandum whereby salt is warranted free from average, unless general, or the ship be stranded."

But the present case goes further than a claim for salvage where a ship has not been abandoned at sea. In this case the vessel had been abandoned by the master and the crew when she was discovered and taken possession of by the salvors. Their Lordships are of opinion that this case is distinguished from *De Mattos v. Saunders* (14). The passage above quoted shows that at the time when the salvage service was commenced in that case there was not any loss for

A which the insurers were liable under the terms of the policy. In that case also the vessel does not appear to have been abandoned by the master and crew, whereas in this case the vessel was a derelict. There can be no doubt that the barque was at that time, in the eye of the law, a "derelict," a term legally applied to a ship which is abandoned and deserted at sea by the master and crew without any intention on their part of returning to her. It is not like the case of a vessel
B which is left by her master and crew temporarily with the distinct intention of returning to it. In such a case the ship is not abandoned, and, therefore, is not derelict, though the master may have given up the entire management to the salvors. In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. In the case of a derelict, the salvors who first take possession have not
C only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary, and the first salvors have no right to prevent other persons from rendering assistance if
D the master wishes such aid.

So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him. In the present case, the vessel being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were
E not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed, as LORD ABINGER remarked in *Roux v. Salvador* (5), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment.
F As to the freight, the sale of the cargo clearly constituted a total loss, for after the sale the assured and underwriters in his place lost the right to carry on the cargo. The salvage services, if not a peril insured against, were an immediate and necessary consequence of a peril insured against, whether of barratry or a peril of the sea; the immediate consequence was that the ship was rendered liable for the salvage expenses, and the proceedings in the Admiralty Court were the immediate
G and necessary consequence of the damages remaining unpaid.

It was urged at the Bar that there was no valid or legal charterparty or contract for freight in consequence of the fraudulent arrangement made by Brooks, the master of the vessel, but this contention cannot be supported. There were two contracts—one the charterparty of Jan. 6, 1882, made by the master on the part of the owner of the vessel; the other, the fraudulent agreement on the part of the
H master on his own account to accept a bogus cargo, and to make away with the vessel. The latter did not vitiate the former, which might have been enforced if the master had refused or neglected to cause the loss of the ship. Their Lordships concur with the Chief Justice that the defendants cannot rely upon want of preliminary proof of loss. It was only the fact of the loss of which preliminary proof had to be given. The production of the master and mate could not be legally
I insisted upon by the insurers, and, in West's case, they asked for nothing more. In the suit upon the policy on freight there was, in addition to the facts relied upon by the Chief Justice, the declaration of the owner of Feb. 14, 1883.

In the fourth plea, and in the grounds of appeal in the action on the ship policy, the defendants relied upon want of preliminary proof of interest, as well as of loss, but the policy on the ship did not provide for preliminary proof of interest. In the action on the policy on freight, though the policy required preliminary proof of interest, the third plea relied only upon the absence of proof of loss. Their Lordships are of opinion that the absence of preliminary proof of interest cannot avail

either of the respondents. The defendants must also fail upon their defence founded upon the alleged fraudulent concealment that at the time of the insurance the ship was worm-eaten, unsound, and unfitted for the voyage. In the respondents' own case it is stated that when the vessel was hauled up at Norfolk she was then, subject to the damage she had in several respects sustained from the storms, found to be sound. The defendants, in their Lordships' opinion, must also fail on the defence that the plaintiff was not interested as alleged. Upon the whole, their Lordships are of opinion that the judgments and orders of the full Bench, dated Aug. 4, 1885, ought to be reversed, and that the original judgments and decrees of Dec. 6, 1884, respectively ought to be affirmed, and that the defendants in each of the actions ought to pay the costs incurred in the full Bench, and they will humbly advise Her Majesty accordingly. The respondents must pay the costs of the appeals to Her Majesty in Council.

Solicitors: *Hill, Son & Co.; Bompas & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

LUDDY'S TRUSTEE *v.* PEARD AND ANOTHER

[CHANCERY DIVISION (Kay, J.), May 31, June 1, 2, 7, 8, 26, 1886]

[Reported 33 Ch.D. 500; 55 L.J.Ch. 884; 55 L.T. 137;
35 W.R. 44; 2 T.L.R. 841]

Solicitor—Duty to client—Fiduciary relationship—Transaction between solicitor and trustee in client's bankruptcy—Purchase of client's interest under will.

The rule of law, which prevents a solicitor from purchasing the property of his client without giving full and complete disclosure, applies to a purchase by a solicitor from the trustee in bankruptcy of his client.

Notes. As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85 et seq.; and for cases see 42 DIGEST 76 et seq.

Cases referred to:

- (1) *Carter v. Palmer* (1841), 8 Cl. & Fin. 657; 8 E.R. 256, H.L.; 3 Digest (Repl.) 373, 248.
- (2) *Taylor v. Salmon* (1838), 4 My. & Cr. 134; 8 Sim. 449; 41 E.R. 53, L.C.; 42 Digest 543, 1034.
- (3) *Coles v. Trecothick* (1804), 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 42 Digest 474, 410.
- (4) *Ex parte James* (1803), 8 Ves. 337; 32 E.R. 385, L.C.; 42 Digest 85, 767.
- (5) *Gibson v. Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 42 Digest 81, 724.
- (6) *Lewis v. Hillman* (1852), 3 H.L.Cas. 607; 19 L.T.O.S. 329; 10 E.R. 239, H.L.; 42 Digest 84, 754.
- (7) *McPherson v. Watt* (1877), 3 App. Cas. 254, H.L.; 42 Digest 82, 734.
- (8) *Wearing v. Ellis* (1856), 6 De G.M. & G. 596; 26 L.J.Ch. 15; 28 L.T.O.S. 113; 2 Jur.N.S. 1149; 5 W.R. 40; 43 E.R. 1365, L.C.; 5 Digest (Repl.) 1069, 8612.
- (9) *Adams v. Swarder* (1864), 3 New Rep. 623; 33 L.J.Ch. 318; 10 L.T. 49; 10 Jur.N.S. 223; 12 W.R. 615, L.J.J.; 42 Digest 80, 718.
- (10) *Emden v. Carte* (1881), 19 Ch.D. 311; 51 L.J.Ch. 371; 45 L.T. 328; 30 W.R. 17, C.A.; 42 Digest 298, 3315.

A Also referred to in argument :

Bulkley v. Wilford (1884), 2 Cl. & Fin. 102; 8 Bli.N.S. 111; 6 E.R. 1094; 42 Digest 106, 1009.

Cooper v. Phibbs (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 35 Digest 93, 27.

Earl Beauchamp v. Winn (1873), L.R. 6 H.L. 223, H.L.; 35 Digest 97, 57.

B *Rochfort v. Battersby* (1849), 2 H.L.Cas. 388; 14 Jur. 229; 5 Digest (Repl.) 1076, *4904.

Re Austin, Ex parte Sheffield (1879), 10 Ch.D. 434; 40 L.T. 15; 27 W.R. 622, C.A.; 4 Digest (Repl.) 541, 4723.

Re Leadbitter (1878), 10 Ch.D. 388; 48 L.J.Ch. 242; 39 L.T. 286; 27 W.R. 267, C.A.; 42 Digest 166, 1702.

C *Sidden v. Lediard* (1829), 1 Russ. & M. 110; 39 E.R. 42, L.C.; 43 Digest 699, 1372.

Beattie v. Lord Ebury (1874), L.R. 7 H.L. 102; 44 L.J.Ch. 20; 30 L.T. 581; 38 J.P. 564; 22 W.R. 897, H.L.; 35 Digest 11, 36.

Rashdall v. Ford (1866), L.R. 2 Eq. 750; 35 L.J.Ch. 769; 14 L.T. 790; 14 W.R. 950; 35 Digest 11, 35.

D *Attwood v. Small* (1838), 6 Cl. & Fin. 232; 2 Jur. 226; 7 E.R. 684; 35 Digest 41, 363.

Smith v. Kay (1859), 7 H.L.Cas. 750; 30 L.J.Ch. 45; 11 E.R. 299, H.L.; 35 Digest 20, 109.

Brownlie v. Campbell (1880), 5 App. Cas. 925, H.L.; 35 Digest 123, 249.

E *Walters v. Morgan* (1861), 3 De G.F. & J. 718; 4 L.T. 758; 45 E.R. 1056, L.C.; 35 Digest 23, 137.

Edwards v. Meyrick (1842), 2 Hare, 60; 12 L.J.Ch. 49; 6 Jur. 924; 67 E.R. 25; 42 Digest 82, 738.

Montesquieu v. Sandys (1811), 18 Ves. 302; 34 E.R. 331, L.C.; 42 Digest 85, 761.

Cane v. Allen (1814), 2 Dow. 289; 3 E.R. 869, H.L.; 42 Digest 79, 710.

F *Knight v. Bowyer* (1859), 4 De G. & J. 619; 45 E.R. 241, L.J.J.; 35 Digest 635, 3667.

Austin v. Chambers (1838), 6 Cl. & Fin. 1; 7 E.R. 598, H.L.; 42 Digest 85, 762.

Action by the trustee in bankruptcy of Charles Broughton Luddy, to set aside a sale made by Sperring, the former trustee in the bankruptcy, of the bankrupt's interest in certain freehold property, under the will of his mother Eliza Ann Luddy. G The defendants were John Davis Peard, the solicitor of the bankrupt, and his brother William Peard, and the sale was made to John Davis Peard in the name of William Peard as his nominee.

The defendant, John Davis Peard, acted as solicitor of Charles Broughton Luddy in the lifetime of his mother, Eliza Ann Luddy, and after her death he continued to act as such solicitor for a time. From her death, until a short time before the commencement of this action, he acted as solicitor for Luddy and his aunt Mary Morton, as the executors and trustees of the will of Eliza Ann Luddy. Under that will the residue was left upon trust for the benefit of Luddy or his children in terms which occasioned a question of some difficulty what interest Luddy actually took, it being doubtful whether his interest was absolute or merely for life. H The will was dated in 1872. Mrs. Luddy thereby left all her real and personal estate to her trustees, directing them to pay to her sister, Mary Morton, an annuity of £65 for life, and to her daughter-in-law, Eliza Luddy, spinster, an annuity of £25 for life; and as to all the residue of her real and personal estate, she directed her trustees to convey, assign, or otherwise assure the same to her son, C. B. Luddy, his heirs, executors, administrators, and assigns absolutely; and, if he should marry and die leaving children who should attain twenty-one, then she directed her trustees to convey and assign the residue to such children; but if her son should die in her lifetime without leaving children, then they were to convey I

to his widow and to Mary Morton and Eliza Luddy, as tenants in common. The testatrix died in October, 1876. In May, 1877, C. B. Luddy was adjudicated bankrupt on the petition of one Sperring, who, on June 6, 1877, was appointed trustee in the bankruptcy. Peard, while acting as solicitor for the bankrupt, had acquired a considerable knowledge of the estate, and had been able to form an opinion as to its value. When he was employed by the bankrupt to negotiate with the trustee for the purchase of the bankrupt's interest, for the benefit of his (the bankrupt's) wife and children, without stating either his opinion of the value of the bankrupt's interest or the identity of the purchaser he arranged with his brother to purchase the interest for the sum of £77.

Finlay, Q.C., and Cordery for the plaintiff.

Graham Hastings, Q.C., and Farwell for the defendant, J. D. Peard.

Cur. adv. vult.

June 26, 1886. **KAY, J.**, read a judgment in which he stated the facts in great detail, and continued: I have stated these facts at length because the questions they raise can only be solved by a very careful examination of them. One of these questions is whether the confidential relation of solicitor and client with respect to this property had come to an end between Luddy and Peard before the purchase. I do not regard this as an essential, though doubtless it is an important, circumstance. Peard admits that no formal close of that relationship ever took place. He was in frequent correspondence with Luddy, advised him as to the chance of his obtaining a discharge, was employed on his behalf to endeavour to effect a purchase of this very property from the trustee in bankruptcy for the benefit of Luddy's wife and family; and, when Luddy suggested that Farmer should act for him, Peard, on Feb. 11, 1880, wrote objecting to "your placing Farmer between myself and you," in terms which show plainly that he desired that no one but himself should act as adviser of Luddy in the matters relating to this property. It has been gravely argued that a bankrupt cannot have a solicitor. If that means that a bankrupt has nothing wherewith to pay for professional services it may be intelligible; but why a bankrupt should not have relations of confidence with a solicitor, just as he might with a spiritual adviser or a doctor, I do not in the least understand. I have no doubt that such a relation existed in this case at the time when the purchase was made.

The next, and a very important question, is whether, during this professional relation, Peard acquired any knowledge or belief as to this property which he was bound to communicate to Luddy before he could have bought the property from him, supposing he had not become bankrupt. Stress has been laid upon the representation, made by Peard to the trustee in bankruptcy, and to his solicitor, and to Luddy himself, to each of whom Peard represented Luddy's interest as a life interest only, and as having no saleable value. I have said during the argument that I do not believe he had any intention to mislead. He had not proved the design of buying for himself when he made these statements, and probably they were not intended as anything but a short summary of the effect of the opinion of counsel which he had obtained. But it is quite clear that, before the purchase, his professional skill had led him to believe that the construction of the will was doubtful, and that it was possible that Luddy's interest was, after all, an absolute one, which would be worth, instead of £213, more like £2,000 at least. I have looked in vain for any trace of a communication of this belief to Luddy or to the trustee in bankruptcy or his solicitor. It is also certain that, from having had to consider the condition of the property when negotiating mortgages for Luddy, Peard had formed an opinion that it was more valuable than appeared from the rental, which he speaks of as a ground rent, and says, in his answers to requisitions, was "nothing like the full value." Except that, on Feb. 18, 1880, in a letter to Luddy he stated that the property, when it came to be divided among the children, would, he fancied, be some £5,000 or £6,000, or ought to be, I cannot find any

A disclosure of this knowledge to Luddy, while to Sperring and his solicitor Peard constantly affirmed that Luddy's interest was valueless.

To sum them up shortly, the inferences I draw from the facts are these. From a time anterior to the death of the testatrix until after his purchase from Sperring, J. D. Peard acted as solicitor for Luddy in respect of this property. In the course of that employment he was called upon to consider carefully the extent of Luddy's interest under the will. He evidently formed an opinion that it was probably an absolute interest and not merely practically nothing more than a life interest. In the course of the same employment he also formed an opinion that the property was more valuable than the actual rental showed. He did not disclose his opinion on these points either to Luddy or his trustee or the trustee's solicitor. When negotiating as solicitor for Luddy, he found that Sperring could be induced to sell for a very small sum. He availed himself of his knowledge, during his negotiation for Luddy's family, to buy secretly for himself in the name of his brother, William Peard, for £77, property which was in fact worth some thousands of pounds.

What is the law which is applicable to such a state of circumstances? In *Carter v. Palmer* (1), where one who had previously been employed as confidential legal adviser, after that employment had ceased, brought up charges on his former employer's estate, under a compromise as to which he had been consulted, the general doctrine is stated by LORD COTTENHAM thus (8 Cl. & Fin. at pp. 705-707):

"As agent he necessarily became acquainted with all the circumstances connected with these securities and most particularly with the means which existed of providing for the payment of them. In advising the respondent as to compounding for these claims, and from his knowledge of what had subsequently taken place, he was aware that the claims might actually be bought up for much less than their nominal amount and their actual worth. What enabled him to purchase these claims for a sum little more than one-third of their actual value but the information he had acquired as agent or counsel for the respondent? Such information, therefore, was applied by him to defeat the negotiation in which he had himself been engaged for his client or employer, and, by substituting himself in the place of Mackinurdo, to deprive such client or employer of the benefit of a compromise which he had been endeavouring to effect and which the terms of the purchase proved to be feasible. From the earliest times down to the latest case in which I believe the subject has been discussed, which is *Taylor v. Salmon* (2), the rule in equity has been always recognised which would prevent a person in the situation of the appellant making such purchase for his own benefit whilst he continued to act as agent. As the reason for this disability continues to operate after the employment has ceased, the disability itself must continue, unless a contrary rule has been established by decisions. But this is not the case, but the very reverse. In *Coles v. Trecothick* (3) LORD ELDON does not say that it is sufficient for the party buying to divest himself of the character of trustee; but that he must do so by an unqualified, unauthorised contract for liberty to buy. In *Ex parte James* (4) LORD ELDON refused to permit a solicitor to become a purchaser who had ceased to act as such, upon the ground that, whilst acting as solicitor, he had procured all the information that might be useful to him; and he again repeats the rule, that, to enable a person who had held a confidential situation previously to the purchase to become a purchaser, he must show that he had at the time of the purchase shaken off that character by the consent of the cestui que trust freely given, after full information, and bargained for the right to purchase. The several cases which have occurred in which solicitors have been restrained from acting against their former client or communicating information acquired in such employment, proceed upon a principle which governs this case, for it cannot be contended that they are to be at liberty to use for their own benefit and to the prejudice of their former clients, information

acquired while acting for them, which they are not permitted to communicate or to use for the benefit of others."

These words of LORD COTTENHAM apply very closely to the present case. It is observable that the basis of the doctrine is that such a state of circumstances puts the agent, who has, by means of his agency, obtained information which gives him an advantage over the principal in the transaction, under personal disability to maintain that advantage to the prejudice of the principal. Putting aside the circumstances of secrecy, and supposing Luddy not to be bankrupt, the case would be one in which Peard could not have maintained such a purchase from Luddy himself unless he could show that he had made a full communication to his client of all he knew or believed respecting the property, and as LORD ELDON said in *Gibson v. Jeyes* (5), had given his client all that reasonable advice against himself that he would have given against a third person. If, while negotiating for his client, he had secretly bought for himself, the case would be much stronger.

In *Lewis v. Hillman* (6), LORD ST. LEONARDS says (3 H.L.Cas. at p. 630):

"I should lay it down as a rule, my Lords, that ought never to be departed from, that if an attorney or agent can show he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction to stand must be open and fair and free from all objection."

These words were referred to with approval by LORD CAIRNS in *McPherson v. Watt* (7)—a case which in some of its circumstances bears a close resemblance to the present. LORD CAIRNS says (3 App. Cas. at p. 266):

"An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything; that he has given an adequate price; and that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel, and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be uberrima fides between the attorney and the client, and no conflict of duty and interest can be allowed to exist."

LORD BLACKBURN said (*ibid.* at p. 270):

"All those branches of the profession are pursued by writers in Scotland and by attorneys and solicitors in England, and they all necessarily involve this, that the writer or the attorney must stand towards his client in a position in which there has been, or there is, confidence more or less reposed in the attorney by his client. It has often been said that that circumstance does not render it impossible for an attorney to purchase property from his client, and that the mere fact of his being an attorney purchasing would cast upon him no more duty than would be cast upon a person in any other profession. If he purchases from his client in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client, just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger. In some cases it may turn upon this, that the

- A attorney, having been the general agent of the seller, has acquired an intimate knowledge of the condition of the property, and not only learnt as much as the seller himself knows, but perhaps a good deal more. In those cases he has acquired the knowledge as being the general agent of the vendor, and he has an unfair advantage in consequence, and there must not be an abuse of the knowledge which he so acquired."
- B But it is argued in the present case that, although a solicitor or other agent may not avail himself of information obtained during his employment to obtain a good bargain from his client, the rule does not apply if the client has become bankrupt and the purchase is from the trustee in bankruptcy. Taking the familiar illustration, if the agent becomes from his employment aware of the existence of a coal mine under his employer's land of which the employer is ignorant, though he could
- C not purchase from the employer without disclosing this, it is said he may do so from his trustee in bankruptcy. I entirely dissent from this argument. The test is whether the purchase would be a benefit obtained to the prejudice or at the expense of the client. In this case it is possible that the property may produce enough to pay all the creditors and leave a balance for the bankrupt. Even if not it would pay a considerable dividend to the creditors. Is it no injury to the client that the solicitor should put this money into his own pocket instead of paying it to the bankrupt or to his creditors? Reliance was placed on those cases in which when a bankrupt has attempted to interfere with the assignee or trustee it has been held that the bankrupt is not a cestui que trust for that purpose. But in many respects the trustee represents him and has duties to him. As LORD ELDON said in *Ex parte James* (4) (8 Ves. at p. 346), the assignees are
- E "to do their duty to the creditors, always remembering also their duty to the bankrupt, if by a fair, prudential, and cautious dealing with the estate a surplus can be secured."
- In *Wearing v. Ellis* (8) LORD CRANWORTH, L.C., quoting SIR WILLIAM GRANT, says (6 De G.M. & G. at p. 603):
- F "From the moment that the debts are paid the assignees are mere trustees for the bankrupt, and can be called upon to re-convey to him."
- He adds that the trustee can be called upon in the Court of Chancery to convey. In *Adams v. Sworder* (9), where the bankruptcy had been annulled, the former bankrupt obtained a decree setting aside a sale by the assignee in which his solicitor
- G was interested.
- In my opinion, the trustee represents and stands in the place of the bankrupt for this purpose, viz., that the bankrupt's solicitor could not be allowed to hold, as against the trustee, an advantage obtained by him on a purchase from the trustee by means of the knowledge he had gained while solicitor for the bankrupt. On this ground alone I should be prepared to hold that Mr. Peard must give up to the
- H trustee in bankruptcy every advantage of this purchase. But there are other reasons which seem to me to make the case stronger. Undoubtedly from Oct. 20, 1879, Peard always represented himself to Sperring and to Devonshire as negotiating to purchase, not on his own behalf but on behalf of the friends of Luddy. It is quite clear that he was employed by Luddy so to negotiate, and the correspondence shows he accepted that employment. This was a deception which would make it
- I difficult to maintain the purchase against the trustee. The trustee was a needy man, entirely without advice in the matter. The draft assignment prepared by Peard was returned with a note upon it by Buckler that he knew nothing about the recitals, and Buckler, who professed to act as his solicitor in the matter, has said that he would not have allowed the matter to proceed if he had remembered his former query as to the effect of the will.
- Put all these facts together. The solicitor of the bankrupt having, as such solicitor, acquired an intimate knowledge of the nature and value of this peculiar property, concerning which he had acted as solicitor and receiver for years, is

employed by the bankrupt to negotiate with the trustee in bankruptcy for the purchase of it, which the bankrupt hoped to induce his sister to carry out for the benefit of his wife and children. The solicitor negotiates accordingly, never suggesting to the trustee that he intended to buy for himself, but giving the trustee and his solicitor to believe that the purchase was by, and on behalf of, the bankrupt's family. He discovers that the trustee, being a needy man, is ready to conclude the matter for a very small sum—considerably less than he has represented to his client—and then concealing the matter altogether from his client, and concealing from the trustee and his solicitor that he was buying on his own account, he completes the purchase in the name of his brother, and when he is compelled to disclose that the property has been sold, he represents to the bankrupt that the purchase is really by his brother and still conceals, until forced by an examination in bankruptcy, to disclose his own interest in the purchase. A
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In my opinion, such a transaction cannot be supported in equity, and I must declare the defendants to be trustees of all the advantage of this purchase for the trustees in bankruptcy of Luddy. I must consider the terms on which this equitable relief should be granted. There must be an account of the purchase money paid, with interest at 4 per cent. from the time of payment, also an account of all moneys due to Peard upon the securities given to him by Luddy, and of all outlay by him in improvement, with interest at 4 per cent. As I think the defendant J. D. Peard has been entirely in the wrong, I must order him to pay the costs of this action. Some of the charges of misrepresentation are not, I think, proved; but I cannot under the circumstances wonder that they were made. They have not increased the costs, and I cannot make any deduction on that account. Probably the best course will be to direct a taxation of the plaintiff's costs, and to set them off pro tanto against whatever may be found due to J. D. Peard on the account. Subject to this, and to the payment of the balance, if any, to Peard, the defendants must be ordered to convey the property and hand over the deeds to Luddy's trustee. If the trustee is entitled to any just account and taxation of the costs of Peard against Luddy outside this transaction, I understand there is a summons pending under which he may obtain this, and, that being the more proper proceeding, I do not direct such an account in this action. A technical objection was taken to the frame of this action. Part of this, relating to the absence of evidence as to the leave of the Bankruptcy Court having been obtained, was not raised by the pleadings. The rest was merely as to joining the bankrupt with his trustee as co-plaintiff. This, in the view which I have taken of the rights of the trustee in bankruptcy, becomes immaterial; but I observe that such a joinder of plaintiffs seems to have been sanctioned by the Court of Appeal in *Emden v. Carte* (10). D
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Solicitors: *Woodroffe, Burgess & Loch*; *John Davis Peard*.

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

A

NEWBIGGING v. ADAM AND OTHERS

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), December 7, 9, 10, 11, 20 1886]

B

[Reported 34 Ch.D. 582; 56 L.J.Ch. 275; 55 L.T. 794;
35 W.R. 597]

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord FitzGerald and Lord Herschell), March 16, 19, 20, 22, 23, 26, June 11, 1888]

[Reported 13 App. Cas. 308; 57 L.J.Ch. 1066; 59 L.T. 267;
37 W.R. 97]

C

Contract—Rescission—Misrepresentation—Innocent misrepresentation—Right of plaintiff to indemnity in respect of obligations entered into under, or created out of, the contract.

When a contract is rescinded on the ground of innocent misrepresentation, (which would not entitle the plaintiff to damages in an action of deceit) the plaintiff is entitled to an indemnity in respect of (per COTTON, L.J., and FRY, L.J.) all obligations entered into under the contract which were within the necessary or reasonable expectation of both of the contracting parties at the time of the contract (per BOWEN, L.J.) only obligations created out of the contract.

D

Notes. Considered: *Whittington v. Seale-Hayne* (1900), 82 L.T. 49. Referred to: *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Armstrong v. Jackson*, [1916-17] All E.R.Rep. 1117; *Hulton v. Hulton*, [1917] 1 K.B. 813; *Compagnie Chemin de Fer Paris-Orleans v. Leeston Shipping Co.* (1919), 36 T.L.R. 68; *Spence v. Crawford*, [1939] 3 All E.R. 271; *Nicholson and Venn v. Smith Marriott* (1947), 177 L.T. 189.

E

As to actions for rescission on the ground of misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 874-888; and for cases see 35 DIGEST 65 et seq.

F

Cases referred to:

(1) *Redgrave v. Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, 417.

(2) *Peek v. Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, 119.

G

(3) *Kennedy v. Panama, etc. Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 35 Digest 118, 216.

(4) *Rawlins v. Wickham* (1858), 3 De G. & J. 304; 28 L.J.Ch. 188; 5 Jur.N.S. 278; 44 E.R. 1285; sub nom. *Rawlins v. Wickham*, *Wickham v. Rawlins*, 1 Giff. 355; sub nom. *Rawlins v. Wickham*, *Wickham v. Bailey*, 32 L.T.O.S. 231; 7 W.R. 145, L.JJ.; 35 Digest 34, 271.

H

Appeal from a decision of BACON, V.-C., in an action for the dissolution of a partnership and an indemnity against all claims against the partnership.

The plaintiff, William Newbigging, was a colonel in the army, on service in India. The defendants, Alexander Adam and Robert S. Adam, were wool brokers and wool merchants at Leith, in Scotland, in partnership as "Adam, Son & Co.," and were also, in the opinion of the lords justices, partners with the defendant

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Walter Townend, under the firm of "Walter Townend & Co.," in the business of worsted spinners, carried on at Providence Mills, Bradford, Yorkshire. The plaintiff, who was personally unacquainted with the defendants, was desirous of giving up his commission in the army and going into business, and negotiations for a partnership with the defendant Townend in the Bradford business were carried on through his brother Alexander Newbigging, who was acquainted with the defendants. About November, 1882, a prospectus, in which Townend was described as "Mr. B.," was handed by Adam, Son & Co. to Alexander Newbigging. The material parts of this prospectus were as follows:

"The spinning business of B. & Co., situated in Bradford, Yorkshire, was formed about fifteen months ago by Mr. B. and Adam, Son & Co. At that time it was contemplated that a working capital of £5,000, with a credit account of £10,000 from A., S. & Co., would be sufficient to work the business contemplated. Mr. B., the practical partner, was to have a half interest in the concern, and the other half was for the firm of A., S. & Co., who supplied all the funds, or its nominee. A lease of the buildings was taken for fifteen years, terminable at intervals on the part of B. & Co., which put in its own machinery, and which is now a thoroughly efficient plant, capable of turning out very varied yarns."

The evidence as to the lack of efficiency of the machinery is stated in the judgment of Cotton, L.J., *infra*.

The negotiations concluded with three documents—an agreement of articles of partnership between Walter Townend and William Newbigging, dated Feb. 21, 1882; an agreement of the same date between W. Newbigging and Adam, Son & Co.; and an agreement dated the day following between Walter Townend and Adam, Son & Co. By the first agreement Townend and the plaintiff were to be partners as worsted spinners from Feb. 1, 1883, to Sept. 1, 1886, under the firm of "Walter Townend & Co.," at Providence Mills, Bradford. The capital was to be £10,000, all of which was to be brought in by the plaintiff, who undertook to pay £5,000 as on Feb. 1, then last, and the remainder within six months thereafter. The machinery, etc., was to be valued as at Feb. 1. The outstanding debts due to the late firm were to be collected by the new firm, and applied in paying the debts of the late firm, and any surplus was to be placed to its credit, and, if there was any deficiency to meet the last-mentioned debts, the same was to be paid by the late firm. Walter Townend was to take one-third of the profits and the plaintiff the remaining two-thirds, but no division of profits was to take place until 5 per cent. interest had been paid on the capital to the person advancing the same. Both partners were to devote their whole time and attention to the partnership business. By the agreement between the plaintiff and Adam, Son & Co., the former was to pay the latter a sum equal to one half of the net profits (not including interest on capital) accruing to the plaintiff from the partnership. By the agreement of Feb. 22, 1883, Townend agreed to consult with Adam, Son & Co. before exercising a certain option of purchase under the partnership agreement, and, in the event of the option being exercised, that Adam, Son & Co. should be deemed the purchasers of the share (of Newbigging). The plaintiff brought into the partnership two sums of £9,700 and £324, against which, sums received by him, when deducted, reduced the amount to £9,279 6s.

Soon after the plaintiff had joined the business he found that the concern was insolvent, and he, accordingly, brought the present action, claiming a dissolution and winding-up of the partnership accounts, that the defendants might be declared jointly and severally liable to indemnify him against all claims and demands in respect of the partnership or any of the debts or liabilities thereof, and repayment of the moneys paid by him, with interest, and other relief. He alleged that he had been induced to join the partnership through the false representations of the defendants as to the profits of the business, the value of the machinery, the quantity and value of the stock-in-trade, and the solvency of the concern. The defendants, the Messrs. Adam, denied the plaintiff's allegations, and counterclaimed against the plaintiff and the defendant Townend for an alleged debt of £16,704 on a balance of account. The action was tried in May, 1886, before BACON, V.-C., who dismissed the counterclaim, and held on the evidence that the plaintiff had been induced to join the partnership through the misrepresentations of the defendants, and was entitled to repayment of the capital brought by him into the business. His Lordship, "being of opinion that the partnership constituted by the then several agreements" had "come to an end," declared that the defendants were jointly and severally bound to indemnify the plaintiff against all outstanding debts, claims,

A demands, and liabilities which the plaintiff had become, or might become, subject to or be liable to pay for, or on account, or in respect of the dealings and transactions of the partnership. The defendants, Messrs. Adam, appealed.

Rigby, Q.C., and R. B. Haldane for the defendants.

Sir Horace Davey, Q.C., and J. G. Wood for the plaintiff.

B No counsel appeared for W. Townend.

Cur. adv. vult.

C Dec. 20, 1886. **COTTON, L.J.**—This is an appeal from a decision of BACON, V.-C., setting aside a contract which had been entered into by the plaintiff, William Newbigging, through his brother, Alexander Newbigging, with the defendants, Adam and Townend. The ground on which the Vice-Chancellor set the contract aside was that a misrepresentation had been made, though unintentionally, and not in any way fraudulently, by the defendant Alexander Adam, to Alexander Newbigging, which induced the contract. He, accordingly, gave consequential relief, and hence the appeal to us.

D The plaintiff being in India, in the army, entertained the idea of giving up his commission, coming home, and entering into business in England or Scotland. His brother, Alexander Newbigging, was acquainted with the Messrs. Adam, and, I think, made some statements to them, or one of them, that he was looking out for a business for his brother. Negotiations then took place, and the principal time—the earliest vital time to be regarded—seems to be the end of October or the beginning of November, 1882. The negotiations went on, and, at that time, I think, one of the Messrs. Adam handed to Alexander Newbigging what has been called a prospectus or proposal. It is on this mis-statement said to be contained in that document that the plaintiff relies, and on which the Vice-Chancellor set aside the contract between the parties, and, therefore, it is necessary to refer to that prospectus. Those proposals were submitted to Alexander Newbigging for his brother, and contained the statements on which, up to that time at least, the contract between the plaintiff and the defendants was based. Subject to what has been said about the arrangements entered into in the beginning of February of the next year, I think those were the proposals on which the contract between the parties was founded.

F That prospectus refers to a business into which it was proposed that the plaintiff should enter. Previously to this time the Messrs. Adam, for some purpose which it is not at present very material to consider, had acquired some machinery and the lease of a mill at Bradford, and Mr. Townend had been put by them into the position of carrying on that business. In this prospectus he was referred to as “Mr. B.” The first statement is:

“The spinning business of B. & Co., situated in Bradford, Yorkshire, was formed about fifteen months ago by Mr. B. and Adam, Son & Co.”

H Undoubtedly it was afterwards explained by the Messrs. Adam to Alexander Newbigging that what was referred to was the business carried on under the name or firm of “Walter Townend & Co.” The prospectus goes on to say:

I “At that time it was contemplated that a working capital of £5,000, with a credit of £10,000 from A., S. & Co., [Adam, Son & Co.] would be sufficient to work the business contemplated. Mr. B., the practical partner, was to have a half interest in the concern, and the other half was for the firm of A., S. & Co., who supplied all the funds, or its nominee.”

I will not enter into a discussion whether there was a misrepresentation by Alexander Newbigging of the meaning of that term.

Then we come to what I think is a most material statement:

“A lease of the buildings was taken for fifteen years, terminable at intervals on the part of B. & Co., which put in its own machinery, and which is now a thoroughly efficient plant, capable of turning out very varied yarns.”

It appears upon the evidence that it is necessary, as a rule, to have different machinery for spinning the different kinds of wool—that foreign and colonial wool requires one system of machinery, and that English wool requires a different kind. However, that is the statement. We stopped counsel for the plaintiff on the question whether there was or was not any other misrepresentation, or whether there was a misrepresentation seriously affecting the contract which was entered into, because we thought that that statement materially affected the contract which was going to be entered into for the plaintiff for a partnership in this business for a term of years, and because, on the evidence before us, it was shown that that statement was substantially and materially, in an important point, incorrect. This machinery, or the greater part of it, was acquired in this way. The firm had become bankrupt at Bradford, and Adam & Co. had bought their machinery, and had also, I think, added considerably to that machinery; but, on the evidence before us, the spinning machinery was not what, in our opinion, was a thoroughly efficient plant. It was shown that the number of spindles and revolutions was such that it could not be said that this machinery in its then state was efficient so as to carry on the spinning business effectually, because, from the number and construction of these machines (the evidence was not contradicted on this point), the spindles would only make a certain number of revolutions, and there was only a certain number of spindles in the greater part of these machines. It is very evident that, whether these were or were not machines which had been bought from the bankrupt firm (and I think a considerable number of them were not), the efficiency of the business—that is to say, its power of carrying on the spinning business to a profit—must depend upon the quality of spun yarn which could be turned out from the machines; and if, as upon the evidence was shown to be the case, these machines could not turn out such a quantity of spun yarn as to compete successfully with other spinning firms, it was not a thoroughly efficient plant within fair meaning and reading of this statement.

Of course, anyone entering into a partnership (the plaintiff knew nothing about it, but his brother Alexander did) would ask himself what prospect there was of carrying on this business at a profit. That must depend upon the capacity of the machinery to turn out a sufficient quantity of good yarn to be sold at a profit. There is here the uncontradicted evidence of two witnesses as to the defects which I have mentioned. The witness for the defendants, when asked whether this was a thoroughly efficient plant, flinched, and could only say, I think, that it was “fairly efficient.” In my opinion, these machines were not correctly described as thoroughly efficient plant, and, without at all saying whether in this proposal other matters are or are not incorrectly stated, which influenced Alexander Newbigging in inducing his brother to enter into the proposed contract, yet, in my opinion, there is that material statement, in fact incorrect, though not made with any dishonest intention, or in such a way as to support an action for deceit as against the defendant who made it.

I will deal now with what was much pressed upon us by counsel for the Messrs. Adam, that, however much Alexander Newbigging, and through him the plaintiff, might have relied on the statements as to the machinery contained in the proposal, yet, by the document of February, 1883, or the end of January, 1883, an entirely new arrangement was entered into which prevented reliance being placed upon those proposals. It turns out that Alexander Newbigging did not originally, as probably, if he had been better advised, he would have done, take advice with reference to this contract. But some time in January, I think—the date is not now material—he was advised by a Scottish lawyer whom he had consulted that some advice as to the general nature of the transaction should be taken from a mercantile man—a man of business—and he was also advised that there should be an investigation by an expert into the value and quantity of the machinery. With reference to the terms of the proposed partnership between Townend and the plaintiff, which had been then arranged in substance, the value of the machinery was important in two ways. The value of the machinery, that is to say, its efficiency—which

A is entirely distinct from whether or not it was worth a certain sum—was a material element in reference to the question whether he should enter into the contract. The proposal was, that the new firm in which the plaintiff was to be a partner should take over the old machinery, and that of course meant to take it as representing a certain sum of money in the books. As I understand, the lawyer who advised Alexander Newbigging desired that there should be an investigation generally into the question how far the contract was one which had a reasonable prospect of success, and also that there should be a valuation of the machinery. Alexander Adam objected to both these proposals, but he said: "When the terms of our contract are agreed on, then have a valuation of the machinery, and provide for that being made." I am not at all entering into the question whether a valuation was afterwards made so as to fulfil the contract, but it was said in argument that what was agreed to by Alexander Adam was an entire putting away of the proposals, or the statement in the proposals, with reference to the machinery, and that what had previously been a contract depending on mutual confidence between him and Alexander Newbigging was no longer to stand on that footing, but was to depend on the valuation to be made under the deed of partnership.

In my opinion, that is erroneous. In order to get rid of the statement in the proposals, what was required was, that before any contract was made there should be an independent investigation as to the truth and correctness of that statement. The deed in effect merely provided that, after the plaintiff had bound himself by contract (which this suit seeks to set aside), then he might have a valuation of the machinery for the purpose of determining at which price it should be taken over by the new firm. Therefore, in my opinion, what took place in January and February, 1883, cannot be considered as preventing the plaintiff from relying upon statements in the proposals which were material towards the contract, and substantially and materially incorrect.

If there was substantially a mis-statement, though not made fraudulently, which induced the plaintiff to enter into the contract, we have to consider what are the consequences. The arrangement that was made was carried into effect by three deeds. The first was a deed of partnership, in terms between the plaintiff and Walter Townend, and the second one was an arrangement between the plaintiff and the Messrs. Adam, that the plaintiff should give to them one-half of the two-thirds profit of the new business which he was to get under the deed of partnership. There was a third deed, to which I need not refer in detail simply between the defendant Townend and the defendants the Messrs. Adam. The material facts are that there was a deed of partnership on its face as between the plaintiff and Walter Townend, and there was a contract between the plaintiff and the Messrs. Adam with reference to the disposal of his share of the profits. Those are the only two contracts on which I intend to rely. There has been a great contest here as to what ought to be the consequences; but on that question my opinion is that there was one contract as between the plaintiff and Alexander Adam, which was carried into effect by those two instruments. There has also been a great contest whether the Messrs. Adam are to be considered as partners in the new concern. That question I do not decide. If what would decide the whole question were whether Adam was principal or concealed partner in the previous business we should all come to the conclusion that he was either principal or concealed partner. But, in my opinion, it is not necessary to enter into that question, and I do not base my decision on that ground. It is true that this contract was carried into effect by three documents; but, although Townend may have assented to the arrangement proposed by the Messrs. Adam, only one contract was to be carried into effect by these three documents, all the terms being settled between the Messrs. Adam and the plaintiff, viz., that a partnership business should be entered into between the plaintiff and Townend, and that there should be that second agreement as between the plaintiff and the Messrs. Adam.

That being so, we must look upon the thing as a whole, and not regard the contract into which the plaintiff entered with the defendants Messrs. Adam as

merely relating to the division of the profits between them and the plaintiff. One entire contract and agreement was entered into between the plaintiff and the defendants the Messrs. Adam, which was carried out and given effect to by the three documents. We cannot, in my opinion, separate the contract of partnership contained in the agreement between the plaintiff and Townend from the contract entered into between the plaintiff and the Messrs. Adam, if we consider Townend a party to the arrangement under which the plaintiff was to enter into a contract to be carried into effect by the three documents.

That contract is to be set aside. When a contract is set aside, the person as against whom it is set aside is to be, with some exceptions, restored to his old position. And I do not think it was much argued here that that could not be done, because the contract to be set aside is that under which the plaintiff became a partner in the new business with Townend, and if that business had perished by its own weakness, in my opinion, the mere fact that it had come to an end, not by any default of the plaintiff, would not prevent him, within the terms of the rule, from restoring to the defendant the former state of things; but the plaintiff is entitled, when the contract between him and the Messrs. Adam and Townend is set aside, to be put back into his old position. How is that to be done? It was scarcely argued that, if the contract was to be set aside in consequence of mis-statements made by the Messrs. Adam, they could get any benefit from the contract of partnership into which the plaintiff had entered; and, in my opinion, they clearly could not. They could not, as by their counterclaim it was sought to do, recover from the plaintiff, as a member of the firm, any portion of the indebtedness of the plaintiff and Townend (if the Messrs. Adam were not treated as partners) which had been incurred during the carrying on of the business of the partnership into which the plaintiff had entered on the statement of the Messrs. Adam. If the £9,500 was brought in by the plaintiff, that was brought in to assist and support the business; and, even if it did not go directly to pay any claims made by the Messrs. Adam against the new firm, the plaintiff would be entitled, on the contract of partnership being set aside, to have paid back to him the sum which, under the contract set aside, he had been induced to bring into the business.

But the Vice-Chancellor has given more. He has directed an indemnity to be given by the Messrs. Adam to the plaintiff, and that might cover more. Is he right? Undoubtedly, the statements made by the Messrs. Adam were not such as would enable the plaintiff to recover damages in an action of deceit against them, and it was contended by their counsel that it would not be right in an action of this kind to make the defendants, whose mis-statement had enabled the plaintiff to set aside the contract, to undertake liabilities for which they were never subject antecedently to the contract, and that this was really giving damages in another way. I differ from that proposition. In my opinion, it is not giving damages in consequence of the deceit; it is determining what is the proper result of setting aside a contract in consequence of the mis-statements which have been made. That is a very different thing, because, although the damages which would have been obtained (if the contract had not been set aside, and the mis-statement which induced the contract had been made intentionally or with such negligence as to bring about the same consequences) would have amounted to the same sum as that which the plaintiff would get under the indemnity, yet he might have got more. And, although, the rule is said to be that damages are given as an indemnity to the person who is bringing the action, yet here it is not as damages in an action of deceit that an indemnity is directed to be given, but simply as what is the proper consequence, in equity, of setting aside the contract which the plaintiff has been induced to enter into.

In my opinion, it cannot be said that the plaintiff is put back into his old position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside. That is a very different thing from damages. It may be that the plaintiff has been induced by these statements to sell a house or leave the army, and in respect of any loss thereby incurred he could not in this

A action obtain any damages or indemnity; but where that in respect of which he is to be indemnified is only the obligation which he has incurred under the contract which is set aside, in my opinion, requiring the defendant, whose mis-statements, though not fraudulent, have been the ground for setting aside the contract, to indemnify the plaintiff from those obligations, is the only way, in an action like this, by which the plaintiff can be restored to his old position. I entirely disclaim any intention of giving damages in an action like this. In my opinion, it is right to require the defendants to put themselves in the place of the plaintiff in respect of this contract, and to do that in the only way in which they can, namely, by indemnifying him against the obligations which he has undertaken to bear by the contract he has entered into, that contract being now set aside, and declared void as against him.

C *Redgrave v. Hurd* (1) was relied upon by the defendants on this point, but, in my opinion, the decision in that case does not support their argument. Merely damages were there claimed, and not what would be produced by an indemnity. The defendant's counterclaim was to have the contract rescinded and the deposit of £100 returned to him, £100 damages for the defendant's loss and trouble in removing from Stroud to Birmingham, £200 damages for having given up his practice at Stroud, and further relief. Those two last specific claims were simply for damages. If an action had been brought for damages for intentional misrepresentation, those might be the damages which are necessary, under the proper rule as to damages, to indemnify, a plaintiff against loss; but he could not claim them from the defendant in an action to set aside the contract and put the plaintiff in the same position, with reference to the obligations undertaken thereby, as if that contract had not been entered into, and he had called upon the defendant to indemnify him—that is to say, to put himself in his own place. In my opinion, therefore, although this question of indemnity is said not to extend to any great amount, the judgment of the Vice-Chancellor was right in that respect, as well as in the others, and the appeal must be dismissed.

F **BOWEN, L.J.**—I do not propose, after the examination which COTTON, L.J., has devoted to the facts of this case, to go through the evidence at length, and I propose to state briefly the three propositions of fact which I consider to be proved.

I consider it to be proved—and I draw the inference of fact upon the ground which the lord justice has already explained at length—that the business of the old firm was in fact the business of Adam & Co.; that is to say, that they were either principals or concealed partners in the whole business; and, although I observe that the Vice-Chancellor hesitated, because the matter was not raised distinctly before him, to pronounce that Adam & Co. would be liable to outside creditors for the debts of the old firm, the only reason why I do not exercise the same reticence is that I do not understand how, in law, a person can escape liability to outside creditors if he is really a principal or a partner in a business. The second inference of fact which I do not hesitate to draw is that there was a misrepresentation as to the sufficiency of the machinery. There may have been other misrepresentations besides; but there was clearly that, and it appears to me, not only that that misrepresentation was material, but that it really induced the contract and was what went to the root of the bargain. Lastly, it seems to me that the triple agreement of February, 1833, was really, so far as the plaintiff and Adam & Co. were concerned, one agreement—that by the real transaction (which, I think, is hinted at, and can be seen through the memorandum of agreement signed by the plaintiff) it was agreed between Adam & Co. and the plaintiff that the latter should enter into the sub-contract of partnership with Townend which occupies the first of the three documents, all of which together constitute the agreement of February. It was part of the agreement between Adam and Co. and the plaintiff that the plaintiff should take upon himself the partnership with Townend for a period of five years; that he should become and remain for that period Townend's partner, and should place his credit at the disposal of the new firm.

Whether or no after that agreement Adam & Co. still remained partners with the new firm, as they had unquestionably been partners or principals in the old, I say nothing. It is not necessary now, in my opinion, for us to decide that question, and I leave it, so far as my judgment is concerned, unsolved. But if the facts which I have mentioned are rightly determined, as I propose to determine them, equity will set aside this contract, and the only question remaining is upon what terms, and what is the extent and nature of the relief which ought to be given to the plaintiff? The Vice-Chancellor has, in the first place, ordered the sum of £9,700, brought by the plaintiff into the partnership, to be repaid, and also the sum of £324, which, although not brought eo nomine into the partnership, was really and in substance brought into it, because it was applied by the plaintiff in discharge of the debts of the new firm. The Vice-Chancellor ordered this to be repaid after making deductions for certain moneys which were received by the plaintiff, the balance being £9,279 6s.; and he has further declared that the defendants Messrs. Adam & Co., as well as Mr. Townend, are bound to indemnify the plaintiff against all outstanding debts, claims, demands, and liabilities which the plaintiff has or may become subject to, or liable to pay for or on account or in respect of the dealings and transactions of the partnership.

The reason that I dwell at some length on this part of the case is that I conceive it to be important that we should lay down the exact line on which our judgment proceeds, and decide nothing more than is absolutely and really necessary for the decision of the case, and that we should leave open for the future any points which may be allowed to remain open. In the first place, in considering the question to what extent the plaintiff is entitled to demand an indemnity from Adam & Co., one must distinguish between the history and the origin of the doctrine on which equity will give relief in cases of fraud and misrepresentation. With regard to fraud, a contract which is obtained by fraud, being voidable and not void, remains until it is set aside; and when it is set aside it is treated both at law and in equity as non-existing. It appears that equity, as has been pointed out in *Peek v. Gurney* (2) both by LORD ROMILLY, M.R., and the House of Lords, has a concurrent jurisdiction with law to give complete relief in cases of fraud. Common law gave damages in case of fraud, and also recognised a jurisdiction to decide whether there should be a rescission or not. Besides acting upon the view that the contract was voidable, the common law also gave damages for deceit, and, in my opinion, not only as an alternative remedy, but as an alternative or cumulative remedy as the case might be. Chancery had a concurrent jurisdiction, and in cases of fraud, accordingly, there can be no doubt (or, at least, as far as I know, there can be no doubt) that complete indemnity could be given by a court of equity to a person who had been defrauded, so as to protect him as fully as he could have been protected in law.

If we turn to the question of misrepresentation, how does it stand? There is this broad difference, that at law you cannot give damages at all for misrepresentation, and that in equity you cannot, as it seems to me, give any indemnity which corresponds with damages. I do not think that, if it became necessary to go through the mass of authority there is upon the subject, so much distinction would be found between the view which common law takes of misrepresentation and the view which equity takes, as is generally supposed. At common law it has always been considered that misrepresentations which strike at the root of the contract are sufficient to avoid the contract, on the ground explained in *Kennedy v. Panama, &c. Mail Co.* (3), but when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation, it seems to me that it must all be based on this and nothing more, that he is entitled to have the contract rescinded, and he is entitled accordingly to all the incidents of rescission and to all its consequences. If there was any claim to any further equitable relief which was raised by the facts, then it would not be a case of innocent misrepresentation alone.

In the case of innocent misrepresentation alone, it seems to me that everything that the injured party is entitled to must depend on the rescission of the contract.

A It is said that on such misrepresentation the injured person is entitled to be replaced *in statu quo*. It seems to me that, when you are dealing with misrepresentation, you must understand those terms—that he is to be placed *in statu quo*, or put in his previous position, with the limitation borrowed from the subject-matter. It is not that he is to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages. He is not entitled to be recouped all the loss he has suffered. I think the only right he has is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter.

B That seems to me to be the true doctrine as expounded in *Redgrave v. Hurd* (1), where it is put in the neatest way. There SIR GEORGE JESSEL, M.R., before going into the details of the case, said he wished to say something about the law. Before I read the passage it is desirable that I should explain what I understand the facts in *Redgrave v. Hurd* (1) to have been. In that case there was a misrepresentation which upon the pleadings was held to be an innocent misrepresentation only. It is true that a suggestion of fraud was flung out in the pleadings, but the Master of the Rolls and the Court of Appeal thought that fraud was not so expressly pleaded that the case ought to be treated, when it came to the Court of Appeal, as a case of fraud; and so the relief given depended on the misrepresentation alone. The Master of the Rolls treating it as such says (20 Ch.D. at p. 12):

E “Before going into the details of the case I wish to say something about my view of the law applicable to it, because in the text-books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of courts of equity and the rules of courts of common law—a difference which, of course, has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways—either of which was sufficient.”

F Now mark the way in which the Master of the Rolls bases the doctrine of rescission as regards misrepresentation (*ibid.* at pp. 12, 13):

G “One way of putting the case was, ‘A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found out that before he made it.’ The other way of putting it was this: ‘Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements.’ The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of common law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true.”

I With great respect for the shadow and memory of that great name, I cannot help saying that that is not a perfect exposition of what the common law was, but, so far as the rule of equity goes, I must assume that the Master of the Rolls was speaking with due knowledge of all the equity authorities, and he defines the relief, as it

seems to me, as a giving back of the advantages which the injuring party took under it. The advantages may be of two kinds: a man may get an advantage in the shape of an actual benefit, as when he takes money; he may also get an advantage if the party with whom he contracts does something in consideration of the contract—assumes some burden. In such a case, it seems to me that complete rescission would not be effected unless the misrepresenting party, besides handing back the benefits which he had himself received, re-assumed the burden which under the contract the injured person had taken upon himself. I am speaking entirely for myself, but I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, or to lay down the proposition that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words “out of the contract” the limited and special meaning which I have endeavoured to shadow forth. “Loss arising out of the contract” is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done. In the case of misrepresentation, injury there is none. It seems to me that language of that sort would be too wide, and I think that *Redgrave v. Hurd* (1) shows that it would be too wide, because in that particular case the Master of the Rolls excluded from the relief which was given the damages which had been sustained by the plaintiff in removing his business, and other similar items which, if they were anything at all, were damages, and, as damages, of course, could not be recovered at law. It is obvious that you must draw the line somewhere. Supposing that, in consequence of a misrepresentation as to the drainage of a house, I am induced to take a lease of the house, and to occupy it, the misrepresentation is innocent, but I have a right to have the contract set aside. Supposing that before the contract is set aside, while I am temporarily occupying the house, the chimney falls and injures somebody whom I have invited to the house, and assume that under such circumstances a liability would arise at law, it could not be said that I should be entitled to be indemnified by the person who has let me the house against all the accidents which followed from the chimney falling. In truth, it appears to me that there ought to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages.

There is nothing in *Rawlins v. Wickham* (4) which carries the doctrine beyond that. In that case the old partners, after allowing one of their number to retire, remained themselves in the new firm, and the person with whom they made the contract, and whom they introduced into the new firm under his contract with them, took upon himself to share the liabilities with them, which otherwise they would have borne in their entirety. That was a burden which he took under the contract and in virtue of the contract. It seems to me, therefore, that upon this principle indemnity was rightly decreed as regards the liabilities of the new firm. I only wish to say, before I part with the subject of the law, that I do not express any opinion that equity may not carry the doctrine further. All that I say is, that so far as I know, I have not found any case which has carried it beyond the principle which I have laid down, and I reserve my opinion, should ever such a case arise, whether it is to be carried further. At present I am satisfied to rest upon the doctrine as I have explained it.

Let me apply that doctrine to the facts of this case. A part of the contract with Adam & Co. was, as I have expressed my view, that William Newbigging should become, and continue for five years, partner in a new firm, and bring in close on £10,000. He was to be a person who, by this very contract, was to place his credit at the disposal of the new firm, and to pledge his credit with his partners in the new firm for the business transactions of the new firm. It was a burden or liability imposed on him by the very contract. It seems to me that the £9,000 odd, and indeed all the moneys brought in by him or expended by him for the new firm, up

A to the £10,000, were part of the actual moneys which he undertook by the true contract with Adam & Co. to pay. Of course he ought to be indemnified as regards that. I think also, applying the same doctrine, that he ought to be indemnified against all the liabilities of the old firm, because they were liabilities which, under the contract, he was bound to take upon himself. It seems to me, upon those grounds, that the decision of the Vice-Chancellor ought to be supported.

B **FRY, L.J.**—I entirely agree in the conclusion at which my learned brothers have arrived, and I shall add but very few words to what they have said, because their exposition of the facts of this case, and of the law applicable to it, has been so full.

C With regard to the question whether the Messrs. Adam were or were not partners or principals in the original firm of Walter Townend & Co., I entirely agree in their conclusion. I think that that question must be answered in the affirmative. But, even if it were otherwise, I am far from certain that, in this litigation, they must not be treated as having been partners on the ground that the prospectus, as it is called, according to the construction which I put upon it, is a representation by the Messrs. Adam that they were partners in that firm, and when the prospectus proceeds to deal with the proposal for the introduction of the third person, it appears to me to treat him as a third partner in the concern of one or more partners. There is also a remarkable letter of Feb. 1, 1883, written during the course of the negotiations, in which Mr. Alexander Adam, writing to Mr. A. C. Newbigging, says:

“If we have given any untrue statements, your brother would of course have ground for reducing what you and we have been about.”

E That letter, confirms me in the view that they were putting themselves forward as contracting persons, and contracting as partners in the old firm. Putting those two documents together, I am far from certain that, even if the Messrs. Adam had not been principals or partners in the old firm, they must not in this matter, as between themselves and the plaintiff, be taken to have been such. Upon that ground, independently of the other conclusion of fact as to their being partners or principals, F I think the judgment of the learned Vice-Chancellor is to be supported.

G On the other issue of fact, with regard to the character of the machinery, I desire to add nothing. In my judgment, it is plainly made out that the plant was not thoroughly efficient. Not only is that made out by the direct testimony of the witnesses who were called, but it is practically admitted by the witness who was called for the defendants, who is described as the most experienced valuer of machinery in Bradford. When one looks at the history of this machinery, and the account which Townend gave of its condition when the first purchaser took possession of it, it is not at all surprising that the machinery and plant were found not to be thoroughly efficient. That that misrepresentation was a material one it is, to my mind, impossible to doubt; and, therefore, I think that was a distinct mis-representation in point of fact which did give occasion to this contract, and which induced it.

I The only other point upon which I will say anything at all is with regard to the indemnity, and in this case it is obvious that my learned brothers, although arriving at the same conclusion, have arrived at that conclusion by different roads. It is, perhaps, enough, to say that I agree in their conclusion, and so escape from an investigation of a very nice and subtle inquiry. I will only say that the inclination of my opinion is towards the view of CORRON, L.J.; and I am inclined to hold that the plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract, when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract. I a little hesitate to adopt the view of BOWEN, L.J., that the obligations must be created under the contract, because I feel a little doubt as to the minute proposition which is necessary to arrive at this, namely, whether the obligation in question in the present suit can be said to have been created under the contract, but, whichever be the true view, it appears to me to be plain in this case that the plaintiff is entitled to the indemnity which the Vice-Chancellor has given him. It appears to

me to be plain that, the plaintiff having been induced by the defendants to enter into the contract of partnership, it must have been in the contemplation of the contracting parties that the new partner would, under that new contract of partnership, become liable to the ordinary partnership obligations, and the obligations against which indemnity is sought are such ordinary partnership obligations. I think, therefore, that the Vice-Chancellor was well founded in the decree that he pronounced, and that this appeal must be dismissed with the usual consequences.

The defendants appealed to the House of Lords (reported 13 App. Cas. 308, sub nom. *Adam v. Newbigging*) where their Lordships dealt very fully with the facts, and varied the order of the learned Vice-Chancellor, there having been certain financial adjustments between the parties.

Appeal dismissed.

Solicitors: *Parker, Garrett & Parker; W. & J. Flower & Nussey*, for *Killick, Hutton & Vint*, Bradford.

[Reported by FRANK EVANS, Esq., and C. E. MALDEN, Esq., Barristers-at-Law.]

GORDON AND ANOTHER v. SILBER AND ANOTHER

[QUEEN'S BENCH DIVISION (Lopes, L.J.), July 28, August 9, 1890]

[Reported 25 Q.B.D. 491; 59 L.J.Q.B. 507; 63 L.T. 283;
55 J.P. 134; 39 W.R. 111; 6 T.L.R. 487]

Inn—Innkeeper—Lien—Husband and wife staying at hotel—Separate property of wife—Lien on wife's property for bill.

A husband and wife arrived together at an hotel with a large amount of luggage and were received as guests at the hotel where they stayed for some time, occupying the same rooms which they had used on a former visit. The husband gave cheques on account of the hotel charges and left some days before his wife. The husband having become insolvent, it was sought to make the separate property of the wife liable for the outstanding hotel charges. This claim failed as it was proved that the contract was between the hotel and the husband and that credit had been given to him. In the action the wife counterclaimed for the return of the luggage which was her separate property and had been detained when she left the hotel as security for the unpaid charges.

Held: the proprietors of the hotel were bound to receive both husband and wife with their luggage and so long as they remained guests to keep their goods safely, and, as an innkeeper's lien was commensurate with his liabilities, it extended to the whole of the goods brought to the hotel whether they were the separate property of the wife or the goods of the husband; accordingly, the wife could not claim the return of her luggage.

Notes. Statutory rights and obligations of an innkeeper in relation to a guest's property are to be found in the Hotel Proprietor's Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 465), whereby the law relating to an innkeeper's lien on a guest's property was amended: see s. 2 (2) of the Act.

Approved: *Robins & Co. v. Gray*, [1895-9] All E.R.Rep. 1170. Referred to: *Lamond v. Richard*, [1897] 1 Q.B. 541; *Wright v. Anderton*. [1908-10] All E.R.Rep. 881; *Marsh v. Police Comr. & McGee*, [1944] 2 All E.R. 392.

As to innkeeper's liability to entertain and receive guests and as to enforcement of innkeeper's liabilities, see 21 HALSBURY'S LAWS (3rd Edn.) 445 et seq., and 463 et seq.; and for cases see 29 DIGEST (Repl.) 24 et seq.

Case referred to:

- (1) *Smith v. Dearlove* (1848), 6 C.B. 182; 17 C.J.C.P. 219; 11 L.T.O.S. 87; 12 Jur. 377; 136 E.R. 1202; 29 Digest (Repl.) 27, 310.

Also referred to in argument:

Bennett v. Mellor (1793), 5 Term Rep. 273; 101 E.R. 154; 29 Digest (Repl.) 15, 177.

Warbrooke v. Griffin (1609), 2 Brownl. 254; 123 E.R. 927; sub nom. *Warbrooke v. Griffith*, Moore, K.B. 876; 29 Digest (Repl.) 27, 308.

Yorke v. Grenagh (1703), 2 Ld. Raym. 866; 92 E.R. 79; sub nom. *York v. Grindstone*, 1 Salk. 388; 29 Digest (Repl.) 26, 296.

White's Case (1558), 2 Dyer, 158 b; 73 E.R. 343; sub nom. *Bird v. Bird*, 1 And. 29; Ben. 60; sub nom. *Byrd v. Byrd*, Benl. 18; 29 Digest (Repl.) 4, 30.

Angus v. McLachlan (1883), 23 Ch.D. 330; 52 L.J.Ch. 587; 48 L.T. 863; 31 W.R. 641; 29 Digest (Repl.) 25, 283.

Broadwood v. Granara (1854), 10 Exch. 417; 3 C.L.R. 177; 24 L.J.Ex. 1; 24 L.T.O.S. 97; 19 J.P. 39; 1 Jur.N.S. 19; 3 W.R. 25; 156 E.R. 499; 29 Digest (Repl.) 24, 269.

Action tried by LOPES, L.J., without a jury sitting as a judge of first instance in the Queen's Bench Division.

The plaintiffs, Gordon and Holland, proprietors of an hotel, claimed against the defendants, Martin Silber and his wife, Lady Lucy Silber, to recover £340 4s. 1d., the balance of a hotel bill for board and lodging. The husband had become insolvent, but the wife had separate property and the plaintiffs claimed against her on that ground. The wife counterclaimed for the return of luggage which was her separate property and had been detained by the plaintiffs for the unpaid balance of the bill. Before May, 1889, the husband had been staying at the hotel by himself and had incurred expenses which he had paid. In May, 1889, he was joined by his wife. Subsequently she left for a fortnight and then re-joined her husband at the hotel. He met her at the station and they came to the hotel with a large quantity of luggage, were received there, and continued to occupy their former rooms until August, 1889, when the husband left, his wife continuing to live there until Sept. 4, 1889. The plaintiffs detained the separate property of the wife, consisting of trunks, boxes and their contents on which, they claimed, they had a lien in respect of the unpaid balance of the bill. The separate property of the wife was admitted and it was also given in evidence by one of the plaintiffs that the hotel bill was made out in the name of the husband, that he had paid by cheque various sums on account of it, and that the plaintiffs looked primarily to the husband for payment, though they thought they could always go back on the goods. It was contended for the plaintiffs that credit had been given to the wife, and that where a married woman possessed of separate property went to an hotel, the ordinary presumption was that she intended to pledge her own credit and bind her separate estate, unless she gave notice to the contrary, and it was also contended that the lien of an innkeeper for his bill extended to all goods brought by a guest to an inn, whether they belonged to such guest or not, and that therefore the property of the wife brought to the hotel was at all events subject to the innkeeper's lien.

J. E. Bankes and *Lewis Thomas* for the plaintiffs.

J. R. Paget for the defendant wife.

Cur. adv. vult.

Aug. 9, 1890. **LOPES, L.J.**, read a judgment in which he stated the facts and continued: I was of opinion that the plaintiffs' claim could not be sustained against the wife on the ground that the husband was the contracting party to

whom credit—as Mr. Holland, the proprietor, candidly admitted—had been given. But the wife's counterclaim raises the important question in this case. The question is, were the plaintiffs entitled to retain these goods of the wife? They were unquestionably her separate property, but were brought into the hotel, and there received by the plaintiffs at the time when the husband with his wife became the guests of the plaintiffs. The plaintiffs, as innkeepers, were bound to receive the defendants and their goods, and were bound, so long as the defendants remained guests at the hotel, to keep safely and securely these goods, and the plaintiffs would have been liable in damages if these goods had been lost. How did the plaintiffs receive them? They knew of no distinction between the goods of the husband and wife, and could not inquire into the respective titles to the goods. They received them as the goods of the husband and his wife who became their guests. Suppose the husband had stolen the goods, still, if the plaintiffs received them with their guests, the lien would have attached.

By the common law of England, every person who keeps a common inn is under an obligation to receive and afford proper entertainment to everyone who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him. The innkeeper is under an obligation to keep the goods of a guest received with the guest in the inn safely and securely, and can be sued and made liable in damages if he fails in that respect. As a compensation for the burden thus imposed upon him, the law has given him a lien on the goods of the guest until the guest discharges the expenses of his lodging and food. If the guest has brought goods to the inn, to which he has no title, that will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiring as to his title. It seems therefore that the lien is commensurate with the obligation to receive the guest, and to keep safely and securely his goods. The right of lien of an innkeeper depends upon the fact that the goods came into his possession in his character of innkeeper, as belonging to a guest: *Smith v. Dearlove* (1).

The guests received in this case were the husband and his wife, and all the goods which were received by the innkeeper were received as the goods of the husband and his wife; they brought the goods to the hotel. If the husband had stolen the goods, the lien, as I have said, would have attached. Can it be said that it is not to attach because some of the goods happen to be the separate property of his wife, who was received as his wife with him as a guest? Husband and wife arrive at an hotel with luggage; the innkeeper has no power of discriminating what may be the property of the husband and what may be the property of the wife. He receives, and is bound to receive, husband and wife, with their luggage. The innkeeper's charges are not paid, and I cannot see how it can be successfully contended that the lien does not attach. It would in many cases be defeating the innkeeper's lien and the object for which it was given. The plaintiffs therefore fail as to their claim, but succeed as to the counterclaim, and there will be judgment for the defendants on the claim, and for the plaintiffs on the counterclaim.

Judgment for defendants on the claim, and for plaintiffs on counterclaim.

Solicitors: *Ingram, Harrison & Ingram; Arnold & Henry White.*

[Reported by W. ORR, ESQ., Barrister-at-Law.]

Re SKEATS' SETTLEMENT. SKEATS v. EVANS

[CHANCERY DIVISION (Kay, J.), August 8, 1889] *

[Reported 42 Ch.D. 522; 58 L.J.Ch. 656; 61 L.T. 500;
37 W.R. 778]

Trustee—New trustee—Power to appoint—Power to appoint “other person or persons”—Fiduciary nature of power—Validity of appointment of himself by donee of power.

By a marriage settlement property of the wife was conveyed to trustees on trust for the wife for life for her separate use and on her death on trusts for the children of the marriage. In case any trustee should die, go abroad, retire, refuse or become incapable to act, a power to appoint “any other person or persons” to be the new trustee or trustees was given to the husband and wife during their joint lives. In exercise of this power the husband and wife purported to appoint the husband and another person to be new trustees in place of the two existing trustees who desired to retire. The husband was not beneficially entitled under the settlement.

Held: the power was of a fiduciary nature and a donee of the power could not appoint himself; further, the words “any other person or persons” in the power excluded in terms the appointment of the donee; accordingly, the appointment of the husband as a new trustee was improper and invalid.

Notes. For the statutory power of appointing new or additional trustees under s. 36 of the Trustee Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 107 et seq.

Applied: *Re Newen*, *Newen v. Barnes*, [1894] 2 Ch. 297. Considered: *Re Shortridge*, [1895] 1 Ch. 278. Explained: *Montefiore v. Guedalla*, [1900-3] All E.R.Rep. 384. Distinguished: *Re Cotter*, *Jennings v. Nye* (1914), 84 L.J.Ch. 337. Referred to: *Re A.*, [1904] 2 Ch. 328; *Re Sampson*, *Sampson v. Sampson*, [1906] 1 Ch. 435.

As to appointment of trustees and donee of power, see 38 HALSBURY'S LAWS (3rd Edn.) 920, 921; and for cases see 43 DIGEST 677 et seq.

Case referred to:

- (1) *Webb v. Earl of Shaftesbury*, *Earl of Shaftesbury v. Arrowsmith* (1802), 7 Ves. 480; 32 E.R. 194, L.C.; 43 Digest 673, 1035.

Also referred to in argument:

Forster v. Abraham (1874), L.R. 17 Eq. 351; 43 L.J.Ch. 199; 22 W.R. 386; 43 Digest 677, 1080.

Tempest v. Lord Camoys (1888), 58 L.T. 221; 52 J.P. 532; 43 Digest 678, 1083.

Sugden v. Crossland (1856), 3 Sm. & G. 192; 25 L.J.Ch. 563; 26 L.T.O.S. 307; 2 Jur.N.S. 318; 4 W.R. 343; 65 E.R. 620; 43 Digest 677, 1079.

Raikes v. Raikes (1863), 32 Beav. 403; 55 E.R. 158; 43 Digest 674, 1046.

Adjourned Summons taken out by the husband and wife, who under their marriage settlement had the power to appoint new trustees, to determine (i) whether the appointment of the husband as one of two new trustees was valid; and (ii) whether the retiring trustees might validly transfer the settlement property to the husband and Dan Drew, the new trustees.

By a settlement made in 1882, on the marriage of Joseph Skeats and Mary Williams, real and personal property belonging to the wife was conveyed to two trustees, in trust for the wife for life for her separate use, without power of anticipation, and after her death on certain trusts for the children of the marriage; and it was thereby provided that, as often as any of the trustees thereby appointed or any future trustee or trustees of these presents “should die, or go to reside abroad, or should desire to retire from or refuse or become incapable to act in the trusts,” it should be lawful for the husband and the wife during their joint lives, and for the survivor during his or her life, and after the death of the survivor for the

continuing trustees or trustee for the time being of these presents, or if there should be no continuing trustee then for the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, to appoint "any other person or persons" to be a trustee or trustees in place of the trustee or trustees so dying or going to reside abroad, or desiring to retire, or refusing or becoming incapable to act. By a deed dated July 15, 1889, after reciting the settlement, and that the then existing trustees were desirous of retiring and being discharged, the husband and his wife, in exercise of the power in the settlement, appointed the husband and Dan Drew to be trustees of the settlement in the place of the retiring trustees; and the husband and his wife thereby declared that certain leasehold premises then subject to the trusts of the settlement should forthwith, and without any conveyance, vest in the husband and Dan Drew as joint tenants.

The trustees disputed the validity of the appointment of the husband as a trustee.

G. E. Cruikshank for the husband and wife.

Upjohn for the retiring trustees.

KAY, J.—No case has been cited in which a person having a power of appointing new trustees has appointed himself and the appointment has been held to be valid by a court of justice. The question whether such an appointment is valid or not depends, I think, as has been argued, very much indeed upon whether the power is to be treated as a fiduciary power or not.

I take that question first of all. The ordinary power of appointing new trustees under a settlement such as this of course imposes upon the person who has the power of appointment the duty of selecting honest, good, persons who can be trusted with the very difficult, onerous, and very often delicate duties which trustees have to perform. He is bound to select, to the best of his ability, the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose (which happens not unfrequently) that the trustees, under the terms of the deed, are entitled to remuneration by way of annual salary or payment: could the person who has the power of appointment put that up and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is, that he cannot exercise the power for his own benefit. Again, why not? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I, therefore, come to the conclusion, independently of any authority, that the power is a fiduciary power.

Webb v. Earl of Shaftesbury (1) before LORD ELDON, seems expressly to confirm that view. LORD ELDON did treat it as a power in the exercise of which the appointor had a fiduciary duty to perform—one which he could not exercise in any way for his own benefit, and one in exercising which he was bound to do the best in the interest of the cestui que trust whose trustee he was appointed. I, therefore, come, without any hesitation, to the conclusion that this is a power which is of a fiduciary nature. What is the rule—the universal rule—observed in courts of justice as to a duty of that kind? The universal rule is, that a man should not be a judge in his own case—that he should not decide that he is the best possible person, and say that he ought to be the trustee. Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness, and to appoint himself would not, therefore, be a proper exercise of such a power. In my opinion it would be extremely improper for a person who has a power to appoint or select new trustees to appoint or select himself, for that principal reason.

Has, or has not, the practice of such a person appointing himself been sanctioned by conveyancers or the profession in general? The answer must be, certainly not. Such appointments, if they ever take place, are exceedingly rare. In all my long experience I have seldom come across such a case, if at all. And then it must be

remembered that such a power is generally, or most often, given to the tenant for life under the settlement. If the power does admit of the appointment of the appointor, there cannot be an exception when it is given to the tenant for life. The tenant for life might appoint himself, and you cannot say that you hold that it is not a proper exercise of the power because he was tenant for life, and, therefore, the appointment is bad. If the power does not authorise the appointment of the appointor, the fact that the appointment is generally given to the tenant for life is another reason for saying that it is obvious that powers of this kind do not contemplate that the appointor would appoint himself. Therefore, if the question is untouched by authority—and it seems to me, so far as the cases which have been mentioned, to be practically untouched by authority—I come to the conclusion that the power is a power of a fiduciary character, and consequently that the man who exercises it is exercising a duty of a fiduciary nature to the cestui que trust under the settlement, and therefore he cannot exercise it by appointing himself. If a decision be wanted on the point, I am prepared to hold that such an appointment is bad.

I think there is more in this case, but I rather dealt by preference with the general question first. In this case the power is worded, as I believe these powers commonly are, thus: [HIS LORDSHIP read the terms of the power, and continued:] The question is, what is the meaning of the word "other?" Does it mean other than the trustee who is dead? If it does, it is admitted the word is superfluous.

Does it mean other than the trustee who is retiring? There again it is quite superfluous, because the trustee would not be appointed; it would be unnecessary or impossible to appoint him. Does it mean necessarily other than the trustee residing abroad or becoming incapable? It would have some meaning then if you apply it only to the trustee. But why should it not mean other than the person making the appointment as well? The person who is acting trustee may appoint some other person. It must be some other person than the deceased retiring or refusing trustee, and other than the trustee or person making the appointment—that is to say, other than himself. Take the case of the executor or administrator of the last acting trustee. May such a person appoint himself? It is more natural to say that it means other than the trustee being replaced, and other than the person making the appointment.

I have taken the broader question first, but if there be a doubt or difficulty whether the word "other" is meant to exclude the appointor, I am of opinion that the proper mode of construing the word is to say that it does mean to exclude the appointor, because the general practice of conveyancers, the understanding of lawyers, and the purposes of deeds like this, are against the notion of a person appointing himself. I should, therefore, if it were at all ambiguous, give the word "other" the meaning I have attributed to it. For both reasons I think the appointment is bad; but I say again, if I had to decide it on the first ground alone, I should equally have held the appointment to be bad.

Order accordingly.

Solicitors: *Schultz & Sons, for J. & C. James, Merthyr Tydfil.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), November 2, 7, 1889]

[Reported 24 Q.B.D. 1; 59 L.J.Q.B. 105; 61 L.T. 867; 54 J.P. 391;
38 W.R. 85; 6 T.L.R. 30]

Limitation of Action—Private street works—Expenses—Recovery by local authority—Date from which time runs—Date of completion of works.

Street—Private street works—Expenses—Recovery from owner of premises—Limitation of action—Date of completion of works.

In 1875 a local authority incurred expenses for paving works which, under s. 62 of the Local Government Act, 1858 (corresponding to s. 257 of the Public Health Act, 1875) became a charge on the premises concerned. In 1885 the expenses were apportioned by the surveyor of the local authority, and in 1888 an action was brought to recover the amount apportioned from owners of premises concerned. The owners pleaded that the action was barred under s. 8 of the Real Property Limitation Act, 1874.

Held: when the expenses were incurred and the works completed a charge was imposed on the premises; from that date time began to run in favour of the owners under s. 8 of the Act of 1874, and not from the date of apportionment; accordingly, the action was statute barred.

Notes. Section 257 of the Public Health Act, 1875, has been repealed and is replaced by s. 181 (4), s. 190 (2) and s. 264 (1), (2), of the Highways Act, 1959; see 39 HALSBURY'S STATUTES (2nd Edn.) 607, 613, 682, respectively. Section 8 of the repealed Real Property Limitation Act, 1874, is replaced by s. 18 of the Limitation Act, 1939; see 13 HALSBURY'S STATUTES (2nd Edn.) 1176.

Considered: *Re Owen*, [1894] 3 Ch. 220; *Stock v. Meakin*, [1900-3] All E.R.Rep. 826. Distinguished: *Dennerly v. Prestwich U.D.C.*, [1929] All E.R.Rep. 647.

Referred to: *R. v. Local Government Board, Ex parte Thorp* (1914), 84 L.J.K.B. 1184; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

As to statutory charges for paving expenses, see 19 HALSBURY'S LAWS (3rd Edn.) 439; and for cases see 26 DIGEST (Repl.) 606 et seq. As to limitation of actions regarding paving expenses and when time begins to run, see 24 HALSBURY'S LAWS (3rd Edn.) 267; and for cases see 32 DIGEST 409. As to construction when statute ambiguous, see 36 HALSBURY'S LAWS (3rd Edn.) 388; and for cases see 42 DIGEST 616 et seq.

Cases referred to:

- (1) *Tottenham Local Board v. Rowell* (1880), 15 Ch.D. 378; 50 L.J.Ch. 99; 43 L.T. 616; 29 W.R. 36, C.A.; 26 Digest (Repl.) 606, 2612.
- (2) *Grece v. Hunt* (1877), 2 Q.B.D. 389; 46 L.J.M.C. 202; 36 L.T. 404; 41 J.P. 356; 25 W.R. 543, D.C.; 26 Digest (Repl.) 602, 2573.
- (3) *Re Bettesworth and Richer* (1888), 37 Ch.D. 535; 57 L.J.Ch. 749; 58 L.T. 796; 52 J.P. 740; 36 W.R. 544; 4 T.L.R. 248; 26 Digest (Repl.) 607, 2618.
- (4) *Earle v. Bellingham* (No. 2) (1857), 24 Beav. 448; 27 L.J.Ch. 545; 30 L.T.O.S. 162; 3 Jur.N.S. 1237; 6 W.R. 45; 53 E.R. 430; 32 Digest 410, 885.

Also referred to in argument:

- Bradley v. Greenwich Board of Works* (1878), 3 Q.B.D. 384; 47 L.J.M.C. 111; 38 L.T. 849; 42 J.P. 725; 26 W.R. 693, D.C.; 26 Digest (Repl.) 563, 2294.
- Farran v. Beresford* (1843), 10 Cl. & Fin. 319.
- Sunderland Corpn. v. Alcock* (1882), 51 L.J.Ch. 546; 46 L.T. 377; 30 W.R. 655; 26 Digest (Repl.) 607, 655.
- Re Boor, Boor v. Hopkins* (1889), 40 Ch.D. 572; 58 L.J.Ch. 285; 60 L.T. 412; 53 J.P. 467; 37 W.R. 349; 26 Digest (Repl.) 609, 2639.

Appeal by the local authority from a decision of the Divisional Court (MATHEW and GRANTHAM, JJ.), reported 58 L.J.Q.B. 418, reversing a decision of a county court judge who gave judgment for the local authority in an action to recover pavement expenses from the defendants, the owners of the premises.

A local authority had, under s. 69 of the Public Health Act, 1848, incurred expenses in doing paving works which they completed in 1875. The expenses were apportioned by their surveyor according to the frontage of the premises on the street where the paving works were done, but the apportionment was not made till 1885. Between 1875 and 1885 the defendants became owners of certain of these premises.

Section 62 of the Local Government Act, 1858, was repealed by the Public Health Act, 1875, but was substantially re-enacted in s. 257 of that Act. In 1887 the amount of the apportionment which was charged on the premises then owned by the defendants was demanded of them, and in 1888 the present action for the recovery of this amount was brought in the county Court. The defence set up was that the action was barred by s. 8 of the Real Property Limitation Act, 1874, which provided as follows :

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

The local authority appealed against the decision of the Divisional Court.

Shiress Will, Q.C., and *Macmorran* for the local authority.

Henn Collins, Q.C., and *Montague Lush* for the defendants.

Cur. adv. vult.

Nov. 7, 1889, **LORD ESHER, M.R.**—This is an action brought against the owners of certain property to enforce a charge which had been imposed upon it by a local authority for some paving works which had been done in the street fronting the property. The question before us turns on the construction of two Acts of Parliament, namely the Local Government Act, 1858, under which the charge is imposed, and the Real Property Limitation Act, 1874, upon which the defendants rely. The first point is, when under s. 69 of the Local Government Act, 1858, was the charge imposed? That point was really decided in *Tottenham Local Board v. Rowell* (1), in which it was held that the charge is imposed as soon as the works are completed. It is a rule of construction which we have often expressed in this court, that an Act of Parliament is to be read in the ordinary meaning of the words in the English language as applied to the subject-matter, unless there is a strong reason or context why it should not be so read; but this latter part of the rule only applies when the Act is capable of bearing two different meanings.

In the case before us then, the charge was imposed in 1875, and the action was begun more than twelve years afterwards. Then comes the question, what is the construction of s. 8 of the Real Property Limitation Act, 1874? The rule of construction I have just spoken of applies also to this Act. Referring then to that section it is clear that the present action is a proceeding to recover money charged upon or payable out of land; but it is argued that the words "present right to receive the same" are equivalent to "present right to enforce the same." It might be so if there were some overwhelming reason, if that were the only construction

which would make the procedure sensible, but in the ordinary use of the English language a right to receive payment is not the same thing as a right to enforce it. Moreover, this way of reading the words would raise insuperable difficulties; whereas to read them the other way, in the natural sense of the words, makes the whole legislation sensible. This difficulty would arise if the local authority's construction were correct, namely, that the local authority would have the power of keeping back the Real Property Limitation Act, 1874, from coming into operation for any time they pleased.

In answer to that difficulty it was suggested on behalf of the local authority that if they did not make the apportionment within a reasonable time a mandamus might be obtained to compel them to do so. But why should we thus invent means of overcoming a difficulty when by reading the words in their ordinary sense no difficulty arises? It is also suggested that a person cannot be entitled to receive a sum of unascertained amount; but I do not see why this should be so. A sum may be offered him which the person offering it thinks to be the right sum, and which he may also think to be the right sum, although the actual calculation has not been made; and what is there in law, reason, or business, to show that he is not entitled to receive it? I cannot see the difficulty. If the person were only entitled to receive the money as a reversioner and the time had not arrived when he was to be entitled to it, the case would be different, and there would be no present right to receive the money.

Section 8 of the Real Property Limitation Act, 1874, goes on to say that the right to receive must have "accrued to some person capable of giving a discharge for or release of the same." If a person is entitled to receive and has received a sum of money, supposing he is a person having full legal rights, why can he not give a receipt for it; and what is a receipt but a discharge? Some persons, such as lunatics and infants, cannot give a binding discharge, and probably it was to meet such cases that the words "capable of giving a discharge for or release of the same" were inserted. Therefore, reading the section in the ordinary sense of the English language, I think that the local authority was in this case entitled to receive payment of the money though they had not then apportioned it, and having received it, they were capable of giving a receipt for it, which is a discharge. The case, therefore, seems to me to be within the words of s. 8 as read in their ordinary sense, and there seems to be no reason why we should give them any other construction. The appeal is dismissed.

LINDLEY, L.J.—I am of the same opinion. The case turns on the Local Government Act, 1858, and the Real Property Limitation Act, 1874. It is unnecessary to allude to the details of the Local Government Act, 1858; it is enough to say that the local authority under the authority of the Act did execute certain paving works in 1874 and 1875, and that these expenses were apportioned in 1885. The present action is brought to raise a charge on the land on which the apportioned sum is chargeable; and the defence is s. 8 of the Real Property Limitation Act, 1874. It is agreed that, if there was a present right to receive the sum charged when the works were completed, that Act would be a good defence. The section now applicable in such cases is s. 257 of the Public Health Act, 1875, which is substantially to the same effect as s. 62 of the Local Government Act, 1858. The first thing to be noticed is that there are evidently two distinct remedies given by the Act for the recovery of these expenses: one is a summary remedy against the owner of the premises at the time when the works are completed; the other is a charge on the premises themselves. The first of these remedies must be made use of, if at all, within six months after the notice of demand: see *Grece v. Hunt* (2); but we are now dealing with the other remedy, by way of a charge on the premises.

The question for us is the application to this case of s. 8 of the Real Property Limitation Act, 1874, which is almost a repetition of the phraseology of s. 40 of the Real Property Limitation Act, 1833; and consequently we have considered the

decisions on the meaning of the Act of 1833 to see that the construction we are putting on the present one is not inconsistent with any of them. It has been pointed out that s. 2 of the Real Property Limitation Act, 1833, talks of the time "at which the action shall have first accrued," while s. 40 of the same Act speaks of "a present right to receive;" and these two expressions in the same Act apparently do not mean the same thing. The expression "present right to receive" is a little ambiguous, so that we must look at the object of the Act and consider the rival constructions that have been put upon it. If one construction produces consequences in conformity with the scope of the enactment while another introduces a startling novelty, no lawyer would adopt the latter construction. All is harmonious if a present right to receive is distinguished from a right to enforce, and is read in the sense which LORD ESHER, M.R., has given to it; whereas, if you adopt the opposite construction, the creditor can postpone his right to sue indefinitely and for ever. This would be a very anomalous state of things. Who ever heard of a creditor being able by his own act, by omitting to do his duty, to postpone the time for suing? If one construction of the Act lands us in this difficulty we ought not to adopt it if there is a better construction.

On looking a little more closely at s. 8 of the Real Property Limitation Act, 1874, and seeing that it is dealing with charges on land, we must remember that charges may be present or reversionary, and that one expression is used to include the whole. It seems to me that in each case the moment to be looked to is the moment when the charge comes into present operation; when a reversionary charge is being dealt with, the moment to be looked to is the moment when the reversion falls in, and the charge takes effect in possession. The other words which are at the end of s. 8 of the Real Property Limitation Act, 1874, "capable of giving a discharge," appear to me to be inserted to exclude persons, such as infants and lunatics, who may be incapable of giving a discharge. It has been settled by this court in *Tottenham Local Board v. Rowell* (1) which has been followed by NORTH, J., in *Re Bettesworth and Richer* (3), that the charge exists from the date of the completion of the works; and therefore I do not see any difficulty in saying that there is a present right to receive it, though the exact amount has not been reduced to pounds, shillings, and pence.

If that seems at first sight a strained view, let me illustrate it by a common case. When a partnership is dissolved each partner has a present right to receive his share though the accounts may not yet be taken. There is no difficulty in this view of the matter, or at all events so little that it is more than counterbalanced by the extreme difficulty in which we should be placed by the other construction. I am not aware of any earlier case under the Real Property Limitation Act, 1833, which is inconsistent with the view we take here. In *Earle v. Bellingham* (No. 2) (4), where it was held that the time for computing interest on a legacy ran from a particular date, there are no doubt some observations by LORD ROMILLY, M.R., which seem to show that he was of opinion that the time from which such interest ran was necessarily the same as that referred to in the Real Property Limitation Act, 1833, and that in the case of a legacy time does not begin to run under the statute till twelve months after the death of the testator. I doubt if he is right, but it is unnecessary to decide that today. I agree with the judgment of the Divisional Court that the right to receive accrued at the time when the works were completed.

LOPES, L.J.—This case raises an important question under the Real Property Limitation Act, 1874, and I entirely agree with the judgments of LORD ESHER, M.R., and LINDLEY, L.J. The paving works which the plaintiff did were finished in 1875, but no apportionment was made till 1885, and the defendants contend that time began to run in their favour from the earlier date. It is insisted by the local authority that the words "a present right to receive" in s. 8 of the Real Property Limitation Act, 1874, mean the same thing as a present effective right to sue; but I cannot see why this Act should not be read in the ordinary grammatical

construction of the words. *Tottenham Local Board v. Rowell* (1) establishes that such expenses as have been incurred here are a charge on the premises as soon as the works are completed.

When does the right accrue to the board to receive the amount secured by the charge? In my opinion, it accrues as soon as the expenses have been incurred and the works completed. It may be that certain things must be done before the right can be enforced, but the right to receive what is secured by the charge arises concurrently with the charge. The words are "present right to receive," and not "present right to recover;" and it is to be observed that the right to receive may exist though the exact sum to be received is not ascertained. There are many cases where the legislature requires notice to be given before an action can be maintained; nevertheless the right of action exists as soon as the actionable wrong has been committed, though it cannot be enforced until the statutory requirements are complied with. Many other illustrations might be given, if necessary. Then come the words of s. 8 "to some persons capable of giving a discharge for or release of the same." I think those words were inserted to exclude persons who are incapable, such as lunatics or infants. This construction which we have adopted is in accordance with the literal meaning of the words of the Act, and is consistent with its object and spirit. The other construction would be highly inconvenient, because the local authority could delay their right to sue to an indefinite period, and the object of the Act would be obviated. I think that the judgment of the Divisional Court was correct, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Tathams & Hardy; W. H. Withall & Co.*

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

MASSEY AND ANOTHER *v.* HEYNES & CO. AND ANOTHER

[QUEEN'S BENCH DIVISION (Wills and Grantham, JJ.), May 31, June 1, 1888]

[Reported 21 Q.B.D. 330; 57 L.J.Q.B. 468; 59 L.T. 470]

[COURT OF APPEAL (Lord Esher, M.R., and Lindley, L.J.), July 6, 1888]

[Reported 21 Q.B.D. 337; 57 L.J.Q.B. 521; 36 W.R. 834]

Practice—Service out of jurisdiction—Action against two defendants—One defendant resident within jurisdiction and one without—No joint cause of action—"Necessary or proper party to action"—"Action properly brought against some other person duly served within the jurisdiction"—R.S.C., Ord. 11, r. 1 (g).

The plaintiffs, English shipowners, brought an action for breach of contract against two sets of defendants—a firm of English brokers and a firm of foreign merchants resident and carrying on business in Austria. The action against the English brokers was for damages for breach of their warranty that they were authorised by the foreign merchants to sign a charterparty on their behalf, and the action against the foreign merchants was for damages for breach of the charterparty. The plaintiffs obtained an order to issue a concurrent writ and to serve notice thereof on the foreign merchants out of the jurisdiction under R.S.C., Ord. 11, r. 1 (g). On an application by the foreign merchants to set aside the order,

Held: the action was "properly brought against some other person duly served within the jurisdiction" within R.S.C., Ord. 11, r. 1 (g), notwithstanding that there was no joint cause of action against the two sets of defendants, but two several and alternative causes of action; "proper party" was a descriptive phrase intended to apply to a class of cases in which persons were now made parties under R.S.C., Ord. 16, which permitted alternative causes to be dealt with in the same action; accordingly, service out of the jurisdiction under R.S.C., Ord. 11, r. 1 (g), had been rightly ordered against the foreign merchants.

Notes. Referred to: *Tyne Improvement Comrs. v. Armement Anversois Société Anonyme, The Brabo*, [1949] 1 All E.R. 294.

As to service out of the jurisdiction, see 30 HALSBURY'S LAWS (3rd Edn.) 323 et seq.; and for cases see DIGEST (Practice) 308. For R.S.C., Ord. 11, r. 1 (g) and R.S.C., Ord. 16, r. 4, see ANNUAL PRACTICE (1963), pp. 141 and 327 respectively.

Cases referred to:

- (1) *Yorkshire Tannery and Boot Manufacturing Co., Ltd. v. Eglinton Chemical Co., Ltd.* (1884), 54 L.J.Ch. 81; 33 W.R. 162; Digest (Practice) 360, 730.
- (2) *Sykes v. Schofield* (1880), 14 Ch.D. 629; 49 L.J.Ch. 833; 42 L.T. 822; 29 W.R. 68; Digest (Practice) 527, 1929.

Appeal from a decision of the Divisional Court, *infra*, affirming an order of DENMAN, J., at chambers, refusing to set aside an order for the service of notice of writ of summons out of the jurisdiction.

Messrs. Massey and Sawyer, shipowners, of Hull, had entered into a charterparty with Messrs. Schenker & Co., merchants, of Fiume, in the empire of Austria, through the agency of Messrs. Heynes & Co., brokers, of London, who signed the charterparty on behalf of Messrs. Schenker & Co., by telegraphic authority. The charterparty contained a clause that the chartered ship should at the order of the charterers call at various ports in the Adriatic in geographical order, but the charterers alleged that the Messrs. Heynes & Co. had no authority to insert the clause, and on the master of the vessel insisting upon its strict interpretation repudiated the charterparty. The shipowners brought an action against the brokers and the foreign merchants: against the brokers to recover damages for breach of their warranty that they were authorised by the foreign merchants to sign the charterparty, and against the foreign merchants, for damages for breach of the charterparty in not loading a cargo pursuant to the terms thereof, and applied for leave to issue a concurrent writ, and serve notice thereof on the defendants Schenker & Co. out of the jurisdiction under the provisions of R.S.C., Ord. 11, r. 1 (g). Leave being given, the notice was served on Jan. 2, 1888, and judgment in default of appearance was signed against Schenker & Co. on March 9, and a writ of inquiry was thereupon issued, on the hearing of which, on April 5, 1888, a verdict was given against them. On April 16, 1888, a garnishee order was served on a firm in England having in their hands money belonging to Schenker & Co., and it was not until this was done that they applied to set aside the order giving the plaintiffs leave to issue a concurrent writ, and serve notice thereof out of the jurisdiction, and to rescind the judgment and all proceedings thereunder on the ground that they had misunderstood the nature of the writ, and that judgment had gone against them without their knowing what had taken place. This application was refused, and the defendants Schenker & Co. appealed against the refusal. By R.S.C., Ord. 11, r. 1:

"1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland: or . . . (g) Any person out of the

jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Hollams for the defendants *Schenker & Co.*

English Harrison for the plaintiffs.

WILLS, J.—This is an application to set aside an order for service out of the jurisdiction of notice of a writ issued in this country against two sets of defendants, a firm of English brokers and a firm of foreign merchants resident and carrying on business at Fiume, in the empire of Austria, in respect of a breach of a contract which did not take place within the jurisdiction, and for which the foreign defendants could not have been sued under the powers of R.S.C., Ord. 11, r. 1 (e), the Order under which leave is given for the service of writs out of the jurisdiction. If, therefore, the service of this writ is to be held good it must be supported under r. 1 (g) of that Order. Order 11, r. 1 (g), provides that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or judge whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The nature of the complaint against the two sets of defendants was this: English brokers were instructed by the foreign firm to make a charterparty with the plaintiffs. This charterparty was to be carried out in the Mediterranean, and a breach took place. The foreign firm set up as their defence for this breach that the brokers exceeded their authority, and that they, therefore, are not liable. The brokers, on the other hand, say that they had authority to make the charterparty, and made it as agents, and that they, therefore, are not liable. There are, therefore, two sets of persons implicated, against whom there is no joint remedy or joint cause of action, but two separate causes of action, because, if authority was given, there is no action against the brokers, if not, there is no action against the firm. The case, therefore, is extreme, and no case could probably be put in which the possible objections to service out of the jurisdiction would be more striking. It is a case in which the Austrian firm could certainly not have been sued by themselves, because none of the other rules with respect to service out of the jurisdiction are applicable to the case; and the real question is, whether under these circumstances the foreign defendants can be said to be proper parties to an action properly brought against some other persons duly served within the jurisdiction. There can be no doubt that the action against the English brokers is an action against some other person, and it is moreover properly brought, and they were duly served.

We are driven, therefore, to grapple with the question what is really meant by the words, "a necessary or proper party to an action" within Ord. 11, r. 1 (g). It is quite clear that a party may be a proper, without being a necessary, party to an action, because the words are used alternatively. I have inquired of counsel whether they are able to point, apart from the Rules under the Judicature Act, to any persons who would be proper without being necessary parties to an action. I confess that I myself am unable to say from my own knowledge that there is any instance of such a thing under the old practice, and counsel were unable to supply any such. It seems to me, therefore, that the phrase "proper party" is not a technical but a descriptive phrase, intended to apply to a class of cases in which persons are now made parties to actions who could not, under the old practice, have been sued under the same writ. I allude to the class of cases in which Ord. 16, provides that alternative claims may be dealt with in the same action. Before that provision was made it was sometimes impossible for a plaintiff who had an alternative claim to find out where the truth was. Both the parties knew, but it frequently happened that the plaintiff could not find out where his remedy was except by exhausting his remedies against the various persons mixed up in the matter. Order 16, was undoubtedly framed for the very purpose of dealing with this difficulty.

A I cannot myself see what reason there can be why a person in the position of these foreign defendants should not be dealt with as if they were within the jurisdiction of this country. There is, it must be remembered, no remedy against him except as to any property which he may have in this country. If there were some clear principle of international law or comity which would be violated by these proceedings, that would be a reason for our deciding differently, but no such reason, B so far as I know, exists, and I think that the rule was really intended to apply to a case of this description. The matter clearly does not fall within Ord. 11, r. 1 (e) but ex hypothesi r. 1 (g) applies to cases which are beyond the scope of r. 1 (e), or else there would be no use for it. It is of course a jurisdiction which must be exercised with care, but if these defendants are properly parties to the action, and the action is properly brought, I cannot see why they should not be proceeded against. If C there were a shadow of ground for believing that the action was brought against some person within the jurisdiction *mala fide*, and for the purpose of bringing in a foreigner, who could not otherwise be proceeded against here, I should say that the action was not properly brought, and the court would inquire, not whether the jurisdiction could be exercised, but whether it ought to be.

D As to the power to exercise it, it seems to me that if, according to the regular practice of the courts of this country, a person could, if he were resident in the country, be joined in the same writ and made a party to an action, then, if that person is without the jurisdiction, this power can be exercised. That is the conclusion at which I arrive without authority. Is there any authority? *Yorkshire Tannery and Boot Manufacturing Co., Ltd. v. Eglinton Chemical Co.* (1) does not throw much light upon it, because the other person was not served at the time the application was made for service out of the jurisdiction, and therefore it was rightly held that there was no action properly brought against some other person duly served, and, therefore, on purely technical grounds Ord. 11, r. 1 (g) was not satisfied. There are some other observations made by PEARSON, J., in that case, but I do not propose to go through them, because I do not think that they go F further than a recommendation that the jurisdiction should be carefully exercised, and that the court ought to see that persons are not spuriously and *mala fide* made British defendants in order to found an action against a foreigner.

There is another case which comes much nearer the present, although the circumstances are distinguishable. That is *Sykes v. Schofield* (2). It is reported so shortly that we sent for the papers to see what the nature of the action was. It G was an action upon a promissory note, and an action was properly brought in England against one of the endorsers, and a motion for the purpose of adding the name of Forsdyke, the drawer of the note, who was resident in New York, and, therefore, could not have been sued by himself in England, was granted. There were substantially two actions joined in the same writ, but the causes of action were concurrent and not exclusive. It seems to me, however, that although that distinction in the circumstances may be pointed out, yet there is no distinction in principle between that case and the present. It was a case in which, according to the practice of the courts of this country, the foreign defendant might, if he had been in England, have been sued in the same writ, but not necessarily so. He would have been a proper but not a necessary party to the action. That case, therefore, goes far to support our decision here.

I Then the defendants Schenker & Co. ask that the judgment should be set aside on the ground that they misunderstood the nature of the writ, and that judgment has gone against them without their knowing what was taking place. The language of the writ, however, is perfectly intelligible to any person having any knowledge of the English language, and it is clear to me upon the affidavits that there were persons in their employment who had such a knowledge. With the utmost desire, therefore, to prevent injustice, I think it would be creating a bad precedent and doing equal injustice to the other side if this judgment were set aside. I think that they had an opportunity of being heard and neglected it.

In my opinion, therefore, the judge was right, and this appeal must be dismissed. A with costs.

GRANTHAM, J.—I am of the same opinion. The object of the Judicature Acts and of the Rules was to do away with technicalities which prevented parties from getting the justice to which they were entitled. It sometimes used to happen that a plaintiff failed to recover, because at the trial of the action it appeared that he had sued the wrong person, a thing which he had had no means of finding out before. This was the reason why the various rules of Ord. 16, were framed. By r. 4, of that Order

“all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative,”

and r. 5, r. 6 and r. 7 were all framed to meet the class of cases to which this belongs. In this case it would be clearly possible for the two sets of defendants to ring the changes in such a manner that each set of defendants might be successful in turn, although one is clearly liable. The rules I have mentioned were framed to meet the difficulty, and the question we have now to decide is, whether the same principle can be adopted where one of the parties is resident abroad? It cannot, unless Ord. 11, r. 1 (g) applies. Why, then, was the word “proper” used in Ord. 11, r. 1 (g), and what is its meaning? I think it is used as distinguished from the word “necessary,” in order to bring within the operation of the r. 1 (g) persons who are properly made parties to an action under the various rules of Ord. 16. No doubt great care ought to be exercised in such matters to avoid any appearance of injustice, but in this case a foreign firm has made a contract and has repudiated it. How can the plaintiffs know whether they are right in saying that they did not give their brokers authority to insert a certain clause in the charterparty, or the brokers right in assuming that they had such authority? In my opinion the plaintiffs are perfectly right in joining both parties as defendants to the action, and it is only just that the foreign firm should be joined.

From this decision the defendants Schenker & Co. appealed.

Gorell Barnes, Q.C., and *F. W. Hollams* for the defendants Schenker & Co.
French, Q.C., and *W. English Harrison* for the plaintiffs.

LORD ESHER, M.R.—In such a case as this, there being one transaction, and the plaintiff having an alternative remedy against one or other of two persons he is entitled to claim relief in the same action alternatives against one or the other of the two—to state facts which, if his allegations are true, show that he is entitled to this alternative relief against one or other of the two parties who have been concerned in the one transaction. R.S.C., Ord. 11, r. 1 (g) must certainly apply to the time of the service of the writ or notice of the writ. The court cannot deal with the case according to the result of the trial of the action; as they could never decide who would be a “proper party” to the action until the trial was over. Whether a person out of the jurisdiction is a “proper party” to an action against a person who has been served within the jurisdiction, must depend on whether had both parties been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.

LINDLEY, L.J.—I have no doubt that R.S.C., Ord. 11, r. 1 (g), applies to such a case as this. When the liability of several persons depends upon one investigation, they are all “proper parties” to the same action, and, if one of them is a foreigner residing out of the jurisdiction, the rule applies.

LOPES, L.J.—Clearly, it must be determined whether a person is a “proper party” to an action at the time when the writ is issued. The words “an action

A properly brought against some other person" evidently point to that. If both these parties were within the jurisdiction it could not be contended that they were not both "proper parties" to the action. As one of them is out of the jurisdiction, I can see no reason why R.S.C., Ord. 11, r. 1 (g), should not apply.

Appeal dismissed.

B Solicitors: *Botterell & Roche; Waltons, Bubb & Johnson.*

[*Reported by H. D. BONSEY, Esq., Barrister-at-Law.*]

R. v. WHITCHURCH AND OTHERS

D [COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Pollock, B., Hawkins, Grantham and Charles, JJ.), February 1, 1890]

[Reported 24 Q.B.D. 420; 59 L.J.M.C. 77; 62 L.T. 124;
54 J.P. 472; 6 T.L.R. 177; 16 Cox, C.C. 748]

E *Criminal Law—Conspiracy—Combination to do unlawful act—Act not criminal if done by prisoner alone, but criminal if done by a combination of persons—Conspiracy to procure abortion of woman not pregnant—Liability of woman operated upon.*

A combination of one person with another or others to commit a felony renders every one of the persons taking part in such combination guilty of conspiracy. A person can, therefore, be convicted of conspiracy with other persons to do an act, the doing of which by such other persons amounts to a felony, notwithstanding the fact that the doing of the act by such person alone would not have been criminal.

A woman, convicted upon indictment of conspiring with two men to procure her miscarriage, **held** to have been rightly convicted even though she was not pregnant and would not have been guilty of a felony if she had attempted abortion alone.

Notes. Considered: *R. v. Mackenzie & Higginson* (1910), 75 J.P. 159; *Board of Trade v. Owen*, [1957] 1 All E.R. 411.

As to conspiracy, see 10 HALSBURY'S LAWS (3rd Edn.) 310 et seq.; and for cases see 14 DIGEST (Repl.) 121 et seq. For the Offences against the Person Act, 1861, s. 58, see 5 HALSBURY'S STATUTES (2nd Edn.) 810.

Cases referred to in argument:

R. v. Turner (1811), 13 East, 228; 104 E.R. 357; 14 Digest (Repl.) 124, 863.

R. v. Rowlands (1851), 17 Q.B. 671; 2 Den. 364; 21 L.J.M.C. 81; 18 L.T.O.S. 346; 16 J.P. 243; 16 Jur. 268; 5 Cox, C.C. 466; 117 E.R. 1439, C.C.R.; 14 Digest (Repl.) 128, 891.

R. v. Warburton (1870), L.R. 1 C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 19 W.R. 165; 11 Cox, C.C. 584, C.C.R.; 14 Digest (Repl.) 125, 868.

Case Stated by WILLS, J., at Northampton Assizes for the consideration of the Court of Crown Cases Reserved.

The Case stated that Thomas William Whitchurch, John Howe, and Elizabeth Cross were indicted in the following terms:

"The jurors, etc., present that Thomas William Whitchurch, John Howe, and Elizabeth Cross believing that the said Elizabeth Cross was then pregnant, and that in due course of nature she would be delivered of a child begotten by the said John Howe, and wickedly intending and contriving to conceal such preg-

nancy and to prevent such her delivery in due course of nature, on June 1, 1889, did among themselves unlawfully, knowingly, and wickedly conspire, combine, confederate, and agree together feloniously and unlawfully to procure the miscarriage of the said Elizabeth Cross by unlawfully administering to and causing to be taken by her certain noxious things, and by unlawfully using certain instruments and other means with intent to procure the miscarriage of the said Elizabeth Cross."

The indictment then set out a number of acts done in pursuance of the conspiracy, which do not call for report. The evidence established that the prisoners all believed that Elizabeth Cross was pregnant, and that for the purpose of procuring abortion Whitechurch and Howe, with her consent and by her procurement, both administered to her noxious drugs and used or caused to be used upon her instruments, but there was no evidence that she was in fact pregnant, and for the purpose of the present case it must be taken that she was not in fact pregnant.

The prisoner's counsel objected that for a woman not being pregnant to do or cause to be done acts upon herself for the purpose of procuring abortion was no offence either at common law or by statute, and, therefore, she could not be convicted of conspiracy with other persons that they should do upon her and she should suffer the same acts. The learned judge was of opinion that, whether or not it was no offence for a woman not pregnant to do acts to herself intending thereby to procure an abortion, which was actually impossible, it would none the less be criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been, in her as well as in the men, if she had been pregnant: the Offences against the Person Act, 1861, s. 58) because the commission of the felony was rendered impossible by circumstances unknown to her. He was further of opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained if effected by herself alone and without the help of the men might not have been criminal, and directed the jury, if they believed the evidence, to convict the prisoners, which they did. The men had been previously convicted of the felony of administering drugs and using instruments for the purpose of procuring the miscarriage of the female prisoner, but no sentence was passed in respect of the present indictment. A sentence of six months was passed on the female prisoner.

The question for the court was whether the conviction against the woman would be sustained.

By the Offences against the Person Act, 1861, s. 58:

"Every woman, being with child, who, with intent to procure her own miscarriage . . . shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious things, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony . . ."

Hammond Chambers for the prisoner.

Etherington Smith for the prosecution.

LORD COLERIDGE, C.J.—I am of opinion that this conviction should be affirmed. All that we have to deal with here is an indictment charging a woman, who must be taken for the purposes of our decision not to have been with child, with conspiring with others to procure her miscarriage. If she had been indicted alone for attempting to procure abortion by taking noxious things and using instruments on herself, she could not have been convicted under the circumstances of the case, both in good sense and upon the terms of the statute itself. For I think we are all agreed that the statute does not make it, and it is not an offence at common law, for a woman who is not pregnant to attempt to procure abortion by acts committed

A on herself by herself. The offence which is charged here, however, is the offence of conspiracy, and, without going into the law of conspiracy, as to which we find some divergence in the opinions of different learned judges who have had to give their decisions with regard to it, it is sufficiently clear from the authorities to say that a combination of a person with other persons to commit a felony is within every definition of what is conspiracy. Here the prisoner combined with two other persons, who had been convicted of the felony of administering drugs and using instruments for the purpose of procuring the miscarriage of the prisoner, to commit a felony. I cannot, with all possible respect for the learned counsel, who has said all that there was to be said upon the materials at his disposal, entertain the slightest doubt that, where three persons combine together to commit a felony, every one of those persons is equally guilty of conspiracy, although the person on whom the offence is intended to be committed is a person who could not have been convicted by herself of attempting to do that with which she is indicted for conspiring with others to do. I am, therefore, of opinion that the prisoner was rightly convicted, and that this conviction should be affirmed.

POLLOCK, B.—I have arrived at the same conclusion, and have nothing to add.

D **HAWKINS, J.**—I am of the same opinion. The woman here is not charged with conspiracy to do what may have been an innocent act. She is charged with conspiring with others to do an act which such others could not do without committing a felony; that is, she may do that herself without being punishable criminally, but other persons may not do it without committing a felony. Here the conspiracy charged is a conspiracy for the commission of a felony by persons who were acting in direct contravention of the section of the statute; and I am therefore of opinion that this woman was rightly convicted.

GRANTHAM, J.—I am of the same opinion.

CHARLES, J.—I am of the same opinion.

Conviction affirmed.

F Solicitors: *Solicitor to the Treasury; R. Metcalfe for Becke & Green, Northampton.*

[*Reported by R. CUNNINGHAM GLEN, ESQ., Barrister-at-Law.*]

NIEMANN v. NIEMANN

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), December 19, 1889]

[Reported 43 Ch.D. 198; 59 L.J.Ch. 220; 62 L.T. 339;
38 W.R. 258]*Partnership—Dissolution—Collection of debts—Offer of shares in company in satisfaction of debt—Power of one partner to accept offer.*

One partner has no power, without special authority or a special course of dealing, to accept shares in a company in satisfaction of a debt due to the firm, even though the shares are fully paid up.

In an action for winding-up a partnership, the court has no jurisdiction to authorise a receiver to do anything which it cannot authorise one partner to do against the will of the other.

In a deed of dissolution of a partnership it was agreed that one partner, the defendant, should undertake the liquidation of the firm and the payment of creditors and should indemnify the other partner, the plaintiff, against the claims of creditors, and, further, that he should pay and account to the plaintiff for his share of any dividends received in respect of any debts or claims after all the firm's creditors had been paid. Among the debts was one due from a firm in Java. It was proposed to form a Dutch limited company to take over the Java firm and to allot fully paid-up shares to the partnership firm in satisfaction of the debt due. The defendant intended to accept the shares under the power given him for winding-up the partnership. In an action brought by the plaintiff against the defendant to have the partnership wound-up under the direction of the court and to restrain the defendant from compromising the claim against the Java firm, and for the appointment of a receiver.

Held: there was no power in the deed of dissolution to enable the defendant to accept the shares in satisfaction of the debt without the consent of the plaintiff, and the court had no power to appoint a receiver and give him an authority to do so as that would transcend the nature of the original arrangement between the parties to the deed.

Re Land Credit Co. of Ireland, Weikersheim's Case (1) (1873), 8 Ch. App. 831, distinguished.

Notes. As to power of one partner to bind the firm, see 28 HALSBURY'S LAWS (3rd Edn.) 503 et seq.; and for cases see 36 DIGEST (Repl.) 460 et seq.

Cases referred to:

(1) *Re Land Credit Co. of Ireland, Weikersheim's Case* (1873), 8 Ch. App. 831; 42 L.J.Ch. 435; 28 L.T. 653; 21 W.R. 612, L.JJ.; 36 Digest (Repl.) 463, 336.

(2) *West of England and South Wales District Bank v. Murch* (1883), 23 Ch.D. 138; 31 W.R. 467; sub nom. *West of England Bank v. Murch, Re Booker & Co.*, 52 L.J.Ch. 784; 48 L.T. 417; 24 Digest (Repl.) 640, 6321.

Also referred to in argument:

Re Crawshay, Dennis v. Crawshay (1888), 60 L.T. 357; 5 T.L.R. 144; 24 Digest (Repl.) 831, 8243.

Appeal by the plaintiff from a decision of KEKEWICH, J., in a partnership action.

The plaintiff C. G. A. Niemann and his brother, the defendant H. W. F. Niemann, carried on business in partnership as merchants in Fenchurch Street. By an indenture dated June 3, 1887, it was agreed that the partnership between them should be forthwith dissolved, and that the defendant should undertake the whole burden of the liquidation of the firm and the payment of the creditors, and should indemnify the plaintiff against the claims of the creditors; that neither of the partners should make any claim upon the other in relation to the partnership, but the

A defendant should pay and account to the plaintiff for his share of any dividends which might be received in respect of any debts or claims which should be received by him, after all the creditors of the firm had been paid.

All the principal assets of the partnership had been realised with the exception of a debt of about £29,000 due from Messrs. Bultzingslowen & Co., of Java. All the partners in this firm were dead, and the estate of the surviving partner was not sufficient to pay the creditors. It was proposed to form a limited company in Amsterdam to work certain sugar factories and coffee estates in Java belonging to that firm, and to allot fully paid-up shares to the partnership firm in satisfaction of their debt. The defendant approved of this arrangement, and intended to accept the shares under the power given him for winding-up the partnership. The plaintiff did not approve of it, and commenced the present action against the defendant, claiming to have the partnership wound-up under the direction of the court, and an injunction restraining the defendant from compromising or settling the claim on the estate of Bultzingslowen & Co. without the consent of the plaintiff, and for a receiver. The defendant entered an appearance to the action, and immediately moved before KEKEWICH, J., asking that he might be authorised by the court to carry out the proposed compromise, or that he might be appointed receiver to get in the outstanding debts of the partnership. The affidavits in support of the motion alleged that the arrangement would be a very beneficial one, and the only way of realising any part of the debt.

KEKEWICH, J., approved generally of the proposed compromise, and ordered, upon £2,000 being paid into court by the defendant as security for the eventual share of the plaintiff under the deed of dissolution, that the defendant should be appointed receiver, with liberty to compromise the claim in question upon terms to be approved by the judge in chambers, the defendant to produce details of the scheme of compromise. From this decision the plaintiff appealed.

Cozens-Hardy, Q.C., and C. James for the plaintiff.

Napier Higgins, Q.C., and Ingle Joyce for the defendant.

F **COTTON, L.J.**—This is an appeal against an order made by KEKEWICH, J., who ordered to be wound-up, in what he considered the best way, the partnership in dispute here. The action was brought to take the accounts of the partnership and for a receiver, the plaintiff and defendant being partners and having carried on a business which a few years ago was dissolved by agreement. What the judge has done has been to appoint a receiver, but he has appointed a receiver with liberty to come before him for the purpose of discussing the terms of a proposed arrangement to be entered into.

G There is a large debt due to the firm which has not been paid, and of which the defendant says that he has no chance of getting payment except by the arrangement which he desires to carry out. He has filed an affidavit which contains what may be called a skeleton of the arrangement, and he says that they have a very large claim on a certain firm, but that there are many other creditors, and that the only way of getting anything is to enter into an arrangement to form a company which will take over the property, and that certain shares will be handed over to the different creditors. That is in fact all that is stated in the affidavit of the defendant. Today we get a detailed statement, from which it appears that there is to be, not a limited company in England, but one in Holland. We have no evidence what a limited company in Holland is, but this is said to be a limited company. This is strongly objected to by the plaintiff, one of the partners in the firm, and he says that the learned judge had no right or power to compel him to assent to a compromise to be entered into by the defendant on these terms. I do not enter into the question whether it is properly called a compromise or not, but I hold that he had no power to authorise the defendant to enter into such an arrangement. How does the defendant justify it? He could not exercise the powers given to him by the deed made between the two brothers except under the authority of the court. He must get the leave of the court to do it, and the court could not

give any extra powers beyond the authority which he had as partner. The effect of the action was simply a limit on his power, so as to prevent him exercising that power without the sanction of the court.

We come to the question, whether the court could sanction the agreement which he proposes to enter into. Is there anything in this deed which enables him to do that? I do not think it would be contended, subject to one case (*Weikersheim's Case* (1)) quoted by counsel for the defendant to which I shall presently refer, that there would be power for one partner, though he was the partner who was carrying out the winding-up of the affairs of the partnership, to enter into such an arrangement unless some power was given him by the other partner; and here in this deed, which is laudably short, I cannot see anything which will give him any special power to enter into any arrangement like this. He is made the person to wind-up the concern; he is to pay all the debts, and I think it prevents (though that question has not been much argued) the plaintiff from the interfering with the exercise of the powers given by this deed to the defendant, his brother. The defendant is to take upon himself the whole burden of the liquidation of the firm and payment of the creditors, and indemnify the plaintiff against the claims of the said creditors,

"and neither of the said partners will make any claim upon the other of them, but the said H. W. F. Niemann [the defendant] shall pay all the existing debts of the firm and indemnify the said C. G. A. Niemann [the plaintiff] against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims after all the creditors of the firm shall have been paid out of the existing assets of the firm."

That does not give him any special power as regards dealing with the assets; it only defines the burden he undertakes, and, so far as there are any indications there, it shows that he would not have any authority to take shares in a new company, because the deed supposes *prima facie* that what will be received by him in respect of the assets of the firm would be divisible as dividends between himself and his partner. I think that is valuable in this way; it looks to the firm being wound-up, and the assets of the partnership being realised in the ordinary way, which would be to collect and get payment of whatever could be got—payment in full, or if not, payment of such sum as could be obtained.

Has the court any power to do what is proposed by appointing a receiver? That seems to be the point most relied upon here on the part of the defendant. It is very true the receiver is appointed on behalf of both the parties to the action, but it is only for carrying into effect on behalf of both of them those powers which are settled and determined by the contract between them. There is nothing to enable the court to authorise the receiver to make a new contract between the parties, or to assume to himself that which by the contract between the parties is not given by one to the other. Therefore, in my opinion it would be wrong to hold that the court can by appointing a receiver enable the receiver to do that which it cannot authorise one partner to do against the will of the other.

How does the case stand here? I do not enter into the question whether it is correct or not that this proposed scheme will give the most profitable result to the two partners if they like to accept it. The only question we have here is, whether the plaintiff, one of the partners, is right in saying that the defendant has no power to do this, and the court was wrong in purporting to give him authority to do it, for it is not merely a payment of a debt, or a compromise of a payment of a debt, but it is sanctioning the defendant to enter, on behalf of himself and his partner, into a speculation in order if possible, with others, to work out the estate of a debtor of the firm in such a way as to produce a profitable result. In my opinion the court has no power either to authorise the defendant to do it without the appointment of a receiver, or to authorise the receiver to do it when the contract between the parties does not authorise it.

Then, what ought we to do as regards this order? There is some little difficulty in it from the fact that the order only purports to be the appointment of a receiver,

A and it was pressed upon us that the appointment of a receiver, in consequence of the difficulties between the parties, is almost a matter of course, and, therefore, there can be no valid objection to that. I do not think one can quite deal with it in this way. The appointment of a receiver under this order was simply made for the purpose of enabling that scheme to be carried into effect, and the appointment of the defendant as receiver was simply machinery for the purpose of enabling that

B to be carried out in such a way as that the court might have control over it. I think KEKEWICH, J., was acting in the way he thought most advisable for the interests of both these parties, but in my opinion it was not right in the court to authorise such a scheme to be carried into effect under the guise of compromising a claim on a debtor to the firm.

C The only thing, therefore, I think we can do is altogether to discharge the order, as it was made simply for that purpose without prejudice to any other application to be made for the appointment of a receiver. I doubted whether it would not be best to leave the receiver as appointed, but to declare that this scheme could not be carried into effect; but I think, as the sole object of appointing this receiver was to carry into effect the scheme which has been proposed, the best course is to discharge the order altogether, and the plaintiff must have the costs both here and

D below.

There is only one case which I think I ought to refer to, which was cited as an authority for what has been done, and that was *Weikersheim's Case* (1); and I refer to it especially, because it was quoted as sanctioned by the opinion of LINDLEY, L.J., in his book on PARTNERSHIP. The case there was really this: one member of a firm of bankers took as security, and caused to be registered in the name of the bank, shares in a company which involved liability, and it was said that that is an authority in favour of the receiver here doing what he is proposing to do. When one looks at the case one finds that the judges who decided it (JAMES and MELLISH, L.JJ.) were of opinion that, in the business of bankers, it was so ordinary to take shares in companies as a security for a debt, that it was part of the implied contract between them; but then JAMES, L.J., points out that in fact all

E the partners assented to this being done. I rather think that LINDLEY, L.J.'s, statement here has been a little misunderstood. He does say

F "one partner has implied authority to accept in the ordinary course of business security for a debt due to his firm."

I do not think there is any doubt about that. Then he goes on:

G "And where one member of a firm of bankers accepted as security for moneys due to the bank shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories to the company."

H At first sight that sentence does look as if it did not refer to the authority of the partners in that case, but was a general statement of the law that there would be an implied authority to accept shares under these circumstances. But, when we look to the case to which he refers, we see that that was not its effect, and I cannot think that he intended to lay down as a general rule of law that what was done in *Weikersheim's Case* (1) could be done on the ground that the judges held in that case that a partner in a bank would have that implied authority, though they

I really decided it on the ground that, in that particular case, the partners had known and assented to what was done. I thought it right to mention this because that statement in LINDLEY, L.J.'s book might mislead those who do not look at the authority referred to, which I always like to do, even when it is cited in a book like LINDLEY, L.J.'s. In my opinion, the plaintiff is right, and the appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. I think the decision turns on a very broad and a very short point, that here there is no power under the deed to do what

is desired. It seems to me, for the reasons given by the lord justice, that the court has no power to clothe a receiver with an authority which would wholly transcend the nature of the original arrangement between the parties. It does not seem to me to be necessary to decide that in no case can anything but cash be taken by way of compromise. One can imagine that it would depend on the circumstances of each particular case whether anything can be received as an equivalent for cash; but here it is really not a compromise at all—it is the mere substitution for the payment of a debt, of a speculation to take shares in a new and unformed company in Amsterdam, the object of which is by the employment of the assets to recoup the creditors. That is something far more than a compromise, and therefore I think it is not what the court can impose on an unwilling partner.

I agree entirely with what has been said about *Weikersheim's Case* (1). The whole ratio decidendi there was what was the ordinary scope and authority of a partner in a banking business. It seems clear, as soon as the judgments of JAMES and MELLISH, L.JJ., are referred to, that both base their views on the broad foundation of their commercial opinion as to what is the ordinary business of a banker; but JAMES, L.J., assumes also as a reason in that particular case that the authority was not only to be implied from the scope of business of the partnership, but was actually an express authority conferred by the knowledge and assent of the other partner. That shows that *Weikersheim's Case* (1) is not an authority for the proposition for which it was cited, and that the passage in LINDLEY, L.J.'s book if it did imply that (and perhaps it does not) would be an oversight.

FRY, L.J.—If I were not differing from the decision of the learned judge below I should probably say nothing, but I will shortly state the reasons why I concur with my learned brethren. The arrangement contemplated in this case is shortly of this kind: that the claim which the partnership had against the Java firm shall be given up to a new company which is intended to be formed, and that the partners in the old or dissolved firm shall become shareholders in a concern which is to be carried on with the property of the Java firm. In other words, instead of remaining creditors of the Java firm, they are to become partners by way of a limited company in the business of their debtors. That is the nature and whole scope of the arrangement proposed. It appears to me that such an arrangement as that is not within the ordinary powers of a partner who is charged with the liquidation of a dissolved partnership. It is not necessary to say whether he is bound to receive all the property which he collects in the form of cash, or whether, under such circumstances, he may proceed in another way. That point does not require decision; but that he has power to enter into a company or partnership to carry on the business of the debtor to the firm which he is winding-up is, in my opinion, not the case. I think, therefore, that, looked upon from the general point of view, the contention cannot be successfully urged.

Then it is said that the deed of June 3, 1887, makes a difference, and that shows that the defendant was to be made so completely the dominus of the winding-up that he has power to do this. I find nothing in that deed in support of such a contention. It appears to me only to contemplate an ordinary liquidation of the partnership affairs, with this exception, that the plaintiff is not to interfere in matters of discretion arising in that winding-up. It does not clothe the defendant with any larger power, or any power, of doing anything else than a liquidating partner might do. As has been already observed by COTTON, L.J., the third section of the deed, which refers to the plaintiff accounting to the defendant for his share of any dividends received, looks as though the intention of the parties was that these outstanding claims were to be got in by way of receipt of dividends on the claim, and not by way of any such arrangement as is now proposed. In my opinion, the appointment of the defendant as receiver would not enlarge his powers, because, while the court by appointing the defendant receiver protects his operations and gives him power of having recourse to the court for assistance and advice, it does not enable him to do that which as against the plaintiff the existing convention or

A agreement between the parties does not justify. I repudiate the notion that the court has a general discretion to do what it thinks best for the parties in the winding-up of their affairs, which are the subject of agreement and obligation between them. The argument urged upon us, that the court can do what it thinks best, cannot hold. There appears to me to be no authority really cited in support of that contention. I will say nothing more about *Weikersheim's Case* (1) except

B that I entirely agree in the comments made upon it.

With regard to the case cited to us of *West of England and South Wales District Bank v. Murch* (2), I will only say that it has nothing to do with this case as it appears to me. I will only state that the conclusion which I arrived at in that case (whether rightly or wrongly seems for the present purpose immaterial) was that there was a compromise by an executrix, and that that compromise came under

C Lord Cranworth's Act (23 & 24 Vict., c. 145). It has nothing to do with the power of a receiver appointed in a suit, the object of which is the winding-up the affairs of a dissolved partnership. I think, therefore, the order must be discharged, and that the order suggested by the lord justice is right.

Solicitors: *Druces & Attlee; Hollams, Son, Coward & Hawksley.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

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BROWN AND OTHERS v. FAREBROTHER

[CHANCERY DIVISION (Kekewich, J.), 2 February, 1889]

[Reported 58 L.J.Ch. 3; 59 L.T. 822]

F Auctioneer—Sale of land—Sale by order of court—Deposit—Payment of deposit to vendors' solicitors—Failure of solicitors to pay deposit to vendors—Right of vendors to recover amount of deposit from auctioneer.

In a partition action it was ordered that hereditaments should be sold by the plaintiff, one of several vendors, by public auction in such way as he should think fit, and the proceeds paid into court. The sale took place under conditions of sale which provided for the payment of the proceeds of sale at the office of the vendors' solicitors, and also contained a reference to a certificate in the partition action. The required deposit was paid by the purchaser to the auctioneers, who acknowledged the receipt and signed the memorandum of sale as "agents for the vendors." The auctioneers subsequently paid the balance of the deposit (after deductions for costs) to the solicitors for the vendors, who did not

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pay to the vendors. In an action brought by the vendors for the recovery of the money from the auctioneers,

Held: as the sale was under an order of the court, the auctioneers had authority to pay the deposit to the solicitors of the vendors, and were not liable to refund.

Biggs v. Bree (1) (1881), 51 L.J.Ch. 64, 263, applied.

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Notes. As to authority of auctioneer, see 2 HALSBURY'S LAWS (3rd Edn.), 83 et seq.; and for cases see 3 DIGEST (Repl.) 4 et seq.

Case referred to:

(1) *Biggs v. Bree* (1881), 51 L.J.Ch. 64; 45 L.T. 648; 30 W.R. 132; affirmed (1882), 51 L.J.Ch. 263, C.A.; 3 Digest (Repl.) 6, 30.

Action by the plaintiffs, vendors of certain land, claiming to recover from the defendants the balance of a deposit received by them as auctioneers and paid by them to the plaintiffs' solicitors.

In the partition action of *Brown v. Saxby*, dated July 17, 1886, it was ordered that certain hereditaments should be sold by public auction by the plaintiff, William James Brown, who was one of several vendors and was plaintiff in that action as well as in the present one, in such way as he should think fit; and it was ordered that the money to arise from such sale should be paid into court. The chief clerk's certificate, filed on Aug. 7, 1886, certified as to the persons interested. The property was put up for sale by the plaintiff on Nov. 29, 1886. By the 3rd condition of sale it was provided that the purchaser was to pay the remainder of his purchase money at the office of Messrs. R. Jones & Co., the solicitors of the vendors. By condition 8:

"The vendors sell and will convey as devisees under the will of the late William Brown deceased, and no further proof or evidence of their right to convey shall be required than an office copy of the chief clerk's certificate, dated Aug. 6, 1886, in an action *Brown v. Saxby*."

At the sale Mr. C. Skinner became the purchaser of the hereditaments for £625, and he paid a deposit of £62 10s. to the defendants Messrs. Farebrother, Lye & Co., the auctioneers. The memorandum at the back of the conditions of sale was duly filled in and signed by the agent of the purchaser, and contained these words at the end, signed by the auctioneers:

"As agents for the vendors we ratify this sale and acknowledge the receipt of the said deposit of £62 10s."

On June 15, 1887, the auctioneers paid the deposit (after deducting costs) to a member of the firm of Messrs. R. Jones & Co., the vendors' solicitors. The money not being forthcoming from the solicitors, the plaintiff required the auctioneers to pay it into court. On their refusal, he instituted this action. The other owners of the property were added as plaintiffs by amendment at the hearing.

The defendants pleaded payment to the solicitors of £34 5s. 9d. (being the balance of the deposit of £62 10s., after deducting costs and charges), and alleged that it was the usual and customary course for auctioneers to pay to the solicitors of the vendors.

Seward Brice, Q.C., and *F. H. Colt* for the plaintiffs.
Farwell for the defendants.

KEKEWICH, J.—I do not intend to hold that it is within an auctioneer's ordinary authority to pay money to the vendor's solicitors—either money which has been paid on deposit or any other money—without an authority for that particular purpose. And still less do I intend to hold that any custom such as is pleaded by the defendants could be established, because I have not heard any argument or evidence upon that point; but as at present advised, it seems to me that it would be impossible to support any such custom. The only point which I am called upon to decide is whether, under the particular circumstances of this case, it is distinguishable from *Biggs v. Bree* (1).

Counsel for the defendants has contended that the auctioneers were entitled to pay the deposit to the solicitor of the vendors, so as to get a good discharge from them, and to be able now to say that they are not to pay the money over again. In *Biggs v. Bree* (1) there was a sale, not only under the order of the court, but a sale by the direction of the court, as we understand those words, and there was no question that the deposit in that case had to be paid into court. There was equally no question that the time had strictly arrived when that payment of the deposit into court had to be made, and both *SIR GEORGE JESSEL, M.R.*, and *BRETT, L.J.*, declined to limit the right of the solicitor to receive the money, so as to find a distinction between the request for payment of the money before the certificate had been granted, and afterwards. They decided it upon the broad ground of convenience that, it being the duty of the solicitor to pay the money into court, it was not beyond his duty to receive it, or beyond the authority of the auctioneer to pay the money to the solicitor for that purpose. Therefore, having the decision in *Biggs v. Bree* (1) before me—being a decision of *BACON, V.-C.*, affirmed by the

A Court of Appeal—if I have a case where the auctioneer pays money to the solicitor for the purpose of being paid into court, I am bound to hold that to be an authorised payment.

B What occurred here was that there was a partition action, and the court thought fit to direct that the property was to be sold by the plaintiff (who was only one of several vendors) by public auction, in such way as he should think fit, but it was ordered that the money to arise from such sale should be paid into court, it did not say by whom it was to be paid in, but the inference is that it was to be paid into court by the plaintiff, who was in that particular case to occupy the position of the vendors. Nobody else could make that payment into court. Therefore, there was a sale by order of the court, though not by the direction of the court, because the order gives the plaintiff not only the conduct of the sale, but a discretion as to how the sale was to be conducted. The property is accordingly put up for sale, and I have the conditions of sale before me.

C These conditions recognise the fact that it was a sale by the order of the court. Mr. Brown or his solicitor might properly have made a sale by himself alone, and might have made the concurrence of the other vendors a mere question of conveyance by means of the conditions of sale; but that is not what was done. It is distinctly stated to be by the vendors "as devisees under the will of the late William Brown," and there is a reference to the certificate finding who these devisees were, which certificate was to be binding upon the purchaser. The auctioneers sold under these conditions, and what the duty cast upon them by that notice was I am not required to determine; but they were acting for several vendors, and so acting they received the deposit. They knew it was a sale by an order of the court, and, knowing that there was the order, they might have found out that the money had to be paid into court. Whether they did or not, they certainly did know it was a sale by order of the court; and knowing that, it seems to me they might reasonably have concluded that the money was not to be paid to the vendors, and must have concluded that it did not belong to the vendors for their own use.

E As the auctioneers could not have claimed it for their use, what was their duty? F To see that it was paid into court. That *Biggs v. Bree* (1) says they should do by paying it to the solicitors, for the purpose of being paid into court. Therefore, although there is that distinction which I have pointed out between this case and that of *Biggs v. Bree* (1), namely, that in that case there was a sale by direction of the court, while here there was only a sale under an order of the court, still the authority seems to me to conclude the question which arises here. That case is reported in the WEEKLY REPORTER and in the LAW TIMES. And I have also before me a note of it (DART'S VENDORS AND PURCHASERS (6th Edn.), vol. 1, p. 205) which seems to me to be perfectly accurate:

G "Where the auctioneer paid the deposit to the solicitor having conduct of the sale for the purpose of its being paid into court, and the solicitor misappropriated it, it was held that the auctioneer was not liable to repay it."

H The only possible distinction would be that it was not strictly paid here to the solicitor for the purpose of being paid into court. But that seems to me to be a necessary inference from the circumstances of this case. Therefore, without deciding that an auctioneer may properly pay any money to the solicitors for the vendor without an authority for that purpose, or that there is any such custom as was suggested, I hold, upon the authority of *Biggs v. Bree* (1), that the auctioneers had authority to pay to the solicitors of the vendors. There must be judgment for the defendants with costs.

I Solicitors: G. H. Carthew; Fladgate & Fladgate.

[Reported by G. MACAN, Esq., Barrister-at-Law.]

LYONS v. HOFFNUNG AND OTHERS

[PRIVY COUNCIL (Lord Watson, Lord Herschell, Sir Barnes Peacock and Sir Richard Couch), July 11, 15, 1890]

[Reported 15 App. Cas. 391; 59 L.J.P.C. 79; 63 L.T. 293;
39 W.R. 390; 6 Asp.M.L.C. 551]

Shipping—Carriage of goods by sea—Stoppage in transitu—Delivery to purchaser's agent as carrier for the purposes of transit—Bill of lading obtained by purchaser—Purchaser travelling in same ship as goods.

Where goods have not been delivered to the purchaser, or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu, and may be stopped. The right to stop under such circumstances is not affected by the facts (i) that the purchaser has handed to the shipping agents the bills of lading or shipping receipts received by him from the vendor, and has received from them a fresh bill of lading; (ii) that the purchaser is himself a passenger by the vessel on board which the goods are shipped as cargo for conveyance to their ultimate destination.

Bethell v. Clarke (1) (1888), 20 Q.B.D. 615, approved.

Notes. The right of stoppage in transitu is dealt with in the Sale of Goods Act, 1893, ss. 44-48, 22 HALSBURY'S STATUTES (2nd Edn.) 1010-1012.

Referred to: *Kemp v. Ismay, Imrie & Co.* (1909), 100 L.T. 996.

As to stoppage in transitu, see 34 HALSBURY'S LAWS (3rd Edn.) 127-134; and for cases see 39 DIGEST 612-615, 620-623.

Cases referred to:

- (1) *Bethell v. Clark* (1888), 20 Q.B.D. 615; 57 L.J.Q.B. 302; 59 L.T. 808; 36 W.R. 611; 6 Asp.M.L.C. 346; sub nom. *Re Bethell & Co. and Clark*, 4 T.L.R. 401, C.A.; 39 Digest 618, 2164.
- (2) *Dixon v. Baldwin* (1804), 5 East, 175; 102 E.R. 1036; 39 Digest 618, 2169.
- (3) *Hunter v. Beale* (1785), cited in 3 Term Rep. at p. 466; 100 E.R. 680; 39 Digest 621, 2190.

Also referred to in argument:

- Kendall v. Marshall, Stevens & Co.* (1883), 11 Q.B.D. 356; 52 L.J.Q.B. 313; 48 L.T. 951; 31 W.R. 597, C.A.; 39 Digest 619, 2176.
- Valpy v. Gibson* (1847), 4 C.B. 837; 16 L.J.C.P. 241; 9 L.T.O.S. 434; 11 Jur. 826; 136 E.R. 737; 39 Digest 612, 2101.
- Re Isaacs, Ex parte Miles* (1885), 15 Q.B.D. 39; 54 L.J.Q.B. 566, C.A.; 39 Digest 619, 2171.
- Re Love, Ex parte Watson* (1877), 5 Ch.D. 35; 46 L.J.Bey. 97; 36 L.T. 75; 25 W.R. 489; 3 Asp.M.L.C. 396, C.A.; 39 Digest 617, 2163.
- Whitehead v. Anderson* (1842), 9 M. & W. 518; 11 L.J.Ex. 157; 152 E.R. 219; 39 Digest 622, 2200.

Appeal by the plaintiff, the official assignee of the estate and effects of William Clare, who was insolvent, from a judgment of the Supreme Court of New South Wales (WINDEYER and FOSTER, JJ., INNES, J., dissenting), reported 9 L.R.N.S.W. 313, making absolute a rule for a new trial in an action brought by the appellant to recover from the respondents, S. Hoffnung & Co., the defendants in the action, certain goods purchased from them by William Clare, which the respondents had stopped in transitu from Sydney to Kimberley on hearing of William Clare's insolvency, or for damages. At the trial of the action before DARLEY, C.J., and a jury, judgment was entered for the appellant for damages for £505, but the Supreme Court ordered a new trial on the grounds that the verdict was against the evidence and that the jury had been misdirected.

The respondents were merchants in Sydney. At the time of the purchase, the vendor Clare gave instructions to his agent to mark the goods WC/K (i.e., William Clare, Kimberley), and told him to send the goods to the wharf of Howard Smith & Co., shipowners. Clare also said that the goods were going to Kimberley, that he was going to take the goods there and that he was going with them. The goods were sent by the respondents to this wharf, and a document was sent with them which was initialled by one of Howard Smith & Co.'s employees in these terms :

"Wm. Howard Smith & Sons, Ltd., Sydney, 20/5/86. Steamer *Gambier*. For King's Sound. Shipper S. Hoffnung & Co. Consignee W. Clare. Goods, Kimberley."

In respect of some of the goods, apparently those that were in bond, a more elaborate form of receipt was given by the shipowners, but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley. These receipts were handed over by the respondents to Clare, and as he was in possession of them, he obtained from Howard Smith & Co. a bill of lading. The goods were carried in the *Gambier* on a voyage to Kimberley, and Clare was travelling on the *Gambier*. The goods were stopped while on this voyage, when the respondents heard of Clare's insolvency. The question in issue was whether the respondents were entitled to do this.

Barnes, Q.C., and *Howard Smith* for the appellant.

Finlay, Q.C., and *Pollard* for the respondents.

LORD HERSCHELL.—The question raised in this action is, whether the respondents, who are merchants carrying on business in Sydney, were entitled to stop in transitu certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the appellant on the present appeal, and was the plaintiff in the action below.

At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages ^{WC}_K, that is: William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith & Co.'s wharf in Sydney. He stated that he gave no other instructions, but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the *Gambier*; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the *Gambier* or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by the *Gambier* to Kimberley. Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the *Gambier*. The goods were sent by the respondents to Howard Smith & Co.'s wharf, and a document was sent with them which was initialled on behalf of Howard Smith & Co., by one of their employees, which was in these terms :

"Wm. Howard Smith & Sons, Ltd., Sydney, 20/5/86. Steamer *Gambier*. For King's Sound. Shipper, S. Hoffnung & Co. Consignee, W. Clare. Goods, Kimberley."

It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given by the shipowners, but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley.

At the trial before DARLEY, C.J., several questions were put to the jury. The first three were in these terms: (i) "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf, and did the defendants accept such instructions?—Yes. (ii) If so, did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?—Yes. (iii) Did Clare instruct the defendants to ship the goods by the s.s. *Gambier*, and consign them to him at Kimberley?—No." The fourth is immaterial, and it was not answered by the jury. The fifth was in these terms: "After the goods were in fact delivered at Howard Smith & Co.'s wharf, was any contract entered into between Clare and Howard Smith & Co. to ship the goods to Kimberley on his account?—Yes." Upon those findings the Chief Justice entered the verdict for the plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned Chief Justice had misdirected the jury on a point to which their Lordships will call attention hereafter. That rule came on for argument before three learned judges in the Supreme Court, and was made absolute for a new trial by a majority of those judges.

The first question their Lordships have to consider is, whether the verdict can, as the appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two questions put to the jury appear to their Lordships to be possibly open to the charge of ambiguity. If the meaning of the language used: "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf?" and "Did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?" be: were the instructions to deliver them to Clare personally at Howard Smith & Co.'s wharf, and were those instructions obeyed?—it is obviously impossible to support the finding. But even if the meaning be, were the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf in this sense, that they were to be held by Howard Smith & Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their Lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be: were the goods to be delivered to Clare at Howard Smith & Co.'s wharf in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the respondents had a right to stop the goods in transitu.

Reliance was placed by the appellant on the fact that the receipts which have been mentioned were handed over by the respondents to Clare, and that being in possession of these receipts, he obtained from Howard Smith & Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung & Co. did not appear as shippers. Their Lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But however that may be, and assuming it to be the fact that he did obtain such a bill of lading, in their Lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel *Gambier* on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes, no transaction with regard to the carriage of these goods took place between Clare and the shipowners after the date of the

A purchase, except the exchange of the receipts which have been mentioned for the bill of lading.

Even assuming that the jury were entitled to disregard the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their Lordships the decision ought to have been in favour of the defendants in the action. It appears to their Lordships that, upon the undisputed facts of the case, the right to stop in transitu under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because, although the language used by Clare, according to his evidence, was that he was going to Kimberley, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped, and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him. These circumstances appear to their Lordships sufficient to indicate that the right to stop in transitu existed.

The test laid down by LORD ELLENBOROUGH in *Dixon v. Baldwin* (2) appears clearly to cover such a case as this. Alluding to *Hunter v. Beale* (3), in which it was said that "the goods must come to the corporal touch of the vendees, in order to oust the right of stopping in transitu," LORD ELLENBOROUGH says (5 East, at p. 184) that this was

"a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of the principal in a mere course of transit towards him."

Their Lordships think it cannot be doubted that, in the present case, putting the case most favourably for the appellant, the goods came into the hands of Howard Smith & Co. as carriers on Clare's account. The law appears to their Lordships to be very clearly and accurately laid down by LORD ESHER, M.R., in *Bethell v. Clarke* (1). He says (20 Q.B.D. at p. 617):

"When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped."

The present case appears to fall distinctly within the terms there employed.

The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretence for the allegation that Howard Smith & Co. were ever intended to receive or hold, or ever did receive or hold, these goods except as carriers, to convey them to their destination, Kimberley. No arrangement other than an arrangement with reference to the terms of freight had been made by Clare before the goods were put into the possession of Howard Smith & Co. They were received by Howard Smith & Co. upon the terms—for they signed receipt notes to that effect—that they should be carried by them to Kimberley, by means of a particular vessel. Those receipts, showing the terms upon which the goods had been received, passed into the hands of Clare,

and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes, all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not, therefore, seem to be throughout the whole transaction the slightest evidence that Howard Smith & Co. ever held, or were intended to hold, these goods otherwise than as carriers to take them to their destination. Under these circumstances it seems difficult to understand the contention that the right of stoppage in transitu did not exist.

The learned Chief Justice, in summing up to the jury, appears to have told them that, if Clare made a new contract with Howard Smith & Co. in respect of the carriage of these goods after they came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop in transitu. Their Lordships gather this from the particular direction complained of, which formed one of the grounds on which the rule was granted. The ground was :

“That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith & Sons, Ltd., the bills of lading, or shipping receipts, received by him from the defendant, and received from Howard Smith & Son, Ltd., another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because, if at that time they entered into a contract with Clare to carry these goods and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith & Sons, Ltd., became Clare's agents, and it would be equivalent to a delivery to Clare.”

No doubt it might be equivalent to a delivery to Clare, for the purpose of passing the property to Clare; but if his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the destination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare or whether that bill of lading contained the name of Clare or of the defendants as shippers.

The appellant relied upon several cases which were pressed by the learned counsel on their Lordships, in which it had been held that, although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their Lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their Lordships have to deal, where the goods passed direct from the hands of the vendors into the hands of the carriers to be carried to the destination then contemplated by both parties. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from be affirmed. The appellant must pay the costs of the appeal.

Solicitors : Walker & Mewburn-Walker; Hemsley & Hemsley.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re HARGREAVES. DICKS v. HARE

[COURT OF APPEAL (Cotton, Lindley, and Lopes, L.JJ.), March 25, 27, 1890]

[Reported 44 Ch.D. 236; 59 L.J.Ch. 375; 62 L.T. 819;
6 T.L.R. 264]*Annuity—Insufficiency of estate—Administration proceedings—Right of annuitant to prove for capital value of annuity—Annuity not in arrear.*

A testator covenanted to pay to trustees during the life of D. an annuity of £500 for the benefit of her and her children. After the testator's death the trustees issued an originating summons for the administration of his estate on the ground that it was insufficient to provide for the payment of the annuity in full. No payment of the annuity was at the time in arrear.

Held: although the Supreme Court of Judicature Act, 1875, s. 10, gave a right to an annuitant to prove in administration proceedings for the capital value of an annuity, it conferred no right upon the annuitant to obtain an order for administration so long as the annuity was punctually paid, even though the estate was insolvent; the summons should, therefore, be dismissed.

Notes. The Supreme Court of Judicature Act, 1875, s. 10, was repealed, except as to deaths before 1926, by the Administration of Estates Act, 1925, s. 56 and Second Schedule, Part 1: see now s. 34 of, and Sched. 1, Part 1, para. 2 to, that Act, 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Referred to: *Re Beeman, Fowler v. James*, [1896] 1 Ch. 48; *Re Blow, St. Bartholomew's Hospital v. Cumbden*, [1914] 1 Ch. 233; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562; *Re Manners, Public Trustee v. Manners*, [1949] 2 All E.R. 201.

As to contingent liabilities, see 16 HALSBURY'S LAWS (3rd Edn.), 314-316; as to requirements for bringing an administration action, see *ibid.* 438; and for cases see 23 DIGEST (Repl.) 370-372; 24 DIGEST (Repl.) 816-818. For the Supreme Court of Judicature Act, 1875, s. 10, see 9 HALSBURY'S STATUTES (2nd Edn.) 704. For the Apportionment Act, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.

Cases referred to:

- (1) *Whitmore v. Oxborrow* (1842), 2 Y. & C.Ch. Cas. 13; 12 L.J.Ch. 21; 6 Jur. 985; 63 E.R. 6; 24 Digest (Repl.) 876, 8741.
- (2) *Blount v. Hipkins* (1834), 7 Sim. 43; 4 L.J.Ch. 13; 58 E.R. 753; 23 Digest (Repl.) 507, 5710.

Also referred to in argument:

- King v. Malcott* (1852), 9 Hare, 692; 22 L.J.Ch. 157; 19 L.T.O.S. 19; 16 Jur. 237; 68 E.R. 691; 23 Digest (Repl.) 372, 4419.
- Norman v. Johnson* (1860), 29 Beav. 77; 2 L.T. 759; 6 Jur.N.S. 905; 8 W.R. 300; 54 E.R. 555; 24 Digest (Repl.) 861, 8559.
- Read v. Blunt* (1832), 5 Sim. 567; 58 E.R. 451; 23 Digest (Repl.) 371, 4411.
- Burrell v. Delevante* (1862), 30 Beav. 550; 31 L.J.Ch. 365; 8 Jur.N.S. 204; 10 W.R. 362; 54 E.R. 1003; 24 Digest (Repl.) 861, 8560.
- Thomas v. Griffith* (1860), 2 De G.F. & J. 555; 30 L.J.Ch. 465; 3 L.T. 761; 7 Jur.N.S. 293; 45 E.R. 736; sub nom. *Griffith v. Thomas*, 9 W.R. 293, L.C. & L.J.J.; 24 Digest (Repl.) 854, 8502.

Appeal by Messrs. Dicks and Winter from a decision of NORTH, J., refusing to make an administration order in respect of the estate of Ernest Hargreaves deceased.

By a deed dated Jan. 19, 1887, the testator Ernest Hargreaves entered into a covenant to pay to Messrs. Dicks and Winter, as trustees, an annuity of £500 during the life of Mrs. A. H. Dicks, by equal quarterly payments, to be treated as accruing due de die in diem, and to be for the benefit of Mrs. Dicks and children. He died on Oct. 21, 1889. Mrs. Dicks at the time of his death was twenty-seven years of age, and the capital value of her annuity was calculated, according to the succession duty tables, as being £8,386 7s. 6d. The executors paid the quarterly

instalments of the annuity due at Christmas, 1889, and on Mar. 25, 1890, but gave the trustees notice that the estate was insufficient, and that the annuity must cease. They had set apart a sum of £4,000 to meet the annuity, but this would not be sufficient to provide for the annuity for more than eight years. It appeared that the value of the testator's estate, less funeral and testamentary expenses, was £4,349, and that the claims against the estate, exclusive of that in respect of the annuity, amounted to £1,851. The trustees claimed to prove against the estate for the capitalised value of the annuity. On Dec. 13, 1889, the trustees of the annuity took out an originating summons for the administration of the testator's estate. The summons was heard in chambers, on Jan. 27, 1890, by NORTH, J., who refused to make an administration order, but gave a certificate that he did not require the case to be further argued. The trustees of the annuity appealed.

R.S.C., Ord. 55, r. 3, enables persons "claiming to be interested in the relief sought as creditors" to obtain an administration order.

MacLean, Q.C., and *S. Dickinson* for the trustees. The estate is insolvent, and the trustees have, by virtue of s. 10 of the Supreme Court of Judicature Act, 1875, a right to prove for the value of the annuity. They have therefore the right to obtain an administration order. Formerly a contingent creditor had no right of proof, and therefore could not obtain an administration order, but he is now entitled to prove. Order 55, r. 3, enables persons "claiming to be interested in the relief sought as creditors" to obtain an administration order, and is not confined to ordinary creditors, and this is shown to be the case by rr. 4, 44, and 46 of the same order. In *Whitmore v. Oxborough* (1) the holder of a bill of exchange to whom nothing was due at the time of the filing of the bill was held entitled to an administration decree. In *Blount v. Hipkins* (2) a contingent liability was held to be a debt due. This case is distinguishable from *King v. Malcott* and *Norman v. Johnson*, which were relied on by NORTH, J., in chambers, because in those cases the plaintiffs had no immediate right of proof. They also cited *Read v. Blunt*; *Burrell v. Delevante*; *Thomas v. Griffith*.

Buckley, Q.C., and *G. Farwell* for the executors.

COTTON, L.J.—The question here is whether NORTH, J., was right in refusing to grant an administration decree. It is put finally in this way, that under s. 10 of the Supreme Court of Judicature Act, 1875, there is a right to prove, in the event of an administration order being granted, for the value of this annuity, and it is said that that enables the trustees for this lady—although, of course, they have not any right independently, as I read the Act—to have a value put on this annuity.

Independently of this section the executors could not pay the annuitant, the estate being insolvent, the value ascertained by the tables; but they must wait and pay the sums from time to time as they become due, and, as far as I can see, the right to prove for the value of the annuity, ascertained properly, as it will be, is dependent on an administration order being granted.

The section says as follows :

"In the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail [among other things] as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy."

That is to say, where the court is administering the assets of a deceased person whose estate is insolvent, the Act enables a valuation to be made, and enables the person entitled to the benefit of the annuity to prove for the value as so ascertained. In my opinion, that gives no greater right to the trustees for the annuitant or to the annuitant to bring an action than they would have independently of this section.

It is very true that when there is an administration order—that is to say, when the court is administering the assets—it enables the value and the burden of that

A annuity to be ascertained as it would be in bankruptcy, and proof may be made for that sum. I do not know what the view of Parliament was, but I should think it was this: that the probability was, if the estate was insolvent, that some creditor would obtain an administration order, or, if no creditor obtained an administration order, that the executors for their own protection would do so. But, however, that may be, if the Act of Parliament does not give the annuitant a greater right than he had before for the purpose of getting an administration order, we cannot give it him. What debt could the trustees who applied for this administration order have proved as due to them? It is said that this annuity must be considered as accruing *de die in diem*. Yes; but that is to meet that which is provided for otherwise by the Apportionment Act, 1870, giving the trustees, in case of this lady's death, a right to prove for the accrued portion of the annuity, considering it as an interest accruing *de die in diem*. In my opinion, as there is no claim which can be sued for now, as for a sum which is due, the executors having paid as each quarterly payment became due the full amount, there can be no right to bring an action at law against the executors, and therefore no right to an order for the administration of the estate. I am simply dealing now with this section of the Act of Parliament. It may be that this matter was never thought of by the legislature when it passed the Act, or it may be that the legislature did not intend to give the annuitant a right independently of there being an administration by the court, although if that had been granted there would be a right to come in and prove.

Then it was said that we must look at the Rules and Orders, and R.S.C., Ord. 54, r. 3, was very much relied on. That is an order enabling certain things to be done on an originating summons, which without this order could only be done on action brought. It is said here that an originating summons for the administration of the estate in the nature of a creditor's action may be taken out by any person claiming to be interested as a creditor, and the plaintiffs say, "We claim to be interested as creditors." But, in my opinion, they cannot rely on that order as giving them, if they are not otherwise entitled to obtain this on action brought, a right to obtain it by originating summons. If they claim as creditors, and are not creditors, it cannot be said that this rule gives them a right which they can only have if they are creditors. It can never be the effect of this rule that a person can come and say wrongfully, "I claim as creditor; therefore I am entitled to this order."

Other rules are referred to, which provide for advertisements for creditors among other things, and it is said they show that these trustees for this lady could come in and prove their debt. So they could; but, although under the later rules the advertisement must be answered by the trustees, yet it does not mean that we are to construe this r. 3 so as to enable them to come in and obtain the administration order as if they were constituted as creditors entitled under the old law to get a decree for the administration of the estate. It may be a mistake of Parliament, or it may be intentionally done, not to give any right except when there is an administration order; but, in my opinion, neither by this Act nor with the assistance of these rules can the trustees for this annuitant, so long as what is due to them is paid, come and get an administration order so as to enable them to get the benefit of the rights which they can only get if an administration order is granted.

It was said that the cases help the trustees. It is admitted there is no case in which a person who is not entitled to say that he or she is a creditor has ever got an administration order.

The first case, and I think the best for the plaintiff, was that of *Whitmore v. Oxborough* (1). There, as I pointed out, there was a consideration of £500 cash, and £2,952 cash too, but cash secured by bills of exchange payable at future times. There was there a *debitum in presenti solvendum in futuro*, and, although that was perhaps rather a strong decision of KNIGHT BRUCE, V.-C., yet it does not at all apply to this case, where there is no debt due at all to the annuitant, who is simply entitled to this annuity upon a covenant to pay, not entered into as a mode

of paying a certain sum due, but a covenant that a certain annuity from time to time shall be paid to her as long as she lives. That, in my opinion, will not enable us to make the order asked for.

The only other case I need refer to is that of *Blount v. Hipkins* (2). What SHADWELL, V.-C., there decided was that, having regard to the terms of the will and the property left by the will, a certain liability, although not then due, and not constituting in law a debt, might be considered a debt within the meaning of the will he had to construe. Here we have to say whether this is a debt which will support a decree for administration, not whether within a certain will, which we have to construe, and having regard to the provisions of that will and the property which has been dealt with, this annuity was intended to be provided by the will of the testator. That case does not help us, and the other cases which were referred to, if they were correct decisions, will not justify us in making the decree here asked for. In my opinion, the case fails, and the appeal must be dismissed.

LINDLEY, L.J.—I am unable to come to any other conclusion, though one cannot help feeling struck with the curious state in which the law is as regards this matter. The Act of Parliament, after all, is the thing which we must look to for the purpose of determining this question. Great reliance has been placed on Ord. 54, rr. 3 and 4; but, notwithstanding all that has been said about those rules, I cannot understand them as doing more than enabling persons who might obtain relief by bill to get the same relief by summons. They do not create creditors or claimants, or any thing of that sort, and we are thrown back on Supreme Court of Judicature Act, 1875, s. 10, which repeats a previous section in the Supreme Court of Judicature Act, 1873, and I have looked at that to see what the alteration was. The alteration in reference to this point is immaterial. What Parliament has done must be looked at, and what it has not done must be looked at also.

Let us take the last first. Parliament has not in any way affected the administration of assets, except in legal proceedings. It leaves executors to administer assets out of court just as they did before, but it says that when you come to administer assets in court, whether under a winding-up, or in bankruptcy, or under an administration order or decree, certain modifications shall be made, and, speaking generally and rather roughly, it says that, as regards debts provable, and the valuation of contingent debts and so on, the rules in bankruptcy are to apply; that is to say, there is to be one set of rules observed by the court, whether in bankruptcy, or in winding-up or administrations. It says nothing about executors. Here, unfortunately for the trustees, there is no order or decree for the administration of this estate by the court, and the reason is obvious enough—namely, that the executors are in a position to pay all the creditors twenty shillings in the pound, and there never will be, so far as I can see, any decree or order for administration.

The effect of that upon the present trustees is curious. If there were a decree for administration, then, under this Act of Parliament, this lady would be entitled to say, "Value my annuity, and give me the value of it." As there is no such decree for administration, she is not entitled to that, but only to be paid her annuity as it becomes due, and in time I suppose there will be a deficiency of assets if she lives long enough, and it does seem strange that her right should be made to depend on whether there is an administration order or not. But that is an anomaly not peculiar to this case. We all know that, until an order is made for administration, executors can prefer one creditor to another, to an extent to which they cannot after proceedings have been commenced. It seems to be the case that the Act of Parliament has not said that executors shall out of court observe the same rules as they are to observe in court. In my opinion, this appeal fails, and must be dismissed.

LOPES, L.J.—The trustees for this lady are not entitled to have an administration decree unless they can establish a provable debt. They have no provable debt, and, therefore, cannot be considered to rank as creditors. All that is due has

been paid each quarter day. Reliance was placed on Ord. 54, r. 3. That rule, in my opinion, only applies to that which before the rule would have been the subject-matter of an administration action, and does not extend relief further than it would have been obtained by a bill for administration. As has been observed, the state of the law is somewhat anomalous, and presses, no doubt, harshly on this lady, but that is a matter for which this court is not responsible. I think the appeal fails.

Appeal dismissed.

Solicitors: *Winter & Co.; Tatham & Pym.*

[*Reported by A. J. SPENCER, Esq., Barrister-at-Law.*]

STEEDS AND ANOTHER v. STEEDS AND ANOTHER

[QUEEN'S BENCH DIVISION (Huddleston, B., and Wills, J.), February 4, 6, 1889]

[Reported 22 Q.B.D. 537; 58 L.J.Q.B. 302; 60 L.T. 818;
37 W.R. 378]

Accord and Satisfaction—Joint creditors—Accord and satisfaction made to one—Action on bond—Two obligees.

The defence to an action on a bond by two obligees pleaded that accord and satisfaction had been made to one of the plaintiffs. The plaintiffs moved for judgment on the ground that such a plea disclosed no defence.

Held: the defence was good in equity as to the claim of the plaintiff to whom satisfaction was made, but not as to that of the other, since in equity joint creditors are *prima facie* regarded as tenants in common in equal shares both of the debt and of any security for it.

Notes. Explained: *Powell v. Brodhurst*, [1901] 2 Ch. 160. Applied: *Berry v. Berry*, [1929] All E.R.Rep. 281. Referred to: *Re E.W.A.*, [1901] 2 K.B. 642.

As to discharge of obligation where two or more obligees, see 3 HALSBURY'S LAWS (3rd Edn.) 340, 346-347; 8 HALSBURY'S LAWS (3rd Edn.) 211, 219; 27 HALSBURY'S LAWS (3rd Edn.) 201, 402; as to the construction of joint and several promises, see 8 HALSBURY'S LAWS (3rd Edn.) 63; as to the discharge of a contract under seal, see 8 HALSBURY'S LAWS (3rd Edn.) 173; 11 HALSBURY'S LAWS (3rd Edn.) 366, 375; 14 HALSBURY'S LAWS (3rd Edn.) 636; as to form of accord and satisfaction, see 8 HALSBURY'S LAWS (3rd Edn.) 206; as to equitable jurisdiction, see 14 HALSBURY'S LAWS (3rd Edn.) 520-522, 529. For cases see 7 DIGEST (Repl.) 233, and 12 DIGEST (Repl.) 30.

Cases referred to:

- (1) *Webb v. Hewett* (1857), 3 K. & J. 438; 29 L.T.O.S. 225; 69 E.R. 1181; 12 Digest (Repl.) 397, 3072.
- (2) *Wallace v. Kelsall* (1840), 7 M. & W. 264; 8 Dowl. 841; H. & W. 25; 10 L.J.Ex. 12; 4 Jur. 1064; 151 E.R. 765; 12 Digest (Repl.) 535, 4048.
- (3) *Petty v. Styward* (1631), 1 Rep. Ch. 57; 1 Eq. Cas. Abr. 290; 21 E.R. 506; 35 Digest 302, 512.
- (4) *Rigden v. Vallier* (1751), 3 Atk. 731; 2 Ves. Sen. 252; 26 E.R. 1219; 35 Digest 302, 513.
- (5) *Lake v. Craddock* (1733), 3 P.Wms. 158; 24 E.R. 1011, L.C.; 20 Digest (Repl.) 261, 90.
- (6) *Morley v. Bird* (1798), 3 Ves. 628; 30 E.R. 1192; 20 Digest (Repl.) 260, 85.

- (7) *Matson v. Dennis* (1864), 4 De G.J. & Sm. 345; 10 Jur.N.S. 461; 12 W.R. 926; 46 E.R. 952; sub nom. *Matson v. Dennis*, *Matson v. Woodthorpe*, 10 L.T. 391, L.J.J.; 35 Digest 606, 3438.

Also referred to in argument:

Binns v. Fisher (1873), 43 L.J.Ch. 188; 7 Digest (Repl.) 232, 697.

Yeomans v. Williams (1865), L.R. 1 Eq. 184; 35 Beav. 130; 35 L.J.Ch. 283; 55 E.R. 844; 12 Digest (Repl.) 566, 4310.

Taylor v. Manners (1865), 1 Ch. App. 48; 35 L.J.Ch. 128; 13 L.T. 388; 11 Jur.N.S. 986; 14 W.R. 154, L.J.J.; 12 Digest (Repl.) 566, 4311.

Motion. The plaintiffs, Jane Steeds and Thomas Baynton Steeds, brought an action against the defendants, John Steeds and William Beacham, the statement of claim endorsed on the writ reading: The plaintiffs' claim is for principal and interest due upon the defendants' bond to the plaintiffs, dated June 9, 1869, conditioned for payment on demand of £300 with interest at the rate of 4 per cent. per annum. By the defence the defendant Steeds said that in full satisfaction and discharge of all his and the defendant, Beacham's, liability under the bond, he transferred in 1872 certain stock and goods to the plaintiff Steeds which were accepted in full payment and discharge of the bond, and the defendant, Beacham, said that he executed the bond only as surety for the defendant Steeds, and that he was thereby released from all liability. The plaintiffs applied to enter judgment on the ground that the statement of defence disclosed no defence to the action.

J. G. Wood for the plaintiffs.

T. J. Bullen for the defendants.

Cur. adv. vult.

Feb. 6, 1889. **WILLS, J.**, read the following judgment of the court.—The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favour by the two defendants. One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods, which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due on the bond. The other defendant pleads that he executed the bond as surety, and was discharged by the transaction set up by the first defendant. The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether, in respect of a bond given by C to A and B, accord and satisfaction made by C to A, after the cause of action had arisen, and accepted by A is an answer to the claim of A and B.

On behalf of the plaintiffs two objections are raised. (i) That in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. (ii) That even if it would be so were the bond made in favour of A alone, accord and satisfaction with A is no answer in equity to the action by A and B. It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of technicality, absolutely devoid of any particle of merits or justice—viz., that a contract under seal cannot be got rid of except by performance, or by a contract also under seal; so that, supposing it had really been the case, that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in discharge of the obligation; still, at law the obligee of the bond might recover his £1,000 without returning the property. One would have thought that if the courts of equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described.

Counsel for the plaintiffs, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon *Webb v. Hewitt* (1), which he said

established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done great injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear the ratio decidendi of the learned Vice-Chancellor was, that, when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone, and there was an end of it. Upon the first point, therefore, we are against counsel for the plaintiffs, and have no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him, and acceptance by him of goods in satisfaction of the debt, would be equally an answer.

Counsel for the plaintiffs is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C, the obligor, to A, the latter being joint obligee with B, would in equity be an answer to the claim by A and B on the bond. We cannot follow the argument of counsel for the defendants that, as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity and say, that, as at common law payment to or release by A would prevent A and B from suing, he is now in a position to treat A as having been paid, and say that, as this is a common law action, there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence he must take the equitable principles applicable to the circumstances in their entirety; and we must therefore enquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt with its incident of survivorship, and the satisfaction to one of the parties for a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards by joining other parties with him as plaintiffs recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value: *Wallace v. Kelsall* (2). In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was, that they will prima facie be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it: *Petty v. Styward* (3); *Rigden v. Vallier* (4), cited in the notes to *Lake v. Craddock* (5), 1 White and Tudor (5th Edn., p. 208). LORD ALVANLEY, M.R., in *Morley v. Bird* (6), says (3 Ves. at p. 631):

"Though they take a joint security, each means to lend his own money and to take back his own."

Where a mortgage debt had been paid to one of two mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagee was necessary to make a good title: *Matson v. Dennis* (7). This is on the ground that the debt is held by the two in common, and not jointly; and the principle seems to us equally applicable, whether the debt is secured by a mortgage or merely the subject of a personal contract. The principal right of a mortgagee is to the money; the estate in the land is only an accessory to that right. It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purposes of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation; and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with

by the accord and satisfaction has been paid his half at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that counsel for the defendants ought to amend by a further statement of the material facts.

Order accordingly.

Solicitors: *Helder & Roberts*, for *Thomas Ames Hill*; *Darby & Cumberland*.

[*Reported by R. M. MINTON-SENHOUSE, Esq., Barrister-at-Law.*]

SMITH v. JOBSON

[CHANCERY DIVISION (Kay, J.), August 1, 1888]

[Reported 59 L.T. 397]

Will—Children—Inclusion of illegitimate child—Gift over.

By his will dated Sept. 11, 1847, a testator devised a freehold estate to his named eldest daughter, who was illegitimate. The will continued: "I particularly direct that, should any of my children die without having children of their own lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children, and none of the land shall ever be sold." The testator died on Dec. 14, 1854, and his eldest daughter died intestate in 1851 without having had any children. An action was brought for partition of the real estate and the chief clerk found that the persons entitled to the interest of the eldest daughter in the freehold estate devised to her were the surviving children of the testator. The Attorney-General claimed the estate on behalf of the Crown.

Held: the rule of law that, where there is a gift to children, an illegitimate child cannot take concurrently with legitimate children in the absence of a contrary context, did not apply to a gift over, and, therefore, the estate went to the other children of the testator.

Notes. As to the inclusion of illegitimate relations, see 39 HALSBURY'S LAWS (3rd Edn.) 1070; and for cases see 44 DIGEST 811 et seq.

Cases referred to in argument:

Re Hall, Branston v. Weightman (1887), 35 Ch.D. 551; 56 L.J.Ch. 780; 57 L.T. 42; 35 W.R. 797; 44 Digest 819, 6703.

Bagley v. Mollard (1830), 1 Russ. & M. 581; 8 L.J.O.S.Ch. 145; 39 E.R. 223; 44 Digest 807, 6608.

Wilkinson v. Adam (1823), 12 Price, 470; 147 E.R. 780, H.L.; 44 Digest 807, 6607.

Megson v. Hindle (1880), 15 Ch.D. 198; sub nom. *Re Hindle, Megson v. Hindle*, 43 L.T. 551; 28 W.R. 866, C.A.; 44 Digest 816, 6682.

Dorin v. Dorin (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570, H.L.; 44 Digest 809, 6616.

Summons. By his will dated Sept. 11, 1847, James Jobson devised to his eldest son James and heirs his estate at Benknowle, containing about 87 acres of freehold land, with the dwelling-house in the town of Elwick; to his sons William, Joseph, and John, and heirs, all his property in the town of Dalton Piercy, to his eldest daughter Elizabeth his estate at Plaintree Hill and Hill House, in the parish of

Elwick Hall, containing about 67 acres of freehold land and all his property in the parish of Elwick Hall. He bequeathed £1,000 each to his four daughters Mary, Ann, Sarah, and Susanna, and gave an annuity of £26 to his wife. The testator directed that neither his sons nor his eldest daughter should receive any benefit until a fund was raised in 3 per cent, consols to pay the bequests to his wife and daughters. The will continued:

"And I particularly direct that, should any of my children die without having children of their own lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children, and none of the land shall ever be sold."

The testator died on Dec. 14, 1854, and his will was proved on Aug. 25, 1855. Elizabeth, who was illegitimate, having been born before the marriage of the testator, was married in 1850, and died intestate in 1851 without issue. An action was brought for partition of the testator's real estate, and the chief clerk found by his certificate, dated Feb. 21, 1888, that the persons entitled to the interest of Elizabeth in the Elwick Hall estate were the surviving children of the testator.

The Attorney-General took out a summons asking the court to strike out the certificate and that instead it might be stated that the Elwick Hall property had devolved to the Crown as an escheat, and that if necessary the Elwick Hall property might be sold under sections of the Intestates' Estates Act, 1884.

Ingle Joyce for the Crown.

Renshaw, Q.C., and *Borthwick* for the plaintiff.

J. G. Wood and *Vernon Smith* for the defendants.

KAY, J.—I have no doubt as to the meaning of the will. The testator in this case had a child before marriage; he always recognised her as his own child; there is no contest as to that. He made his will in the following terms: [His LORDSHIP then read the material parts of the will as set out above.] It was argued that, as Elizabeth Jane Jobson was illegitimate, the gift over did not apply to the property devised to her; that the gift over applied to the shares of legitimate children dying without having children, and not to the share of Elizabeth, who was illegitimate. It is clear that the testator meant Elizabeth to be included in the word children, and as a matter of construction no human being could doubt that it was the intention of the testator that the gift over of Elizabeth's share should take effect. But it is said that there is a rule of law which prevents my so construing this clause. It is true, there is a rule of law which, where there is a gift to children, prevents an illegitimate child taking concurrently with legitimate children in the absence of a special context rendering it absolutely necessary. But I never heard of that rule being applied to a gift over, and a forced and unnatural construction must be put on the words of the will to extend the rule to such a case. There is no authority to that effect, and I should want a very strong and precise authority, and one which I should feel bound to follow. I hold, therefore, that the contention of the Crown is wrong, and that on the death of Elizabeth Jane Jobson her share goes not to the Crown, but to the other children.

Order accordingly.

Solicitors: *Hare & Co.*, for the Treasury Solicitor; *Oldman & Clabburn*, for *J. W. Salmon, Diss*; *Harvey & Capron*; *Bell, Brodrick, & Gray*.

[Reported by FRANCIS E. ADY, ESQ., Barrister-at-Law.]

WILDING *v.* BEAN

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), November 3, 1890]

[Reported [1891] 1 Q.B. 100; 60 L.J.Q.B. 10; 64 L.T. 41;
39 W.R. 40]

Practice—Substituted service—Defendant out of jurisdiction—No intention to evade service.

There is no power to order substituted service of a writ for service within the jurisdiction when the defendant is out of the jurisdiction, except, perhaps, in cases where the defendant is proved to have gone out of the jurisdiction after the issuing of the writ for the purpose of evading service of it.

Fry v. Moore (1), ante p. 309, applied.

Notes. As to substituted service, see R.S.C., Ord. 9, r. 2; Ord. 10.

As to substituted service, see 30 HALSBURY'S LAWS (3rd Edn.) 321-323; and for cases see DIGEST (Practice) 331-334; 969-973.

Case referred to:

- (1) *Fry v. Moore* (1889), ante p. 309, 23 Q.B.D. 395; 58 L.J.Q.B. 382; 61 L.T. 545; 37 W.R. 565, C.A.; Digest (Practice) 332, 501.

Also referred to in argument:

Field v. Bennett (1886), 56 L.J.Q.B. 89; 3 T.L.R. 239; Digest (Practice) 330, 482.

Watt v. Barnett (1878), 3 Q.B.D. 363; 38 L.T. 903; 26 W.R. 745, C.A.; Digest (Practice) 392, 959.

Hope v. Hope (1854), 4 De G.M. & G. 328; 2 Eq.Rep. 1047; 23 L.J.Ch. 682; 23 L.T.O.S. 198; 2 W.R. 545; 43 E.R. 328, L.C.; Digest (Practice) 330, 487.

Re Urquhart, Ex parte Urquhart (1890), 24 Q.B.D. 723; 59 L.J.Q.B. 364; 38 W.R. 612; 7 Morr. 94, C.A.; Digest (Practice) 333, 511.

Re Slade, Slade v. Hulme (1881), 45 L.T. 276; 30 W.R. 28; Digest (Practice) 334, 515.

Appeal by the plaintiff from a decision of the Divisional Court (POLLOCK, B., and GRANTHAM, J.), setting aside an order for substituted service which had been made by the master and affirmed by DAY, J.

Reversionary interests in property, of which the defendant was tenant for life, had been mortgaged to one Moore, and by a covenant in the mortgage deed the defendant guaranteed the payment by the mortgagor to Moore of the interest upon the mortgage debt. Subsequently, Moore was adjudicated a bankrupt; and, when two years' arrears of interest on the mortgage were owing, the trustee in Moore's bankruptcy applied to the solicitor who had been acting for the defendant and to the trustees under the settlement of the mortgaged property for payment. The solicitor thereupon said that he would bring the matter to the notice of the defendant. On Aug. 14, 1889, a writ in the ordinary form for service within the jurisdiction was issued against the defendant. When the writ was issued, the plaintiff supposed that the defendant was in England; but she was in fact abroad, and had remained abroad ever since. The plaintiff attempted to serve this writ within the jurisdiction, but was unable to discover where the defendant was. The solicitor, who had been acting for the defendant, declined to accept service or to give the defendant's address. In July, 1890, the plaintiff applied for and obtained an order for substituted service upon the solicitor. An application was then made on behalf of the defendant to a master at chambers to set aside the order. Upon this application it was sworn that the defendant had left England on Aug. 8, 1889, and had not since returned, and was now residing permanently abroad. On the part of the plaintiff, it was sworn that the solicitor was in communication with

A the defendant. The master refused to set aside the order, and his decision was affirmed by DAY, J., at chambers. Upon an appeal to the Divisional Court, this decision was reversed, and the order for substituted service was set aside. The plaintiff appealed.

Henn Collins, Q.C., and R. M. Bray for the plaintiff.

B Morton Daniel for the defendant.

C **LORD ESHER, M.R.**—In this case the plaintiff, believing that he had a cause of action against the defendant, issued a writ for service within the jurisdiction. He tried to serve the writ, and failed. He then went to a solicitor who had been acting for the defendant, and who seems to be on that account called the defendant's solicitor, and asked him for the defendant's address. The solicitor said that he would not give it, and he was clearly not bound to do so. There was no duty on his part in the matter at all. Then an order for substituted service of the writ upon this solicitor is applied for and obtained. An application to set aside that order was refused by a judge in chambers; but, upon appeal to the Divisional Court, the order was set aside. The plaintiff now appeals against the order of the Divisional Court. When the writ was issued, the plaintiff supposed that the defendant was in England; but she was in fact abroad, and has remained abroad ever since.

D The question is whether, under those circumstances, an order for substituted service of this writ can be made. The law of England is that there is no power to execute this writ abroad. That is so both by the law of England and by the law of nations. Then, it was held in *Fry v. Moore* (1) that, if you cannot in law
E serve a writ personally, you cannot do so indirectly by obtaining an order for substituted service of that writ. The only writ that has been issued in the present case could not have been served on the defendant, whether the plaintiff knew where she was or not; because, although if the plaintiff had known where the defendant was this writ might have been served upon her in fact, it would have been no service in law. Therefore, it could not be served upon her by means of
F an order for substituted service. The English Parliament has authorised the courts to make rules laying down certain conditions under which leave may be obtained to issue a writ for service out of the jurisdiction. Whether such an enactment is in strict accordance with the comity of nations it is hard to say. An English court, however, has only to follow the English law; and, when Parliament has said that under certain conditions a writ may be issued for service
G abroad, it only remains for the court to determine whether the prescribed conditions have been shown to exist in the particular case. Where those conditions are shown to exist, and a writ for service out of the jurisdiction is allowed to issue, an order for substituted service of that writ might, in a proper case, be made. But, as the writ in this case could not have been served abroad, the judgment of the Divisional Court was right.

H Whether leave will be given in this case to issue a writ for service out of the jurisdiction is another and quite a distinct question. If an application for that purpose is made and it is found that the conditions precedent exist, leave will, no doubt, be granted. All that we decide is that the present writ cannot be served by means of substituted service so long as the defendant is out of the jurisdiction. The writ itself is perfectly regular, and the plaintiff is entitled, if he pleases, to
I keep it alive upon the chance of his eventually finding the defendant in this country, in which case he can serve it upon her, either personally, or, if that is not practicable, by obtaining an order for substituted service. There is a case in which substituted service of this writ might, perhaps, be allowed, although the defendant was out of the jurisdiction; that is, if the defendant left England for the purpose of evading service of the writ after it was issued.

LINDLEY, L.J.—I agree. I think, as the Divisional Court did, that this case is governed by the decision in *Fry v. Moore* (1).

LOPES, L.J.—If it had been proved in this case that the defendant left England for the purpose of evading service of the writ, it may be that that would have been sufficient to enable this order to be made. In the absence of such proof, I think that *Fry v. Moore* (1), to which I was a party, applies, and I see no reason for departing from that decision.

Appeal dismissed.

Solicitors: *G. B. Crooke; R. S. Gregson.*

[Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.]

R. v. HALLIDAY

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Mathew, Cave, Day and A. L. Smith, JJ.), December 14, 1889]

[Reported 61 L.T. 701; 54 J.P. 312; 38 W.R. 256; 6 T.L.R. 109]

Criminal Law—Grievous bodily harm—Immediate sense of danger in mind of pursuer caused by acts of pursuer—Threats amounting to threats against life—Pursued getting out of window and receiving injuries—Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 20.

Where a person creates in the mind of another person such an immediate sense of danger as causes such other person to endeavour to escape, the person who created such a state of mind is responsible for any injuries which may result from his acts to the person endeavouring to escape.

To escape from the violence of her husband, who had used threats amounting to threats against her life, a wife got out of a window and in so doing fell to the ground and broke her leg.

Held: as the acts of the husband had created such an immediate sense of danger in the mind of his wife as caused her to act as she did and to suffer injury as a consequence, he was liable to conviction of having wilfully and maliciously inflicted grievous bodily harm on her under s. 20 of the Offences Against the Person Act, 1861.

Notes. The jurisdiction of the Court of Crown Cases Reserved, as to criminal trials is now vested in the Court of Criminal Appeal by s. 20 (4) of the Criminal Appeal Act, 1907: see 5 HALSBURY'S STATUTES (2nd Edn.) 938.

As to acts involving bodily injury, see 10 HALSBURY'S LAWS (3rd Edn.) 704 et seq.; and for cases see 15 DIGEST (Repl.) 985 et seq. For s. 20 of the Offences against the Person Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 795.

Case referred to:

(1) *R. v. Martin* (1881), 8 Q.B.D. 54; 51 L.J.M.C. 36; 45 L.T. 444; 46 J.P. 228; 30 W.R. 106; 14 Cox, C.C. 633, C.C.R.; 15 Digest (Repl.) 999, 9841.

Also referred to in argument:

R. v. Evans (1812), 1 Russell on Crime, 10th Edn., 469; 15 Digest (Repl.) 936, 8975.

R. v. Hickman (1831), 5 C. & P. 151; 1 Nev. & M.M.C. 292; 15 Digest (Repl.) 936, 8976.

R. v. Pitts (1842), Car. & M. 284; 15 Digest (Repl.) 936, 8977.

Case Stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the court of quarter sessions of the County Palatine of Durham.

A At the Michaelmas Quarter Sessions, 1889, of the county of Durham, the prisoner James Halliday was tried on an indictment charging him with having on June 19, 1889, wilfully and maliciously inflicted grievous bodily harm on Mary Jane Halliday, and (in a second count) with having assaulted her, thereby occasioning her actual bodily harm. It was proved that Mary Ann Halliday was the prisoner's wife, that he had been frequently drunk during the twelve months preceding the day on which the offence was committed, that while drunk his language was very violent and abusive, that he had threatened her frequently, and that in consequence of his threats she had had to leave home and go to a neighbour's house about a week before June 19, 1889, but he had never actually used violence towards her. On June 19, 1889, in consequence of a request made to her by Margaret Ann Halliday (the daughter of prosecutrix and prisoner), the prosecutrix went home and found the prisoner very drunk; the son of the prisoner and prosecutrix was also there, and while he remained the prisoner was quiet, but the son left the house after a short interval and then the prisoner fastened the door and windows and said to prosecutrix, "Now you b—— I'll talk to you," also calling her bad names and ordering her and the daughter off to bed. The prosecutrix was in an inner room, and the prisoner shortly afterwards called out to her asking if she was in bed. The prosecutrix said she was not, whereupon the prisoner exclaimed, "I'll make you so that you can't go to bed," and while staggering towards the inner room he knocked himself against a closet in the outer room. The prosecutrix was afraid he would blame her for that, and ran to the window, took the hasp off it and opened it in order to get out, and had got one leg out when their daughter caught hold of her and held her. The prisoner by this time had got into the room where the prosecutrix was, and was within reach of her, and was calling out "Let the b—— go," whereupon the daughter left hold and the prosecutrix fell into the street and broke her leg. Both mother and daughter were very frightened. While the prosecutrix was lying on the flags beneath the prisoner jeered at her from the window, saying it served her right, and he made no attempt to help her. On these facts the jury was directed, that, if the prosecutrix's apprehension was well grounded, taking into account the circumstances in which she was placed, and if getting out of the window was an act such as under the circumstances a woman might reasonably be led to take, they should find the prisoner guilty. The jury returned a general verdict of guilty on the whole indictment, and the prisoner was sentenced to six months' imprisonment with hard labour and was now undergoing the sentence. The question for the court was whether or not the prisoner was rightly convicted.

G The prisoner was not represented by counsel.
J. L. Walton and Simey for the prosecution.

H LORD COLERIDGE, C.J.—I am of opinion that the conviction in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in *R. v. Martin* (1). There this court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage and rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here the woman came by her mischief by getting out of the window—I use a vague word on purpose—and in her fall broke her leg. That might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the Case, however, that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life saying, "I'll make you so that you can't go to bed;" that she rushing to the window got half out of the window when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell.

I It is suggested to me by my brother that, supposing the prisoner had struck his daughter's arm without hurting her but sufficiently to cause her to let go and she had let her mother fall, could anyone doubt but that that would be the same

thing as if he had pushed her out himself? If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman caused by the acts of the prisoner, and that her injuries resulted from what such sense of danger caused her to do. I am, therefore, of opinion that the prisoner was rightly convicted, and that this conviction must be affirmed.

MATHEW, J.—I am of the same opinion. The jury must be taken to have inferred that the act of escaping from the window and the act of the daughter were the consequences of the prisoner's acts; and I am of opinion that he is liable for the consequences of such acts.

CAYE, DAY, and SMITH, JJ., concurred.

Conviction affirmed.

Solicitors: *Newlands & Newland*, South Shields.

[*Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*]

PRATT v. INMAN

[CHANCERY DIVISION (Chitty, J.), December 4, 1889]

[Reported 43 Ch.D. 175; 59 L.J.Ch. 274; 61 L.T. 760;
38 W.R. 200; 6 T.L.R. 91]

Trustee—Defaulting trustee—Writ of sequestration issued by beneficiaries—Death of defaulter—Survival of sequestration against personal representative of defaulter and receiver appointed in administration action—No bankruptcy petition presented in lifetime of deceased—Goods seized, but not sold.

When a writ of sequestration is issued by beneficiaries against a defaulting trustee the death of the defaulter does not discharge the sequestration where it is issued to compel him to perform a duty (e.g., pay money into court) and the court will direct a sale of the personal property if the action is revived against the defaulter's legal representative, he being a necessary party to any proceedings, if only because he has a right to remove the sequestration by satisfying the demand.

Where under an order the sequestrators have seized, but not sold, the goods during the lifetime of the defaulter, on the death of the defaulter insolvent, if no petition in bankruptcy has been presented in his lifetime, the sequestration is good as against a receiver appointed in an action by creditors for the administration of the estate. Section 45 of the Bankruptcy Act, 1883, held not to be made generally applicable by s. 10 of the Supreme Court of Judicature Act, 1875, to Chancery administration actions, especially where the parties to the action are not that of debtor and creditor.

Notes. Section 45 of the Bankruptcy Act, 1883, has been replaced by s. 40 of the Bankruptcy Act, 1914: see 2 HALSBURY'S STATUTES (2nd Edn.) 376. Section 10 of the Supreme Court of Judicature Act, 1875 (2 HALSBURY'S STATUTES (2nd Edn.) 704) has been repealed, except as to deaths before 1926, and replaced by s. 34 of the Administration of Estates Act, 1925: see 2 HALSBURY'S STATUTES (2nd Edn.) 737.

Applied: *Re National United Investment Corp.*, [1901] 1 Ch. 950. Considered: *Coles v. Coles*, [1956] 3 All E.R. 542. Referred to: *Re Hastings, Ex parte Brown* (1892), 61 L.J.Q.B. 654; *Re Leng, Tarn v. Emmerson*, [1895-9] All E.R.Rep. 1210; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L.T. 342.

As to the effect of bankruptcy where a creditor has issued an execution, see 2 HALSBURY'S LAWS (3rd Edn.) 541; and for cases see 4 DIGEST (Repl.) 545 et seq. As to the issue of the writ of sequestration, see 16 HALSBURY'S LAWS (3rd Edn.) 68 et seq., and for cases see 21 DIGEST (Repl.) 691 et seq. For R.S.C., Ord. 43, r. 6, see ANNUAL PRACTICE (1963) 1061.

Cases referred to:

- (1) *Hyde v. Greenhill* (1746), 1 Dick. 106; 21 E.R. 208, L.C.; 21 Digest (Repl.) 701, 2030.
- (2) *Re Withernsea Brickworks* (1880), 16 Ch.D. 337; 50 L.J.Ch. 185; 43 L.T. 713; 29 W.R. 178, C.A.; 10 Digest (Repl.) 1018, 7007.
- (3) *Mersey Steel and Iron Co., Ltd. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 10 Digest (Repl.) 990, 6813.

Also referred to in argument:

- Ward v. Shakeshaft* (1860), 1 Drew. & Sm. 269; 2 L.T. 203; 8 W.R. 335; 62 E.R. 381; 21 Digest (Repl.) 754, 2396.
- Johnson v. Burgess* (1873), L.R. 15 Eq. 398; 42 L.J.Ch. 400; 28 L.T. 188; 21 W.R. 453, L.J.; 21 Digest (Repl.) 698, 1973.
- Tatham v. Parker* (1855), 1 Sm. & G. 506; 1 Eq. Rep. 257; 22 L.J.Ch. 903; 25 L.T.O.S. 22; 1 Jur.N.S. 992; 3 W.R. 347; 65 E.R. 221; 21 Digest (Repl.) 699, 2000.
- Rowley v. Ridley* (1784), 3 Swan. 306, n.; 2 Dick. 622; 36 E.R. 874, L.C.; 21 Digest (Repl.) 687, 1820.
- Burdett v. Rochley* (1682), 1 Vern. 58; 23 E.R. 308, L.C.; 21 Digest (Repl.) 701, 2023.
- Re Goldsmid, Ex parte Taylor* (1886), 18 Q.B.D. 295; 56 L.J.Q.B. 195; 35 W.R. 148; 3 T.L.R. 109, C.A.; 5 Digest (Repl.) 920, 7585.
- Re Weaver, Higgs v. Weaver* (1885), 29 Ch.D. 236; 54 L.J.Ch. 749; 52 L.T. 512; 33 W.R. 874; 4 Digest (Repl.) 543, 4743.
- Re Neville, Lee v. Nuttall* (1879), 12 Ch.D. 61; 48 L.J.Ch. 616; 41 L.T. 363; 27 W.R. 805, C.A.; 23 Digest (Repl.) 386, 4570.
- Walker v. Bell* (1816), 2 Madd. 21; 56 E.R. 243; 21 Digest (Repl.) 699, 1999.
- Re Wilkinson, Ex parte Stubbins* (1881), 17 Ch.D. 58; 50 L.J.Ch. 547; 44 L.T. 877; 29 W.R. 653, C.A.; 5 Digest (Repl.) 948, 7732.

Motion by the applicant, the heir-at-law and the legal personal representative of the intestate's estate, alleged to be insolvent, for an injunction in the terms of the writ in an action, in which he was one of the plaintiffs, the receiver of the personal estate and of the rents and profits of the real estate levy the other plaintiff, to restrain the defendants, sequestrators under a court order of June 27, 1889, from selling the household effects and furniture of the intestate. The motion was treated as the trial of the action.

By an order, dated May 6, 1889, of STIRLING, J., in an action of *Re Shephard, Shephard v. Shephard*, pending in the Chancery Division, brought by beneficiaries under a will against Mark Shephard as the surviving trustee of the will, it was ordered that Mark Shephard should, on or before May 20, 1889, or within seven days after service of the order, pay into court £2,000. Mark Shephard made default in payment into court of the £2,000, and on June 21, 1889, a writ of sequestration issued, under R.S.C., Ord. 43, r. 6, to Marshal Nisbet Inman and others, whereby they were empowered, authorised, and commanded to enter upon all the real estate of Mark Shephard, and to collect and sequester not only all the rents and profits of his real estate, but also all his goods, chattels, and personal estate whatsoever, and to detain and keep them under sequestration

until Mark Shephard should pay into court the £2,000 and clear his contempt. By an order, dated June 27, 1889, of STIRLING, J., in the action of *Re Shephard, Shephard v. Shephard*, it was ordered that M. N. Inman and others, as such sequestrators, or any three or two of them, were to be at liberty to sell by public auction or otherwise the furniture, goods, and household effects, and all other goods, chattels, effects, and personal estate being in and about the residence of Mark Shephard at Roupell Park, Streatham, in the county of Surrey. Mark Shephard died intestate on Aug. 17, 1889.

By the judgment, dated Sept. 25, 1889, made in an action of *Re Shephard, Atkins v. Shephard*, being a creditor's action for the administration of the real and personal estates of Mark Shephard, Herbert James Pratt (who had acted from Aug. 21, 1889, until the date of the judgment as interim receiver under orders of the court in the action) was continued as receiver of the personal estate, and of the rents and profits of the real estate of Mark Shephard, and the judgment directed the usual administration accounts and inquiries to be taken and made. H. J. Pratt, as such receiver, took possession of the house and premises at Roupell Park, and of the furniture and effects therein contained, on Aug. 22, 1889, and had ever since remained in possession thereof. On Sept. 17, 1889, letters of administration of the estate and effects of Mark Shephard were issued to Stewart Shephard, who was also the heir-at-law of Mark Shephard. By an order Sept. 21, 1889, made in the action of *Re Shephard, Shephard v. Shephard*, it was ordered that the further proceedings in that action should be carried on against Stewart Shephard. M. N. Inman and others, as sequestrators, neglected to sell the furniture and chattels referred to in the order of June 27, 1889, in the lifetime of Mark Shephard. It was alleged that they had so refrained from selling promptly under their order by arrangement with Mark Shephard, and on his paying them sums on account from time to time. After the judgment of Sept. 25, 1889, in the administration action of *Re Shephard, Atkins v. Shephard*, M. N. Inman and others, however, threatened to sell the furniture and chattels.

The estate of Mark Shephard was alleged to be insufficient for the payment of his debts; and that the value of the estate would be seriously depreciated if the furniture and effects, which were of great value, were sold separately from the house and premises at Roupell Park. Accordingly on Oct. 9, 1889, an action was commenced by H. J. Pratt and Stewart Shephard against the sequestrators M. N. Inman and others, claiming an injunction to restrain the defendants and their agents from selling or offering for sale by public auction or otherwise all or any of the furniture, goods, and household effects, and personal estate in or about the house and premises at Roupell Park. By an interim order dated Oct. 9, 1889, made in this action, the defendants were restrained from selling the furniture and chattels until after Nov. 1, 1889; but it was alleged that they threatened and intended, unless further restrained by the court, to proceed to sell the furniture and chattels immediately after Nov. 1, 1889.

Byrne, Q.C., and *L. T. Dibdin* for the applicant, H. J. Pratt.

Romer, Q.C., and *Clydesdale* for the defendants.

CHITTY, J.—This is a motion made by the legal personal representative of Mark Shephard for an injunction to restrain the defendants from selling certain chattels which were the property of Mark Shephard, who is dead. There are three actions. The first is an action that was brought against Mark Shephard in his lifetime by certain persons interested in a trust estate. The plaintiffs were the tenant for life and the remainderman; the sole defendant was Mark Shephard. He was charged with a breach of trust, and an order was made in that action for payment by him of £2,000 into court by a day which is long since past. He did not comply with that order; whereupon the plaintiffs issued a writ of sequestration, and the sequestrators under that writ seized the chattels in question. Subsequently, in that action, a further order was made giving the sequestrators liberty to sell the goods. There were some negotiations, and Mark Shephard died, and

no sale was effected. Since his death that suit has, by order, been continued against the present applicant, the legal personal representative.

In that state of things what is the law? Sequestration unquestionably was, and is, the process of contempt. Sequestration was issued to compel a man formerly to put in an answer and the like, and sequestration also went to compel (I am now using the words of LORD HARDWICKE in *Hyde v. Greenhill* (1)) a defendant to perform a duty such as the payment of money, and such of course as the payment of money into court. It was decided by LORD HARDWICKE in *Hyde v. Greenhill* (1) that the death of the defendant did not discharge the sequestration where the sequestration had been issued for the purpose of compelling him to perform a duty. Of course, if the sequestration was only to issue for the purpose of compelling him to put in an answer, and he was dead, the sequestration would have been discharged. LORD HARDWICKE said in *Hyde v. Greenhill* (1) (1 Dick. at p. 107) that

“a sequestration covered the personal estate, and the court would direct a sale for a duty.”

In that case the original defendant had died, and the suit had been revived against those who represented his real and personal estate. I leave out all about the real estate, as that is immaterial. His Lordship declined to discharge the sequestration as to the personal estate, because the sequestration was for a duty, and the suit had been duly revived. So that if this motion had been made, which it is not, in the first action—the one which I have just been describing—the court, acting on that authority (which is not the sole authority on the point—I am merely citing that as a conclusive authority) would not have discharged the sequestration. The court would, as LORD HARDWICKE did in *Hyde v. Greenhill* (1), after the death, in the presence of the persons who represented the personal estate, have ordered the sale. The result, therefore is, that any motion made in that action by the present new plaintiffs must have failed.

As I have already said, there are three actions. The second action is an action brought after Mark Shephard's death, for the administration of his estate, and an order has been made, an ordinary creditor's judgment has been pronounced for the administration of this estate. The third action is the action in which this motion is made, and it is simply brought against the sequestrators, not even making the plaintiffs in the first action parties. On what ground is the motion supported? First, it was argued by counsel for the applicant that, inasmuch as the order that I have mentioned in the first suit was an order for the payment of money into court, the plaintiffs are not creditors. That is immediately conceded by the defendant's counsel on the motion, and rightly. An order for the payment of money into court does not make a person a creditor. A person who has obtained an order for the payment of money into court cannot take bankruptcy proceedings upon it. That has been decided.

Counsel's argument is that, by virtue of s. 10 of the Supreme Court of Judicature Act, 1875, s. 45 of the Bankruptcy Act, 1883, is imported, that is to say, imported into the law of administration, because he says the estate (it is not proved, but I am assuming that it turns out to be so) of Mark Shephard is insolvent. The plaintiffs in the first suit have not come in to prove as creditors, and they are not, as I have already stated, by virtue of the order, creditors of the deceased, nor are they creditors in the ordinary sense of the term. They have among them a demand against this estate of an equitable character by reason of the breach of trust. Section 10 of the Supreme Court of Judicature Act, 1875, has not imported into the administration of an insolvent estate generally any of the provisions of the Bankruptcy Acts which were then in force or are in force at the present time; it has only imported them where the administration is by the court. The bankruptcy provisions are imported into the administration of a dead man's estate by the Bankruptcy Act, 1883, by a set of express provisions which apply to the case

of the administration of the estate being in bankruptcy, and the estate being, of course, insolvent.

Section 45, of the Bankruptcy Act, 1883, runs thus: "Where a creditor has issued execution," that is the commencement of the section. The counsel for the defendants on the motion argue that the first proposition on the part of the applicant's counsel has put him out of court, because the plaintiffs in the breach of trust suit are not creditors. That observation appears to me to be well founded. Then, supposing the word "creditor" ought to be taken in the larger sense to mean persons who have an equitable demand against the estate of a dead man, are the provisions of s. 45 of the Bankruptcy Act, 1883, imported into the winding-up by the court by virtue of s. 10 of the Supreme Court of Judicature Act, 1875? I am of opinion that that is not so, and I am of opinion further, that the provisions of s. 45 of the Bankruptcy Act, 1883, do not apply to the present circumstances. The section enacts:

"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor [there is no question here about the trustee in bankruptcy of the debtor] unless he has completed the execution or attachment before the date of the receiving order [there is no receiving order here] and before notice of the presentation of any bankruptcy petition [there is no bankruptcy petition here filed] by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Of course there was none in this case.

This is the argument for the applicant: It is said that s. 45 of the Bankruptcy Act, 1883, is imported in order to accomplish his object, which is the bringing in of the second part or sub-section of s. 45, which runs thus:

"For the purposes of this Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

The important words there are,

"For the purposes of this Act an execution against goods is completed by seizure and sale."

Consequently the applicant refers to the seizure of the goods which were not sold under the order giving the sequestrators liberty to sell, and say that the execution falls within this second sub-section. I will adopt for this purpose the principle which JAMES, L.J., acted upon in *Re Withernsea Brickworks* (2). Whether any expression there ought to be modified or ought not to be modified by reason of what LORD SELBORNE said in the more recent case in the House of Lords of *Mersey Steel and Iron Co., Ltd. v. Naylor, Benzon & Co.* (3), I need not stay to consider. JAMES, L.J., declined, in *Re Withernsea Brickworks* (2), to import into an administration of a dead man's insolvent estate in the Chancery Division the provisions of the Act which deprive execution creditors of the fruits of the execution where the sheriff has notice of bankruptcy within fourteen days after sale.

I think that the principle on which JAMES, L.J., acted applies entirely to the case now before me. The result therefore is, that s. 45 of the Bankruptcy Act, 1883, is not imported, and sub-s. (2) of it is not imported (I state that as a general proposition), and it certainly is not imported in the circumstances of this case. The object of the motion is to obtain, as against the sequestrators, in substance an order that they should give up the goods. There is no ground that I can see

A for asking for such an order. Therefore, I refuse the motion, and I must refuse it with costs. The parties having agreed to treat this motion as the trial of the action, I also dismiss the action with costs.

Motion dismissed and Judgment for the defendants in the action.

Solicitors: *R. J. Witty; Coode, Kingdon & Cotton, for E. F. Chamier, Stratton.*

[*Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.*]

BOND v. EVANS

[QUEEN'S BENCH DIVISION (Manisty and Stephen, JJ.), June 11, 12, 1888]

[Reported 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411;
52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461]

Licensing—Offence—Gaming on licensed premises—Absolute prohibition—No knowledge by licensee—Knowledge by servant—Responsibility of licensee—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 17.

The appellant was convicted under s. 17 of the Licensing Act, 1872, as a licensed person, for allowing gaming to be carried on on his premises, an inn and alehouse, to which was attached a skittle alley communicating with the rest of the premises. The appellant employed a servant to manage the skittle alley and attend on persons frequenting it, and had given him general directions not to permit gambling in the skittle alley. On one occasion two constables went to the skittle alley and found inside it men playing cards for money, the appellant's servant being then in charge of the skittle alley and aware that the men were playing cards. It was admitted that the appellant was not present and had no actual knowledge of the card playing, and that his servant had never communicated with him on the subject.

Held: the prohibition in s. 17 against permitting or suffering gaming on licensed premises was an absolute prohibition; the fact that the appellant did not know of the existence of gaming on his premises did not relieve him of responsibility; and he was liable to conviction under s. 17.

Notes. Section 17 of the Licensing Act, 1872, has been replaced by s. 141 (1) of the Licensing Act, 1953: see 33 HALSBURY'S STATUTES (2nd Edn.) 269. Reference to any gaming or unlawful games is to be construed in accordance with the Betting and Gaming Act, 1960, by s. 26 (1): see 40 HALSBURY'S STATUTES (2nd Edn.) 357. Where a person is convicted of an offence under s. 141 of the Act of 1953 a disqualification order relating to certain descriptions of licences may be made under s. 3 (10) (c) of the Licensing Act, 1961: see 41 HALSBURY'S STATUTES (2nd Edn.) 566.

Considered: *Smith v. Slade* (1900), 64 J.P. 712. Referred to: *Chisholm v. Doulton* (1889), 58 L.J.M.C. 133; *Massey v. Morris* (1894), 63 L.J.M.C. 185; *Somerset v. Wade*, [1891-4] All E.R.Rep. 1228; *Coppen v. Moore* (No. 2), [1895-9] All E.R.Rep. 926; *Emery v. Nolloth*, [1900-3] All E.R.Rep. 606; *Boyle v. Smith*, [1906] 1 K.B. 432; *Buxton v. Scott* (1909), 100 L.T. 390; *Allen v. Whitehead* (1929), 45 T.L.R. 655.

As to where master criminally liable where he has knowledge, see 10 HALSBURY'S LAWS (3rd Edn.) 278; and for cases see 14 DIGEST (Repl.) 47 et seq. As to gaming in licensed houses, see 18 HALSBURY'S LAWS (3rd Edn.) 193; and for cases see 25 DIGEST (Repl.) 459 et seq. As to gaming in licensed premises unknown to licensee and evidence, see 22 HALSBURY'S LAWS (3rd Edn.) 686; and for cases see 14 DIGEST (Repl.) 50.

Cases referred to:

- (1) *Somerset v. Hart* (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 32 W.R. 594, D.C.; 14 Digest (Repl.) 46, 136.
- (2) *Bosley v. Davies* (1875), 1 Q.B.D. 84; 45 L.J.M.C. 27; 33 L.T. 528; 40 J.P. 550; 24 W.R. 140; 14 Digest (Repl.) 38, 87.
- (3) *Redgate v. Haynes* (1876), 1 Q.B.D. 89; 45 L.J.M.C. 65; 33 L.T. 779; 41 J.P. 86, D.C.; 14 Digest (Repl.) 49, 162.
- (4) *Newman v. Jones* (1886), 17 Q.B.D. 132; 55 L.J.M.C. 113; 55 L.T. 327; 50 J.P. 373; sub nom. *Newman v. Leach*, 2 T.L.R. 600, D.C.; 14 Digest (Repl.) 45, 130.
- (5) *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 14 Digest (Repl.) 38, 88.
- (6) *Mullins v. Collins* (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 207; 14 Digest (Repl.) 49, 161.

Case Stated by the stipendiary magistrate for the Staffordshire potteries district.

At a court of summary jurisdiction held at Longton, before the magistrate, on Mar. 14, 1888, Thomas Bond (hereinafter called the appellant) was charged on the information and complaint of Joseph Evans, the superintendent of police (hereinafter called the respondent) for that he, being a licensed person, did suffer gaming to be carried on, on his premises at Longton, known by the sign of the George and Dragon Inn, on Feb. 23, 1888. From the evidence which was given before the magistrate at the hearing of the information and complaint he found the following facts. The appellant's premises consisted of an inn, alehouse, and victualling-house, to which there was a skittle alley communicating by doors and passages with the rest of the premises. The appellant had employed George Owen to manage the skittle alley, and to attend upon the persons frequenting it, and he had received from the appellant general directions not to permit gambling on the skittle alley. On Feb. 23, 1888, two police constables visited the skittle alley of the George and Dragon, and upon going inside found some men playing cards for money. At this time George Owen was present in charge of the skittle alley, and cognisant of the acts of the men who were playing cards. It is admitted that the appellant was not present and had no actual knowledge of the card playing, and George Owen never communicated with him on the subject.

The appellant contended that, inasmuch as he had no personal knowledge whatever of the gaming taking place, and had in no way connived at it, and his servant George Owen had suffered it to take place contrary to his duty and his express orders, the appellant could not be convicted, and in support of this contention *Somerset v. Hart* (1) was cited. The magistrate, however, was of opinion that, notwithstanding the decision of the judge in *Somerset v. Hart* (1), the appellant Bond ought to be convicted, because he was satisfied that George Owen, who had been placed in charge of the skittle alley, was present and well aware of what was going on, and permitted the gaming to take place, and that such holding was in conformity with the decisions of the judges in *Bosley v. Davies* (2) and *Redgate v. Haynes* (3), which he felt bound to follow.

By s. 17 of the Licensing Act, 1872:

"If any licensed person (1) suffer any gaming or any unlawful game to be carried on on his premises . . . he shall be liable to a penalty not exceeding for the first offence £10, and not exceeding for the second and any subsequent offence £20."

J. P. Grain for the appellant.

Greene, Q.C., and *A. T. Lawrence* for the respondent.

Cur. adv. vult.

June 12, 1888. The following judgments were read.

MANISTY, J.—The appellant in this case was convicted under the Licensing Act, 1872, s. 17, for suffering gaming to be carried on on his premises. The magis-

A trate before whom he was charged has found the facts to be that gambling took place in the skittle alley which was attached to the appellant's public-house, and that it took place with the knowledge of the appellant's servant, who was in charge of the skittle alley, but without the knowledge of the appellant. In this state of circumstances it was contended before the magistrate, on the authority of *Somerset v. Hart* (1), that there ought not to be a conviction, and on the argument before us the same decision, and that of *Newman v. Jones* (4), were relied on for the appellant.

B Section 17 of the Licensing Act, 1872, under which the appellant was convicted, is one of a group of sections headed "Offences against public order," and passed for the prevention of such offences. It is important to consider the language of these sections. By s. 13:

C "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person,"

D he is made liable to a penalty. A question arose on that section in 1884, in *Cundy v. Le Cocq* (5), which I will consider before I deal with the other cases, because it is a decision on the earlier section. The judgment there has an important bearing on the present case because of the reasons given by STEPHEN, J. He said (13 Q.B.D. at pp. 209, 210):

E "I am of opinion that the words of the section [s. 13] amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bona fide mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head, 'Offences against public order.' Some of these contain the word 'knowingly,' as for instance s. 14, which deals with keeping a disorderly house; and s. 16, which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was, that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober."

G In my opinion the principle of that decision is applicable to the present case, for I think it was intended by s. 17 of the Licensing Act, 1872, absolutely to prohibit gaming on licensed premises, and that the substantial effect is that the responsibility is thrown upon any person who keeps a licensed house to take proper precautions to prevent all gaming on his premises. The only difference between s. 13 and s. 17 is, that in s. 13 the word "permits" is used, while in s. 17 the word is "suffers"; but the word "knowingly" is left out in both sections. In s. 13 the expression used is simply "permits"; in s. 14 it is "knowingly permits"; in s. 15 it is "permitting" only; in s. 16 (1) it is "knowingly harbours or knowingly suffers to remain"; and in s. 17 it is merely "suffers," omitting the word "knowingly." I It should also be observed that the word "knowingly" occurred in the repealed statute (Alehouse Act, 1828, Sched. C), but is omitted from s. 17 of the Act of 1872, which is substituted for that enactment.

Bosley v. Davies (2) was a decision upon s. 17, and involved a consideration of the question whether proof of knowledge on the part of the innkeeper was necessary to support a conviction. It is very important to consider the language which was used in dealing with that question. In the course of the argument, COCKBURN, C.J., made this observation (1 Q.B.D. at p. 87):

"A man may be said to 'suffer' a thing to be done if it is done through his negligence."

The decision was that (*ibid.* at p. 88):

"The case must be sent back to the justices, with an intimation of the opinion of the court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on—constructive knowledge will supply the place of actual knowledge."

That decision was followed by *Redgate v. Haynes* (3), where the conviction was upheld although no knowledge on the part of the appellant that gaming took place was proved. The judgments there are directly in point with regard to the present case. BLACKBURN, J., said (1 Q.B.D. at p. 94):

"I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not 'suffering' the gaming to be carried on, and if the justices were of a different opinion they were wrong. But I think, if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those she leaves in charge of the house, and if those persons connive at the gaming she is responsible."

LUSH, J., also said (*ibid.* at p. 96):

"I agree that it is not necessary that actual knowledge of the gaming should be proved. Section 17 says that the owner of licensed premises who 'suffers' gaming shall be liable to a penalty, and I think that connivance on the part of the landlady or the person in charge would be quite sufficient."

It seems to me that those two cases, added to *Cundy v. Le Cocq* (5), to which I have already referred, constitute a series of authorities against the appellants' contention on which we ought to act; and besides this, if there were no authority on the question, I should entertain no doubt as to the object of the statute. It remains to consider the cases which were relied on for the appellant. In *Somerset v. Hart* (1) the justices refused to convict, and it was held that they were right, on the ground that there was no evidence to show any connivance or wilful blindness on the part of the landlord, and it did not appear that the servant was in charge of the premises. In the present case it is distinctly found as a fact that the appellant's servant was in charge of the skittle alley where the gaming took place. In delivering judgment in *Somerset v. Hart* (1), LORD COLERIDGE, C.J., said (12 Q.B.D. at p. 362):

"The only case cited for the appellant which raises any difficulty in my mind is that of *Mullins v. Collins* (6), where, however, I observe the late ARCHBOLD, J., says that he does not intend in any way to interfere with the maxim that before a person can be criminally convicted he must be shown to have a mens rea. But the true effect of that case may, I think, be summed-up by saying that there the judgment was in affirmance of a conviction."

This last observation applies to the present case. Further on the Chief Justice says (*ibid.* at p. 363):

"It may be observed, further, that the liquor was served by a woman, as to whom there was, it would appear, some doubt whether she was not the appellant's wife, and, if the magistrates thought she was his wife, and entrusted by him with the management of the house, the case would be brought within the principle of the other cases that have been cited."

That is equivalent to saying that if the appellant's wife was engaged in the management of the business the case would come within the decisions in which convictions had been upheld. The Chief Justice goes on to say (*ibid.* at p. 364):

A "No doubt the other cases that were cited give me no difficulty, for, as it appears to me, in all of them the judges expressly say that there must be something from which connivance on the part of the licensed victualler may be inferred—at all events to necessitate a conviction. It is nowhere held in those cases that he can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and there is no connivance on his part."

B The Chief Justice certainly appears to have thought that the connivance of the landlord himself must be inferred in order to justify a conviction; but that is not so, for the other decisions to which I have referred show that the connivance of the servant in charge of the premises is sufficient. I cannot reconcile the statements contained in this passage with the other decisions. *Newman v. Jones* (4) was a decision on other statutes. Moreover, it appears from the judgment in that case that the court quashed the conviction of the appellants, which had proceeded on the ground that "they were legal owners of the property of the club and members of the committee"; but if the decision was that the appellants were not liable as members of the committee, that was not the question submitted to the court, for the only question submitted by the case was, whether "the appellants as trustees of the club were liable." In that case also neither *Bosley v. Davies* (2) nor *Redgate v. Haynes* (3) were adverted to. If *Somerset v. Hart* (1) and *Newman v. Jones* (4) militate against the other decisions to which I have referred, I prefer to adhere to the others. For these reasons I am of opinion that the conviction in the present case was right, and ought to be affirmed.

E **STEPHEN, J.**—I am of the same opinion, and I only wish to add a few observations on the cases which have been referred to. The first case in point of time is *Mullins v. Collins* (6), decided in 1874. That was a charge, under s. 16 of the Licensing Act, 1872, of supplying liquor to a constable on duty, and it was held that the publican was liable to be convicted, although the liquor was sold by his servant without his knowledge. There the servant sold the liquor in the ordinary course of business, taking his chance whether the constable was on duty or not, and did not ask, and the conviction was upheld on the ground that the wilful ignorance of the servant made his master responsible.

F In *Bosley v. Davies* (2) there was very unsatisfactory proof that anyone knew that gaming was going on, and the case was accordingly remitted to the justices. I think this and all the other cases show that the prohibition is not quite absolute, but is subject to this limitation, that, in order to justify a conviction, someone must know of or connive at the gaming. In *Redgate v. Haynes* (3) the justices thought that the landlady had been wilfully blind to what was happening, and that the hall porter had acted in the same way, but it was held by the court that the connivance of the hall porter, in whose charge the hotel was left, was sufficient to support the conviction. These two cases show that the connivance of the servant in charge of the premises is sufficient. In *Somerset v. Hart* (1) the facts were somewhat peculiar. That case, unlike the others which have been referred to, was a case where there had been an acquittal by the justices, and, moreover, the servant who knew of the gaming was only a potman, and was not in charge of the premises, and there had been no delegation of authority to him. This is how I understand *Somerset v. Hart* (1), and, so understood, it does not seem to me to be in conflict with the other decisions.

I **LORD COLERIDGE, C.J.**, there distinguishes *Mullins v. Collins* (6), where the servant either knew that the constable was on duty or was wilfully blind to that fact. In *Somerset v. Hart* (1) the landlord knew nothing, and the potman only knew of the gaming as a fact, but did not come to know it as a part of his business. In *Cundy v. Le Cocq* (5), decided on s. 13 of the Licensing Act, 1872, I said that the prohibition against serving a drunken person imposed by that section was absolute. That case, no doubt, has a bearing on the present case, but I do not attach so much importance to it as MANISTY, J., does. In *Newman v. Jones* (4) there is a

mistake in the judgment, because *Cundy v. Le Cocq* (5) is there spoken of as the case of a charge under s. 16 of selling liquor to a constable on duty, whereas the charge was under s. 13 for selling liquor to a drunken person. The error, however, is not one of any considerable importance.

Newman v. Jones (4) is the only decision which made me hesitate at all in the present case, because at first it seemed to me to have been held that there could not be a conviction because the steward had acted contrary to the orders of the appellants. But the trustees of a club are on a different footing from a licensed victualler, who is the proprietor of a house, and the holder of a licence. For these reasons, I think that *Newman v. Jones* (4) stands on its own circumstances, and is distinguishable from the present case. In the present case I follow *Bosley v. Davies* (2) and *Redgate v. Haynes* (3), and, without differing from the decision in *Somerset v. Hart* (1), I have come to the conclusion that the conviction was right, and ought to be affirmed. I can see no distinction between the word "permits," which is used in some of the other sections, and the word "suffers," which occurs in s. 17. On general grounds, I should entertain no doubt as to the intention of the statute. I think the meaning is, that the landlord of licensed premises must prevent that which the Act prohibits from being done on his premises; and if he does not prevent it, so much the worse for him. I wish to repeat, with regard to s. 17, what I said in *Cundy v. Le Cocq* (5) with regard to s. 13, that the statute imposes a prohibition.

Conviction affirmed.

Solicitors: *H. Tyrrell for Tennant, Paine & Jones, Hanley; J. White & Sons for Hand, Blackiston, Everett & Hand, Hanley.*

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

COLSON v. WILLIAMS & CO.

[CHANCERY DIVISION (Kekewich, J.), January 31, February 1, 2, 4, 1889]

[Reported 58 L.J.Ch. 539; 61 L.T. 71]

Mortgage—Sale—Power of sale by mortgagee—Mortgagee not trustee for mortgagor—Court not concerned with motive for exercise—Obligation of mortgagee to take reasonable care and prudence to obtain fair price.

A mortgagee is not a trustee of his power of sale for the mortgagor and the court is not concerned with the mortgagee's motive for its exercise, even though he be actuated by spite. The mortgagee cannot, however, offer the property to a purchaser merely for an amount to cover his principal, interest, and costs independently of the value of the property. The court will not wish narrowly to scrutinise the acts of the mortgagee so long as there is no legal fraud and so long as he does that which can reasonably be done to realise a fair price; nor will the court inquire, in a sale by public auction, whether it might have been more liberally advertised, or in a sale by private contract, whether sufficient time was granted for other purchasers to come in. In each case the court will consider whether the mortgagee exercised reasonable care and prudence and that conduct which goes to make a fair sale.

Notes. As to mortgagee not being in a fiduciary position regarding the exercise of the power of sale, see 27 HALSBURY'S LAWS (3rd Edn.) 302; and for cases see 35 DIGEST 502 et seq.

Cases referred to :

- (1) *Robertson v. Norris* (1857), 1 Giff. 421; 30 L.T.O.S. 253; 4 Jur.N.S. 155; 65 E.R. 983; affirmed (1858), 4 Jur.N.S. 443, L.C.; 35 Digest 502, 2332.
- (2) *Martinson v. Clowes* (1882), 21 Ch.D. 857; 51 L.J.Ch. 594; 46 L.T. 882; 30 W.R. 795; on appeal (1885), 52 L.T. 706, C.A.; 35 Digest 500, 2303.
- (3) *Warner v. Jacob* (1882), 20 Ch.D. 220; 51 L.J.Ch. 642; 46 L.T. 656; 46 J.P. 436; 30 W.R. 731; 35 Digest 507, 2381.
- (4) *Nash v. Eads* (1880), 25 Sol. Jo. 95, C.A.; 35 Digest 503, 2334.
- (5) *Farrar v. Farrars, Ltd.* (1888), 40 Ch.D. 395; 58 L.J.Ch. 185; 60 L.T. 121; 37 W.R. 196; 5 T.L.R. 164, C.A.; 35 Digest 492, 2229.
- (6) *Davey v. Durant, Smith v. Durrant* (1857), 1 De G. & J. 535; 26 L.J.Ch. 830; 6 W.R. 405; 44 E.R. 830, L.J.J.; 35 Digest 490, 2216.

Action by the plaintiff, the mortgagor, against the defendants, the mortgagees, claiming a declaration that the sale by the defendants of the mortgaged premises under their power of sale for £8,500 was a fraud upon the plaintiff, and that in taking the accounts the defendants might be charged with the sum of £11,000, or such other sum as it might appear that the premises would have realised on a fair and proper sale thereof.

The action came on for trial with witnesses, but the case is reported merely for the general principles of law enunciated by the judge, the special facts of the case are not particularised fully.

The defendants, Messrs. Williams & Co., were bankers, who, by deed dated July 14, 1882, had taken a transfer of a mortgage in fee by the plaintiff for securing £9,500 and interest at 4 per cent. On the transfer to the defendants the principal sum was increased to the sum of £10,000 with interest at 5 per cent. In June, 1886, the defendants, in exercise of their power of sale, put up the premises for sale by auction, but the estate was not then sold. On or about Sept. 29, 1886, the defendants conveyed the premises in pursuance of a private contract to Mr. Radclyffe for £8,500. The plaintiff alleged that before the contract for the sale to Mr. Radclyffe the defendants well knew that £9,500 or more could readily be obtained for the property, and that before the completion of the sale to Mr. Radclyffe a contract with the plaintiff had been signed to purchase the property for £9,000, and to take the corn, hay, straw, and effects on the farms at a valuation, subject to the contract with Mr. Radclyffe being cancelled. The plaintiff alleged also that the plaintiff's chattel effects had been sold by the defendants in a reckless and improvident manner and claimed an account in respect of these sales.

Warmington, Q.C., and *Daunev* for the plaintiff.

Finlay, Q.C., and *Crawley* for the defendants.

KEKEWICH, J.—It is strange that there is so little authority on the question what is the proper limit of discretion of a mortgagee in the exercise of his power of sale. If the judgment of *STUART, V.-C.*, in *Robertson v. Norris* (1), which purported merely to express what he understood to be laid down by *LORD ELDON*, had stood, and it could have been accepted that the law of the court was that the mortgagee is a trustee of a power of sale for the mortgagor, there would have been comparatively little difficulty. It would have been necessary of course to work out that proposition in detail, and in doing so one might have encountered some questions more or less difficult of solution, but the principle would have been sufficiently simple and clear. But that is not now the law: that has been corrected by more judges than one. It has been corrected by *NORTH, J.*, in *Martinson v. Clowes* (2); it has been corrected in *Warner v. Jacob* (3); and last of all it has been corrected by the Court of Appeal in *Nash v. Eads* (4). Those authorities say in unmistakable terms, and I may venture to add that I have no doubt they say correctly, that the proposition which it seems *STUART, V.-C.*, incorrectly deduced from *LORD ELDON*'s judgment is not law.

A mortgagee is not a trustee of his power of sale for the mortgagor; but that mere negative proposition gives one little information or assistance; one requires to

go further. In the first place, it is well to remember that what we call a power of sale is not strictly a power in the legal sense of the word; it is a fetter or limit rather of the exercise of the legal ownership vested in the mortgagee. Of course powers of sale are to be found in mortgages which do not deal with the legal estate: powers of sale are to be found in second and other puisne mortgages; but still the forms are copied from the ordinary mortgage in fee where the legal estate passes; and if a mortgage is regarded, as of course it cannot be, as a conveyance of the legal estate without any fetter or limit of ownership, the mortgagee would require no power of sale at all; he would sell, as when he exercises his power of sale he does sell, viz., by virtue of his legal ownership. He does not appoint under the Statute of Uses, 1535 (27 Hen. 8, c. 10), he simply conveys that which is vested in him by the conveyance to him by the mortgage, and the power of sale is inserted in the mortgage deed in order that the mortgagee, notwithstanding the proviso for redemption, and notwithstanding the conditional character of the conveyance which equity has from time immemorial imposed on the transaction, may use the property which is given to him as a security, and realise it so as to obtain payment of what is due.

It is given to him in the first instance by way of security, it is for his benefit and not for the benefit of the mortgagor. There are terms introduced into the common form of power of sale, such as I understand we have in this case, which are for the benefit of the mortgagor, viz., as to giving notice; as that the sale shall not take place unless the interest is in arrear, and so forth; and special features are sometimes introduced or are dispensed with where the circumstances make that reasonable. Then, that being the origin of the power of sale, the very reason which makes it necessary also gives the reason why it should be exercised subject to certain restrictions: it is introduced because without it the mortgagee would find great, nay insuperable, difficulty in disposing of an estate mortgaged to him. There is a proviso for redemption; there is the conditional character of the contract which makes some such provision necessary; and in the exercise of his power of sale a mortgagee is bound to remember that there is that proviso for redemption, that the conveyance to him is of that conditional character that although he holds the land as his security there is behind the equity of redemption, which, if the property is a good security, is or may be for all practical purposes the ownership of the estate.

In equity we have always been accustomed to deal with that equity of redemption as if it were the legal estate, and to allow the owner of it to deal with it just as if he were really the owner, subject only, of course, to the mortgage. To my mind, to keep those two points clearly in view is to find the solution of the question which I have to consider. Where a mortgagee under ordinary circumstances thinks it necessary; and as long as he is not prohibited by the terms of his contract he is the sole judge whether it is necessary—when he thinks it necessary to realise his security he can do so without hesitation. If there is a notice to be given he must give it; if some conditions are to be observed they must be observed, but as regards the time when he shall realise his security he is the sole arbitrator; no one can interfere with him; he may even do it from a bad motive, as was pointed out by SIR GEORGE JESSEL, M.R., in *Nash v. Eads* (4). The court has nothing to do with the motives of a mortgagee. If he, from whatever motive, deems it right to realise his security, although he may be guilty of spite, although he might even look forward with complacency or satisfaction to the ruin of his debtor, still, if he chooses to exercise his power, he can do so; but whether he acts from good or from bad motive, whether he acts merely as a man of business desiring to realise his security, or whether he acts from some other reason or any of the reasons which may influence the human mind, he is equally bound to remember that there is this equity of redemption behind him, and that being so, he cannot do that which otherwise would be possible, and, in many circumstances and in many cases, easy.

A mortgagee being owed a certain sum on security of land, cannot offer it to a purchaser merely for that which would cover his principal, interest, and costs, in-

dependently of the value of the property. If there is a margin which can be reasonably obtained, he must remember that there is the mortgagor, or possibly a second mortgagee, claiming through him, or possibly other persons having charges who are entitled to be considered. But so long as he exercises the power fairly, with that in view, so long as there is no fraud in a legal aspect of the case, so long as he does that which he fairly can to realise a fair price, he is, in my judgment, entirely free, nor do I think the court would under any circumstances wish narrowly to scrutinise the acts of the mortgagee. The court would not, I apprehend, inquire whether the sale by auction might have been more or less liberally advertised. The court would not, I think, in the case of sale by private contract narrowly scrutinise whether a sufficient time had been granted to other possible purchasers, or whether the property had been valued with that care which might be exercised by a man desirous in his own interest to realise the utmost penny. In each case one must consider whether, having regard to all the circumstances, there was reasonable care, reasonable prudence, all that conduct which goes to make a fair sale as between man and man. That is, as I understand, the result of *Warner v. Jacob* (3) and the other cases, including what was read by counsel for the defendants from the judgment of LINDLEY, L.J., in *Farrar v. Farrars, Ltd.* (5), which no doubt is open to the observation that it was not necessary for the purpose of that particular case, and therefore cannot be accepted as pointing to the particular question which I have before me.

In searching for authorities, I turned to one case which I hoped might be of assistance, *Davey v. Durant* (6). It contains a judgment of TURNER, L.J., as well as one of KNIGHT BRUCE, L.J., and it occurred to me that it was at least worth while to see what TURNER, L.J., said on such a subject; but unfortunately for my consideration of this case, *Davey v. Durant* (6) is of little assistance. TURNER, L.J., was considering a case where it was asked to set aside the purchase as against the purchaser, and all he dealt with was the possibility of a fraudulent undervaluing, which he said was sufficient to set aside such a purchase. Having got this principle which I have endeavoured to explain before me, I must look at the circumstances of this case. [HIS LORDSHIP then went at great length into the facts of the case before him, and continued]: In my opinion, the defendants have not exceeded the limits placed on their discretion by a power of sale in the mortgage deed. That is the whole groundwork of the greater part of the case against them, and that having failed, of course I must give judgment for them on that part of the case.

Judgment for defendants.

Solicitors: *Collisson, Prichard & Greene; Godden, Holme & Co.*

[*Reported by F. GOULD, Esq., Barrister-at-Law.*]

Re COMBINED WEIGHING AND ADVERTISING MACHINE CO.

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), October 28, 1889]

[Reported 43 Ch.D. 99; 59 L.J.Ch. 26; 61 L.T. 582; 38 W.R. 67;
6 T.L.R. 7; 1 Meg. 393]

Company—Winding-up—"Creditor"—Garnishor—Garnishee order against company—Right of garnishor to present winding-up petition—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 82.

A person who had obtained a garnishee order on a company **held** not to be a creditor of the company within s. 82 of the Companies Act, 1862, and, therefore, not entitled to present a petition for the winding-up of the company in the event of their not paying to him the sum dealt with by the garnishee order.

Notes. Section 82 of the Companies Act, 1862, has been replaced by s. 224 of the Companies Act, 1948: see 3 HALSBURY'S STATUTES (2nd Edn.) 642.

Considered: *Pritchett v. English and Colonial Syndicate*, [1899] 2 Q.B. 428. Applied: *Re Montgomery Moore Ship Collision Doors Syndicate* (1903), 72 L.J.Ch. 624; *Norton v. Yates*, [1906] 1 K.B. 112; *Cairney v. Back*, [1906] 2 K.B. 746. Referred to: *Re Greenwood, Sutcliffe v. Gledhill*, [1900-3] All E.R.Rep. 97; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Geisse v. Taylor*, [1905] 2 K.B. 658; *Sinnott v. Bowden*, [1911-13] All E.R.Rep. 752; *Re Steel Wing Co., Ltd.*, [1920] All E.R.Rep. 292.

As to effect of attachment of debts of a company, and as to who may not petition for a company to be wound-up, respectively, see 6 HALSBURY'S LAWS (3rd Edn.) 474, 537; and for cases see 10 DIGEST (Repl.) 873 et seq. As to service of garnishee order and effect of the order, see 16 HALSBURY'S LAWS (3rd Edn.) 86, 90; and for cases see 21 DIGEST (Repl.) 741 et seq. For R.S.C., Ord. 45, r. 2, see ANNUAL PRACTICE (1963) 1102.

Case referred to:

(1) *Chatterton v. Watney* (1881), 17 Ch.D. 259; 50 L.J.Ch. 535; 44 L.T. 391; 29 W.R. 573, C.A.; 21 Digest (Repl.) 720, 2201.

Also referred to in argument:

Re Pen-y-Van Colliery Co. (1877), 6 Ch.D. 477; 46 L.J.Ch. 390; 10 Digest (Repl.) 874, 5766.

Butler v. Wearing (1885), 17 Q.B.D. 182; 3 Morr. 5; 5 Digest (Repl.) 878, 7342.

Wood v. Dunn (1866), L.R. 2 Q.B. 73; 7 B. & S. 94; 36 L.J.Q.B. 27; 15 L.T. 411; 15 W.R. 180, Ex. Ch.; 5 Digest (Repl.) 870, 7303.

Re European Banking Co., Ex parte Baylis (1866), L.R. 2 Eq. 521; 35 L.J.Ch. 690; 15 L.T. 310; 12 Jur.N.S. 615; 10 Digest (Repl.) 898, 6070.

Appeal by the petitioner, who claimed to be a creditor of the company within s. 82 of the Companies Act, 1862, from a decision of NORTH, J., on a petition to wind-up the company.

The petitioner had recovered judgment against Wright, to whom £38 was due by the company. The petitioner then obtained a garnishee order absolute, directing the company to pay the £38 to him, and that in default thereof execution might issue for the same. The petitioner not being paid by the company, issued execution against it under the garnishee order, and the sheriff made a return of nulla bona. This petition to wind-up the company was then presented, the petitioner alleging that he was a creditor of the company for £38.

On June 1, 1889, NORTH, J., held, on the authority of *Chatterton v. Watney* (1), that the debt was not transferred from Wright, the judgment debtor, to the petitioner by the garnishee order, that Wright remained the creditor of the company in respect of the debt, though the petitioner was entitled to receive it, and that

the petitioner was not a "creditor" of the company and was not entitled to present the petition, which was dismissed.

The petitioner appealed.

Eve for the petitioner.

Firminger for the company.

George White for shareholders.

COTTON, L.J.—When this case was opened, from the way in which it was presented to us, we thought it turned on the question whether the petitioner had a case under s. 80 (2), of the Companies Act, 1862; but that is not the point we have really to consider, because the question, in the first instance, is not only whether the petitioner has made out a case for winding-up the company, which I very much doubt, but whether he is a person entitled to present a petition. The latter point turns upon the construction of s. 82. He says, "I am entitled to present a petition." I am not a contributory. I am a creditor. Is he a creditor? He is no creditor of the company, unless and except so far as the garnishee order which he obtained made him a creditor. Mr. Wright owed him money; he got a judgment against Wright, having done that he attached a debt due from the company to Wright, and the order is made absolute.

What does the garnishee order do? It is not an assignment of the debt due by the garnishee to the debtor of the garnishor; it merely gives the garnishor a lien upon that debt. That was laid down by SIR GEORGE JESSEL, M.R., confirming the view taken by myself in *Chatterton v. Watney* (1), where he says (17 Ch.D. at p. 262):

"I quite agree with the view of COTTON, L.J., that a garnishee order does not operate as a transfer of the debt."

"Transfer" does not necessarily mean absolute transfer, but a transfer of the debt by way of assignment, security, or otherwise. In this case, even if there was a transfer or assignment of the debt, so as to constitute the petitioner an assignee either in law or equity of this debt, so that he could claim to be a creditor under s. 82 of the Companies Act, 1862, and entitled to present a petition, we should still have to consider the question, whether he had made out a case for winding-up this company. But, on the ground that he is not entitled to present the petition, I think it unnecessary to go into the case on its merits. I am of opinion that the petitioner is not in any way a creditor of the company, and not in any way one of the persons entitled to present a petition.

I ought to refer to the question, whether this is an equitable assignment of the debt. Of course, if there had been an order by the person to whom the debt was owing to pay to the petitioner, that would have been a good equitable assignment. But, in my opinion, a mere order in the nature of a garnishee order made by a competent authority putting a hold upon the fund, and enabling the person who has obtained the garnishee order to give a good discharge for it, does not come within the principles of equitable assignment, and therefore the petitioner cannot, under the doctrine of equitable assignment, claim to be a creditor in this case.

BOWEN, L.J.—I am of the same opinion. The real point is, whether the petitioner is a creditor or not within s. 82 of the Companies Act, 1862. I think in all probability, having regard to the language of the preceding sections, that a creditor under s. 82 includes a creditor in equity as well as in law. It is not necessary to decide it, and I believe the point has been expressly left undecided in a previous case, and I desire to keep it open, but I should think it would include a creditor in equity. In any case I cannot see here that this statutory position, which was created originally by the Common Law Procedure Act, 1854, and has been perpetuated in the rules under the Judicature Act, this relation which exists between a judgment creditor and the garnishee, is a position which involves the

creation of a creditor. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a court of common law that the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section, and the orders made under it, does not create a debt at all; it creates an attachment of a portion of the debt, and, in case of nonpayment, it confers the right of issuing execution, and nothing more. One must remember that these winding-up sections cannot be extended lightly or loosely, because they relate to procedure in the nature of execution against the company, and involve considerable results against property.

FRY, L.J.—I am of the same opinion. R.S.C., Ord. 45, r. 2, provides that the service of the garnishee order on the garnishee "shall bind such debts in his hands." The question, I take it, is, what is the meaning of the words "bind such debts in his hands." It has been argued that it amounts to a transfer of the debt. It is remarkable, if that was the meaning of the words, that those words were not used, and that the order does not say "transfer" the debt. But, further than that, the whole scheme of the order is inconsistent with its being a transfer; and, in fact, the question has been settled by the court. It is plain, to my mind, that there is no transfer of the debt. It is equally plain, to my mind, that the garnishee order does not make the garnishor a creditor of the garnishee. What the order does is this: it gives the garnishor certain statutory rights. It enables the garnishor to say to the garnishee, "You shall not pay the money which you owe to your creditor. I can give a valid receipt for it." It enables him, in the event of the money not being paid, to obtain execution. He has all these rights, but there is no transfer of the debt, and he is not created a creditor. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Norris, Allens & Chapman; Perkins & Sawyer.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

GIBSON v. EVANS

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Hawkins, J.), June 20, 1889]

[Reported 23 Q.B.D. 384; 58 L.J.Q.B. 612; 61 L.T. 388;
54 J.P. 104; 5 T.L.R. 589]

Libel—Interrogatories—Name of author of words complained of—Newspaper—Identity material fact in action.

Where in an action for libel against a newspaper proprietor the defendant admits the publication of the words complained of, the plaintiff cannot interrogate him as to the name of the author of the words complained of unless the identity of the author becomes a material fact in the action.

Notes. Section 4 of the Defamation Act, 1952, mitigates the law as to unintentional defamation in certain cases: see 32 HALSBURY'S STATUTES (2nd Edn.) 401.

Referred to: *Parnell v. Walter* (1890), 24 Q.B.D. 441.

As to interrogatories, in an action for libel, as to printer, publisher, proprietor or author, see 24 HALSBURY'S LAWS (3rd Edn.) 100; and for cases see 18 DIGEST (Repl.) 183 et seq.

Cases referred to:

- (1) *Hennessy v. Wright* (No. 2) (1888), 24 Q.B.D. 445, n.; 36 W.R. 879; 4 T.L.R. 662, C.A.; 18 Digest (Repl.) 185, 1606.
- (2) *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154; 55 L.J.Q.B. 448; 54 L.T. 714; 34 W.R. 783; 2 T.L.R. 640, C.A.; 18 Digest (Repl.) 185, 1604.

Also referred to in argument:

Wilton v. Brignell, [1875] W.N. 239; 18 Digest (Repl.) 184, 1599.

Appeal by the defendant in an action for libel from an order of POLLOCK, B., at chambers, ordering the defendant to furnish further answers to certain interrogatories administered by the plaintiff.

The plaintiff was the proprietor and editor of a newspaper called the "Cambrian News and Welsh Farmers' Gazette," and sued the defendant as the editor and proprietor of a newspaper called the "Goleuad," for an alleged libel contained in a letter to the defendant's newspaper upon him in the conduct of his paper. The defendant denied that he wrote the words complained of, but admitted that he had published them; he also pleaded that the words did not refer to the plaintiff, and did not bear any defamatory meaning, and were privileged. He also alleged that upon the receipt of a complaint from the plaintiff, he published in the next issue of his newspaper an apology. In the apology it was stated that the letter (the alleged libel) was written by a person who lived at a distance, and who, it was believed, never saw the plaintiff's paper, and had no intention of referring to the plaintiff. The defendant also tendered a most ample apology to the plaintiff, and expressed regret that the letter had caused him pain. The plaintiff administered certain interrogatories to the defendant, who was required (*inter alia*) to give the name and address of the writer of the letter, and the name and address of the person who, as stated in the apology, lived at a distance, who never saw the plaintiff's paper, and who was the writer of the said letter. The defendant objected to answer the above questions, on the ground that, as he had admitted the publication of the letter and thereby his responsibility for it, such interrogatories were irrelevant, and that they were not made for a bona fide purpose, and were an attempt to discover his evidence. The defendant appealed against the order made that he should make further answers to such interrogatories.

B. F. Williams, Q.C., and J. B. Roberts for the defendant.
Abel Thomas for the plaintiff.

LORD COLERIDGE, C.J.—I am of opinion that this appeal ought to be allowed. The action is for a libel contained in a letter published in the defendant's newspaper. The defendant in his defence denies that the words complained of referred to the plaintiff, and says that he did not write them, though he admits their publication; he also pleads that the words are not defamatory, and are privileged. He does not dispute liability if the words did refer to the plaintiff, and are defamatory, and are not privileged. He has also pleaded an apology, and a more ample apology could hardly be conceived. Is, then, the plaintiff under the present circumstances entitled to ask the defendant who was the writer of the words complained of?

The decisions go to show that interrogatories of this kind have been uniformly disallowed. As to the authorities in equity, it was pointed out by LINDLEY, L.J., in *Hennessy v. Wright* (No. 2) (1), that the question could not have arisen in those courts, because discovery was never granted in aid of an action founded on tort. Counsel for the plaintiff, however, proposed to distinguish that case, because, he said, he would be in a position to prove that the letter did refer to the plaintiff, and that it was intended to do so by the writer. I do not think that that is the valid distinction. In *Hennessy v. Wright* (No. 2) (1), such an inquiry was disallowed by the Court of Appeal. The plaintiff there asked to be told who had made the reports and written the articles in the paper complained of; but he was held not entitled to put such a question, as the names of the persons were not material to enable him to maintain his own case or destroy that of his adversary. Counsel for the plaintiff also relied most strongly on *Marriott v. Chamberlain* (2), but that was a peculiar case. There the alleged libel was a statement that the plaintiff had fabricated a story as to his having seen a copy of a certain letter alleged to have been written by the defendant, and the defendant admitted the writing and publication of the libel, and pleaded justification.

The defendant then said that it was part of his case that there was no such letter in existence as the plaintiff referred to, and claimed to interrogate the plaintiff in order to show that there was no such letter, and required the names and addresses of certain persons who might have been called on behalf of the plaintiff. The Court of Appeal held that the existence of the letter was a fact material to the issue raised by the plea of justification, and that the right to interrogate was made out. No doubt under such circumstances the right to interrogate as to such points exists, but that is not the case here, which is a totally different one. I think this appeal ought to be allowed.

HAWKINS, J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Roberts & Evans*, Aberystwyth; *Minshall, Parry-Jones, Woosnam & Smith* for *R. J. Griffith*, Dolgelly.

[Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.]

SHEPPARD v. GILMORE

[CHANCERY DIVISION (Stirling, J.), June 14, 15, 16, 22, August 2, 3, 11, 1887]

[Reported 57 L.J.Ch. 6; 57 L.T. 614]

Sale of Land—Restrictive covenant—Building estate—Sale of plots to different purchasers—Restrictions on use of plots—Benefit of vendor—Right of purchaser to enforce covenant against other purchaser.

Where a vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, if the covenants are simply for the benefit of the vendor, purchasers of the other plots cannot claim to take advantage of them, but, if they are intended for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se, for their own benefit. It is a question of fact whether the covenants were imposed for the benefit of the vendor only or whether they were meant by him, and understood by the purchasers, to be for the common advantage of the purchasers.

A vendor sold adjoining plots of land to various purchasers. The conveyances to the purchasers took place about the same time, and they were all in the same form. In each case a rentcharge was reserved, and the purchaser covenanted, inter alia, on behalf of himself, his heirs and assigns, to build on the plot a house "agreeable to such order of buildings as was mentioned and described in a plan drawn for and signed as well by" the purchaser and the vendor; and further that "the outside form of building . . . shall not after the same is built and finished as aforesaid be ever altered or varied." Assignees of one of the purchasers brought an action against assignees of a purchaser of an adjoining plot to restrain them from altering the front of their house in breach of the covenant. The assignees had notice of the covenants. There was no plan endorsed on any of the conveyances, and no plan signed by any of the purchasers was produced at the trial.

Held: the covenants were intended for the benefit of the vendor only and could not be enforced by an assignee of a purchaser.

Nottingham Patent Brick and Tile Co. v. Butler (1) (1885), 15 Q.B.D. 261; post p. 1075 applied.

Notes. As to restrictive covenants in general, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 40 DIGEST (Repl.) 337 et seq.

Cases referred to:

- (1) *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q.B.D. 261; 54 L.J.Q.B. 545; 54 L.T. 444; 33 W.R. 231; affirmed (1886), post p. 1075 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.
- (2) *Renals v. Cowlishaw* (1878), 9 Ch.D. 129; 48 L.J.Ch. 33; 38 L.T. 504; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (3) *Mann v. Stephens* (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, 2784.
- (4) *Western v. MacDermott* (1866), L.R. 1 Eq. 499; 35 L.J.Ch. 190; affirmed, 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, 2886.
- (5) *Coles v. Sims* (1854), 5 De G.M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.J.J.; 40 Digest (Repl.) 345, 2794.
- (6) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

Also referred to in argument :

Keates v. Lyon (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.J.J.; 40 Digest (Repl.) 343, 2780.

Sayers v. Collyer (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 40 Digest (Repl.) 361, 2893.

Duke of Bedford v. Trustees of British Museum (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.

Master v. Hansard (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 19 Digest (Repl.) 47, 254.

Harrison v. Good (1871), L.R. 11 Eq. 338; 40 L.J.Ch. 294; 24 L.T. 263; 35 J.P. 612; 19 W.R. 346; 40 Digest (Repl.) 358, 2869.

Tipping v. Eckersley (1855), 2 K. & J. 264; 69 E.R. 779; 19 Digest (Repl.) 171, 1135.

Action in which the plaintiffs, who were the owners of a certain house in Marlborough Buildings, Bath, sought to restrain the defendants, who were the owners of an adjoining house, from erecting against the front of their house a porch running to the height of three stories up their house and projecting about seven feet from it, on the grounds that this construction was a breach of restrictive covenants subject to which the defendants held their house.

Both houses were held under a common title. By indentures of lease and release, dated Dec. 19 and Dec. 20, 1766, certain pieces of land, the sites of the row of houses Marlborough Buildings (then intended to be called Milk Street), were conveyed by Sir B. Garrard to J. Wood and T. Brock, in trust for J. Wood, in consideration of a perpetual yearly rentcharge; and J. Wood covenanted with Sir B. Garrard that he, his heirs and assigns, would at his and their own cost, within ten years, erect such houses as therein mentioned upon the pieces of ground thereby conveyed according to the plan thereto annexed. Wood also covenanted to keep the houses when erected in repair, and to rebuild them in case of fire; to fence in the property and keep the fences and road in repair. There were covenants by Sir B. Garrard against building over certain lands there referred to. The plan referred to did not show any elevation of buildings, but simply showed certain proposed streets which were to be laid out, and the pieces of land which were not to be built on. It also showed a street running through from Brock Street, crossing Milk Street, and passing into what was called there Town Common, which was immediately to the west of the land on which Marlborough Buildings was built. The plan had no scale.

Wood died in December, 1785, having by his will devised his real estate to J. Tomkinson and E. Wood. Sir B. Garrard also died, and his devisee was Sir P. Gay. By an indenture of Dec. 16, 1785, it appeared that conveyances had been made by Wood of parts of the land, reserving to Sir B. Garrard rentcharges equal in amount to the rentcharge reserved by the deed of December, 1766, and Sir P. Gay, pursuant to a provision for that event contained in the deed of December, 1766, released Wood's devisees, and the land remaining vested in them from the rentcharge, and released them from the covenants as to erection and repair of buildings entered into by Wood so far as regards the piece of land which had been so conveyed. By indentures dated Sept. 28 and Sept. 29, 1787, Tomlinson and E. Wood, and certain mortgagees, conveyed the site of the houses in Marlborough Buildings to W. Cross as trustee for three persons, Fielder, Broom, and King, purchasers at an auction, as tenants in common. The benefit of the covenants entered into by Sir B. Garrard was assigned to the purchasers, but the conveyance was not expressed to be subject to the covenants contained in the deed of December, 1766. Then there was a proviso and agreement that the houses to be erected on the said ground facing Milk Street should be so far set back and range in or near a straight line so as to make Milk Street to be not less than forty feet wide, measuring from the fronts of such houses to the opposite boundary wall of the

gardens or stables belonging to houses in the Royal Crescent. The street was made forty feet wide in accordance with this proviso, and not sixty feet as provided by the plan on the deed of December, 1766. And the street shown on that plan running from Brock Street into Town Common was not so made, but two houses had been built on the western part of what seemed to have been intended to be the site of the street.

By indentures of lease and release, dated Dec. 4 and Dec. 5, 1787, made between Fielder, Broom, and King of the first part, Cross, their trustee, of the second part, and R. Hewlett of the third part, the site of the plaintiffs' house was conveyed to R. Hewlett, their predecessor in title. It was stated to be in consideration of Hewlett having begun and being then building a messuage upon the ground, which was intended by him to be finished in such manner as thereafter mentioned, and of the perpetual yearly rent thereafter reserved, and the covenants on Hewlett's part thereafter contained. It was also stated to front east on the street to be called Marlborough Buildings, and was conveyed with the messuage then building thereon, and with the benefits of the covenants entered into by Sir D. Garrard by the deed of December, 1766. Hewlett covenanted to pay the rentcharge, and further covenanted that he, his heirs and assigns, would complete the messuage then being built by him in the manner thereby directed, and subject to the provisos and conditions in that behalf therein contained,

"and agreeable to such order of building as was mentioned and described in a plan drawn for and signed as well by the said R. Hewlett as the said Fielder, Broom, and King, of such buildings."

He also covenanted to erect boundary walls to be party walls between him and the owners of the premises adjoining, and to be paid for and repaired by them at their equal expense; and that

"the outside or form of building of the said intended messuage on the east side of the said plot of ground hereby conveyed shall not after the same is built and finished as aforesaid be ever altered or varied";

and also to pay the expense of making the common sewer, and to contribute to the completion and repair of a certain road; and also not to permit certain trades to be carried on upon the premises, including the trade of a victualler. Then there was a proviso that, in case any difference should arise between Hewlett, his heirs or assigns, and any other assignee or tenant of Fielder, Broom, and King, of any other, or near or adjoining premises, touching the making, erecting, or repairing of any party wall, or any sewer, or the price to be paid for the same, or any other matter, cause or thing whatever relating to the building of the said house and buildings thereby conveyed, then such difference should be referred to W. Cross, whose determination should be final. The conveyance to Charles Fielder, the defendant's predecessor in title, was dated Feb. 5, 1788. That also was in consideration of a rentcharge, and subject to provisos and covenants similar to those contained in the conveyance to Hewlett, and C. Fielder covenanted to observe them.

There were thirty-four houses in Marlborough Buildings, all in external appearance resembling one another, and apparently built about the same date, but at the north end of the land conveyed to Fielder, Broom, and King was a public-house, which appeared to have been used for that purpose for many years. Conveyances of twelve of the houses in Marlborough Buildings (ranging from No. 5 to No. 34) were put in evidence. They were all dated Dec. 5, 1787, or Feb. 5, 1788, and were all substantially in the same form.

Graham Hastings, Q.C., and Mulligan for the plaintiffs.

W. Pearson, Q.C., and Emden for the defendants.

Cur. adv. vult.

Aug. 11, 1886. **STIRLING, J.**, stated the facts, and continued: There is no question at all that the defendants, as far as the covenants contained in the con-

veyance of Feb. 5, 1788, are concerned, took with notice. There is a question whether they took with notice of the provisos in the former deed as to the road being forty feet wide, or the distance between the front of the buildings and the opposite wall being forty feet. On that there is a question, but, as regards the covenant not to alter the east front of the building, there is no doubt that the defendants took with notice of that; and the question which arises on this part of the case is, whether the plaintiffs have any right to enforce it.

As regards that, the law is very shortly put by HALL, V.-C., in the case of *Renals v. Cowlishaw* (2), in which he says this (9 Ch.D. at p. 129):

"Who then (other than the original covenantee) is entitled to the benefit of the covenant? From the cases of *Mann v. Stephens* (3), *Western v. MacDermott* (4), and *Coles v. Sims* (5), it may, I think, be considered as determined that anyone who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of, the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right—that is, the benefit of the covenant—enures to the assigns of the first purchaser; in other words, runs with the land of such purchaser. This right exists, not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established."

That was approved by the Court of Appeal, and the law has been recently considered and laid down in *Nottingham Patent Brick and Tile Co. v. Butler* (1), which, at first instance, came before WILLS, J., in the Queen's Bench Division. That went to the Court of Appeal, and the law which is laid down by WILLS, J., was approved by the Court of Appeal. He says (15 Q.B.D. at p. 268):

"The principle which appears to me to be deducible from the cases is, that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se for their own benefit."

Then he goes on to discuss the cases, and the result of the whole appears to me to be that it is a question of fact to be decided having regard to all the circumstances of each case, as WILLS, J., put it (*ibid.*),

"whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers."

This is the question which, having regard to all the circumstances, I have to decide.

In the first place, on the one hand, it is to be observed that each deed in this case reserves to the vendor the rentcharge. It is also to be observed that the covenants which are contained in the deed are not merely negative restrictive covenants, but also to a large extent affirmative covenants, and are obviously, so far as they are affirmative, inserted for the benefit and protection of the vendor, and for the security of his rentcharge which he receives out of the property. It is also to be observed that, as to that piece of land lying at the end of Marlborough Buildings, on which a house has been erected, it cannot be inferred from anything that appears in the evidence that the vendor ever intended to deal with that as

subject to the restrictive covenants in question, because it has, so far as the evidence goes, always been, at all events has been for a long time, held and enjoyed as a public-house, which would be contrary to one of the covenants contained in the deed. On the other hand, there are certain things in the deed which point the other way.

First of all, there is the reference to the plan of building, and it is alleged in the statement of claim that that plan was signed by each purchaser of a plot on the building estate, amongst others, by Fielder, and it was alleged that each purchaser signed the same plan. If that had been proved, it would no doubt have gone a long way, if it had not been entirely conclusive, as to the question whether these restrictive covenants were intended to be for the benefit of the purchasers, or solely for the benefit of the vendor. But the plan is not forthcoming. There is no plan which is referred to in any one of the deeds which has been put in evidence in this case, which is forthcoming, and I cannot I think, infer that it was the same plan to which each purchaser referred in the covenant into which he entered. It is suggested that I ought so to infer on various grounds. First of all, it is said that, if it was a separate plan, it would be more natural to endorse it upon the deed, and unquestionably there is no plan endorsed. On the other hand, it appears from some of the deeds, at any rate, that the building of the houses had already commenced, and the plan being a building plan relating to the nature of the houses to be erected, it is more probable it was agreed to and signed before the building commenced. Then, again, it is said that if there had been several plans—if a distinct plan had been signed with reference to each house, it is improbable that all would have been lost. But, even supposing that evidence had been given of searches sufficient to justify the conclusion that there was no plan forthcoming, I think it would be going too far for me to come to that conclusion.

As regards the wording of the deed itself, I do not say that the wording is conclusive against the contention of the plaintiffs, but certainly it is equally in favour of the defendants, and perhaps, if it is strictly construed, more so. It is a plan drawn for and signed as well by Hewlett as Fielder, Broom, and King of such buildings. That is to say, the wording alone is perfectly consistent with its being a separate plan, and perhaps, if one had to construe the deed strictly, that might be the better construction. However, I do not think on the whole I can infer that the same plan was signed by all the purchasers.

Then another point which was much relied upon was the proviso at the end of the covenants to which I have referred with reference to arbitration. Certainly that points to other persons having a certain interest in the covenants. But that also appears on the face of the deed, because there are certain covenants, namely, those which relate to the erection of the party walls, those which relate to the construction of the sewers, and those which relate to the completion and maintaining of the road, as to which the deed itself points, to the expense being borne by the owners and occupiers of the buildings, and it seems to me that this proviso is inserted in reference to this. Upon the whole I have come to the conclusion that, having regard to all the circumstances, it is not made out to my satisfaction that these covenants were intended to be otherwise than for the benefit of the vendor, and that, therefore, the plaintiffs fail in this respect.

It was strongly contended that, in coming to such a conclusion, I should be departing from the decision in *Western v. MacDermott* (4), which relates not to the same property, but to certain houses which were built in Brock Street, one of the streets shown on the plan referred to in the deed of 1766. Now, as regards that, LORD ROMILLY came to the conclusion, in deciding the case, that the covenant which had been entered into in that case ran with the land, and, as I read it, his decision was founded on that. He does deal with the equitable doctrine afterwards for coming to the conclusion; but I do not think, and I think it was admitted by the learned counsel for the plaintiffs, that the statement of the law with regard to the equitable doctrine is not precisely in accordance with the cases which have

since been decided in the Court of Appeal. Therefore, as far as that goes, I cannot regard it as a binding authority upon me. When the case went to the Court of Appeal the Lord Chancellor did not decide whether the covenant ran with the land, but he says (2 Ch. App. at p. 78) :

"I am relieved from the necessity of considering the question, because it was admitted on the part of the defendant that, he having purchased his house with notice of the restrictive obligation attached to it, a court of equity would interfere to prevent his violation of it. This, indeed, could not be disputed after the cases of *Tulk v. Moxhay* (6) and *Coles v. Sims* (5). But the defendant, admitting that he was bound by the covenant, denies that he has been guilty of any violation of it";

and then he goes on to deal with the rest of the case.

I have been furnished with copies of the bill and answer in that case, and also with a copy of the Lord Chancellor's judgment, which is not quite given in full in the report; but I am unable to arrive at the conclusion that the Lord Chancellor decided there precisely the point upon which the case would be an authority now, namely, the mode in which he arrived at the conclusion that the plaintiff in that case had a right to enforce the restrictive covenant subject to which, no doubt, it was admitted that the defendant took. The facts are not precisely the same in that case as in the present, and there may have been something in the case, or in the evidence, which induced the very learned and experienced counsel by whom the case was argued on behalf of the defendant not to contest that point. At all events, I cannot regard it as a decision now on the question of fact, which the cases to which I have referred appear to me to show it to be—as a binding decision which would compel me to hold that in this case the plaintiffs are entitled to the benefit of these restrictive covenants. Therefore, upon that part of the case I hold that the plaintiffs have failed.

Solicitors : *Daves & Sons* for *Gill & Bush*; *Robinson, Preston & Stow* for *Burne & Rooke*.

[Reported by A. J. HALL, ESQ., Barrister-at-Law.]

KEARLEY v. THOMSON AND ANOTHER

[COURT OF APPEAL (Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.),
February 20, March 31, 1890]

[Reported 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150;
54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267]

Contract—Illegally—Right to recover money paid in pursuance of illegal contract.

Where, in accordance with the terms of a contract, an illegal purpose has been partly carried out, money paid for that purpose cannot be recovered.

The plaintiff, who was a friend of a bankrupt, paid, illegally, a sum of money to the solicitors of a petitioning creditor in consideration of an undertaking by them not to appear at the bankrupt's public examination and not to oppose his discharge. The solicitors, in accordance with their undertaking, did not appear at the public examination. Before the bankrupt had applied for his order of discharge, the plaintiff sought to recover from the solicitors the sum he had paid them.

Held: the sum could not be recovered.

Principle in *Taylor v. Bowers* (1) (1876), 1 Q.B.D. 291, doubted.

Notes. Considered: *Barclay v. Pearson*, [1893] 2 Ch. 154; *Hermann v. Charlesworth* (1905), 74 L.J.K.B. 620; *Apthorp v. Neville* (1907), 23 T.L.R. 575; *Gordon v. Metropolitan Police Chief Commissioner*, [1908-10] All E.R.Rep. 192. Applied: *Re National Benefit Assurance Co., Ltd.*, [1931] 1 Ch. 46. Considered: *Berg v. Sadler & Moore*, [1937] 1 All E.R. 637; *Bigos v. Bousted*, [1951] 1 All E.R. 92. Referred to: *Tingley v. Müller*, [1916-17] All E.R.Rep. 470; *Anderson v. Daniel* (1923), 93 L.J.K.B. 97.

As to incidents of illegal contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 12 DIGEST (Repl.) 310 et seq.

Cases referred to:

- (1) *Taylor v. Bowers* (1876), 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 24 W.R. 499, C.A.; 12 Digest (Repl.) 316; 2438.
- (2) *Hall v. Dyson* (1852), 17 Q.B. 785; 21 L.J.Q.B. 224; 18 L.T.O.S. 63; 16 Jur. 270; 117 E.R. 1481; 4 Digest (Repl.) 593, 5300.
- (3) *Collins v. Blantern* (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, 2229.
- (4) *Herman v. Jeuchner* (1885), 15 Q.B.D. 561; 54 L.J.Q.B. 340; 53 L.T. 94; 49 J.P. 502; 33 W.R. 606; 1 T.L.R. 445; C.A.; 12 Digest (Repl.) 266, 2052.

Also referred to in argument:

- Taylor v. Chester* (1869), L.R. 4 Q.B. 309; 10 B. & S. 237; 38 L.J.Q.B. 225; 21 L.T. 359; 33 J.P. 709; 12 Digest (Repl.) 311, 2401.
- Tappenden v. Rundall* (1801), 2 Bos. & P. 467; 126 E.R. 1388; 12 Digest (Repl.) 316, 2437.
- Aubert v. Walsh* (1810), 3 Taunt. 277; 128 E.R. 110; 25 Digest (Repl.) 428, 96.

Appeal by the plaintiff from an order of the Divisional Court (HUDDLESTON and STEPHEN, JJ.), in an action brought by them to recover the sum of £40 paid to the defendants, who acted as solicitors for a certain creditor of a bankrupt Clarke, in pursuance of an agreement made by them which was illegal.

Crump, Q.C., Woolf, Q.C., and Lewis Thomas for the plaintiff.

Edward Clayton (Jelf, Q.C., with him) for the defendants.

Cur. adv. vult.

Mar. 31, 1890. **FRY, L.J.**—I have been asked by the Lord Chief Justice to deliver judgment in this case, and the Master of the Rolls has authorised me to say that he concurs in the judgment I am about to deliver.

The facts are shortly these. A petition in bankruptcy was presented by Baynes against Clarke, and a receiving order was made. The defendants were the solicitors acting for the petitioning creditor. The plaintiff, who appears to have been a friend of Clarke, intervened, and on Oct. 6, 1887, the defendants wrote this letter to the plaintiff:

"*Re Clarke.* At the request of Mr. Kearley we have received from him the sum of £20 on account of our costs herein, and he is to pay us before twelve tomorrow a further sum of £20; and in consideration of this sum of £40 we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge."

That was signed by the defendants, and, on the next day, the further sum of £20 was accordingly paid, and a receipt given in these terms:

"Oct. 7, 1887. *Re Clarke.* Received of Mr. Kearley the further sum of £20, mentioned in our receipt of yesterday."

On the same day the public examination of the bankrupt took place, and at that public examination the defendants did not appear.

The tendency of such an undertaking as that which was given by the defendants is obvious; it tends to pervert the course of justice. The defendants were not bound to appear, but they were bound not to enter into an agreement which would fetter their liberty of action as to appearing or not. *Hall v. Dyson* (2) was referred to in support of the proposition that such an agreement is illegal, and I think that there can be no doubt that it is so. That being so, the general rule is, that the plaintiff in an action to get back money paid in the pursuance of an illegal agreement cannot succeed, in accordance with the maxim, in *pari delicto potior est conditio possidentis*, and with another to the effect that money paid voluntarily cannot be recovered back.

It follows that the plaintiff, in the present case, who paid the £40 in pursuance of an illegal contract, cannot recover it back. The general rule applicable to such a case is laid down in *Collins v. Blantern* (3), by WILMOT, C.J., (2 Wils. at p. 350):

"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again, you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. Procul, O! procul este profani."

To that general rule there are certain exceptions, or apparent exceptions. One of them is in the case of oppressor and oppressed. In that case the plaintiff would not have entered into the agreement if he had not been in some way unduly pressed by the defendant, and therefore the maxim, in *pari delicto potior est conditio possidentis*, does not apply. Another exception is, where the plaintiff is a member of a class protected by statute, as, for instance, by the statutes against usury, against lotteries, and others now repealed. In both these cases of oppressor and oppressed, and of those against whom there is a statutory protection and the members of the class protected, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

It is suggested to us that a third exception is to be found in the judgment of the Court of Appeal in *Taylor v. Bowers* (1), which exception is said to be applicable in the present case. In that case MELLISH, L.J., said (1 Q.B.D. at p. 300):

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out."

I believe that there is no authority for that proposition earlier than the year 1876 when that case was decided. Notwithstanding the great authority of the learned

judge who laid down that proposition of law, there may arise a question whether it can be maintained. That question may have to be considered hereafter. In expressing these doubts as to the correctness of that statement of the law, I have the concurrence of the Lord Chief Justice.

Supposing it to be good law, does it apply to this case? The contract here was not to appear at the bankrupt's public examination and not to oppose his order of discharge. It has been performed as regards the first stipulation, but the application for an order of discharge has not yet been made. Can it be contended that, if the illegal contract has been partly carried out and partly remains unperformed, the money can still be recovered? Test the argument that part performance does not prevent the recovery of the money by this illustration: Suppose a contract by A. for the payment of money to B. in consideration that B. will murder C. and D., and payment of the money in pursuance of the contract. After B. has murdered C., but not D., can A. recover back the money? In my judgment he cannot.

I am of opinion, therefore, that where an illegal purpose has been partly carried out, money paid for that purpose cannot be recovered back. We were pressed with the language used by the Master of the Rolls in *Herman v. Jeuchner* (4). My opinion is that the words there used do not bear the construction sought to be put upon them, viz., that so long as the contract remained imperfectly performed the money could be recovered back; because, as a matter of fact, in that case the contract had been completely carried out. Moreover, as I have already said, the Master of the Rolls concurs in this judgment. For these reasons I am of opinion that this appeal should be dismissed.

LORD COLERIDGE, C.J.—I agree.

Appeal dismissed.

Solicitors : *Aird & Hood; Ward, Perks & McKay.*

[*Reported by A. H. BITTLESTON, ESQ., Barrister-at-Law.*]

WILSON v. GLOSSOP

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes L.J.J.), January 17, 23, 1888]

[Reported 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707;
52 J.P. 246; 36 W.R. 296; 4 T.L.R. 239]

Husband and Wife—"Necessaries"—*Right of wife to pledge husband's credit—Adultery by wife—Connivance of husband.*

Where a husband has connived at his wife's adultery he remains under a duty to maintain her and she has the right and power to pledge his credit for necessaries.

Notes. Considered: *Marczuk v. Marczuk*, [1956] 1 All E.R. 657. Referred to: *Stimpson v. Wood* (1888), 52 J.P. 822; *Mitchell v. Torrington Union* (1897), 76 L.T. 724; *Brooking-Phillips v. Brooking-Phillips*, [1911-13] All E.R.Rep. 684; *Wickins v. Wickins* (No. 2), [1918] P. 282; *Dean v. Dean*, [1923] P. 172; *Welton v. Welton*, [1927] All E.R.Rep. 431; *Waller v. Waller*, [1956] 2 All E.R. 234.

As to a husband's liability for necessaries supplied to his wife, see 19 HALSBURY'S LAWS (3rd Edn.) 859 et seq.; and for cases see 27 DIGEST (Repl.) 181 et seq.

Cases referred to:

- (1) *Montague v. Benedict* (1825), 3 B. & C. 631; 107 E.R. 867; sub nom. *Montague v. Espinasse*, 1 C. & P. 502; sub nom. *Montague v. Baron*, 5 Dow. & Ry.K.B. 532; sub nom. *Montague v. —*, 3 L.J.O.S.K.B. 94; 27 Digest (Repl.) 186, 1418.
- (2) *Eastland v. Burchell* (1878), 3 Q.B.D. 432; 47 L.J.Q.B. 500; 38 L.T. 563; 42 J.P. 502; 27 W.R. 290; 27 Digest (Repl.) 187, 1438.
- (3) *Harris v. Morris* (1801), 4 Esp. 41, N.P.; 27 Digest (Repl.) 190, 1473.

Also referred to in argument:

- Manby v. Scot* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 173, 1273.
- Cooper v. Lloyd* (1859), 6 C.B.N.S. 519; 33 L.T.O.S. 149; 6 Jur.N.S. 125; 141 E.R. 559; 27 Digest (Repl.) 194, 1530.
- R. v. Flintan* (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 233, 255.
- Uox v. Kitchin* (1798), 1 Bos. & P. 338; 126 E.R. 938; 27 Digest (Repl.) 193, 1517.
- Norton v. Fazan* (1798), 1 Bos. & P. 226; 126 E.R. 873; 27 Digest (Repl.) 193 1525.
- Govier v. Hancock* (1796), 2 C. & P. 25, n.; 6 Term Rep. 603; 101 E.R. 726; 27 Digest (Repl.) 193, 1518.
- Drew v. Drew* (1842), 1 Notes of Cases, 315; 6 Jur. 110; 27 Digest (Repl.) 385, 3171.
- Denniss v. Denniss* (1808), 3 Hag. Ecc. 348, n.; 2 Rob. Eccl. 268, n.; 162 E.R. 1182; 27 Digest (Repl.) 379, 3120.
- Etherington v. Parrot* (1703), Holt, K.B. 102; 2 Ld. Raym. 1006; 1 Salk. 118; 90 E.R. 955; 27 Digest (Repl.) 181, 1353.
- Robison (or Robinson) v. Gosnold* (1704), 6 Mod. Rep. 171; Holt, K.B. 103; 1 Salk. 119; 87 E.R. 927, N.P.; 27 Digest (Repl.) 181, 1356.
- Holmes v. Holmes* (1755), 2 Lee, 90, 116; 161 E.R. 283; 27 Digest (Repl.) 444, 3750.

Appeal by the defendant from an order of the Divisional Court (MATHEW and CAVE, JJ.), reported 19 Q.B.D. 379, allowing an appeal by the plaintiff from a decision of the Sheffield county court judge, sitting without a jury, in favour of the defendant, in an action brought by the defendant's mother-in-law for forty weeks' maintenance of the defendant's wife.

A In August, 1885, the defendant charged his wife with adultery and turned her out of his house without any means of support, whereupon she went to reside with her mother, who supplied her with board and lodging. The defendant subsequently petitioned in the Probate and Divorce Division for a dissolution of his marriage on the ground of his wife's adultery, and at the trial the jury found that the wife had committed adultery, but that the petitioner had connived at the adultery committed by her. The petition was thereupon dismissed and the present action was then commenced.

Moorsom, Q.C., and Cyril Dodd for the defendant.

H. Reed for the plaintiff.

Cur. adv. vult.

C Jan. 23, 1888. **LORD ESHER, M.R.**—In this case the plaintiff is to be taken to be in the position of a stranger who has supplied things which were necessary for the sustenance of a married woman. A jury has found that, although the defendant's wife had committed adultery, the defendant connived at it. Notwithstanding that finding, and that the Divisional Court has held that his connivance precluded the defendant from relying upon his wife's adultery as a defence to this action, he has appealed to this court. When a man has married a woman he is bound by law to keep her, unless she has offended him and the world by committing adultery. But to protect her against herself is one of the first duties that he owes to her. This man has been her willing accomplice. The argument on his behalf must go to this extent, that if he had forced his wife to commit adultery, and had lived on the proceeds, he might at any time throw her on the streets and decline to support her. I would not have held that that was the law of England unless I had found a clear authority to that effect; and I should have bowed to such authority with shame. I do not care to consider the question that has been argued whether the wife could have succeeded in a suit for the restitution of conjugal rights. To say that a man who has been a willing accomplice of his wife in her adultery, can turn her out on the streets, and refuse to support her, is revolting. There is no authority, and no symptom of authority, for any such thing. This appeal is, therefore, dismissed.

F **FRY, L.J.**—If a husband turns his wife away for any cause not justifiable in law, she carries with her the right to pledge her husband's credit for necessaries. Is it any cause that she has committed adultery with his connivance? To say that that was a cause would, as the Master of the Rolls has said, be morally and socially abominable. That being so, she did carry with her the right and power to pledge his credit for necessaries, and he is consequently liable in this action.

G **LOPES, L.J.**—The facts of this case are not in dispute, and can be shortly stated. The wife of the defendant committed adultery with his connivance. The husband subsequently turned her out of doors. She had no means of support, and she was supplied with necessaries for her maintenance by the plaintiff, who now seeks to make the defendant liable for the money so expended. During cohabitation there is a presumption, though a rebuttable one, arising from the circumstances of cohabitation, that the wife is, in certain cases, the agent of her husband, and entitled to pledge his credit. But when the wife is living apart from her husband at the time of making the contract the presumption is the other way, and it lies I on the creditor to show that the wife is living apart from her husband under such circumstances as give her an implied authority to bind him. If she is turned away by her husband without any justifiable cause, and without the means of supplying herself with necessaries, the husband is bound by any contract she makes for necessaries suitable to her degree and estate: per *BAYLEY, J., Montague v. Benedict* (1). Again, in *Eastland v. Burchell* (2), *LUSH, J.*, says (3 Q.B.D. at pp. 435, 436):

“The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent.

This is a well-established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But, if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere."

Apply the law so laid down to the present case. A husband who has connived at the adultery of his wife turns her out of doors without the means of providing herself with necessaries—does he not wrongfully compel his wife to leave his home? What right has he to complain of that to which he has been a willing party? What justification is there for his turning his wife out of doors without the means of supplying herself with necessaries? *Harris v. Morris* (3), relied on in the court below, seems to proceed on the ground that the husband's liability revives if he takes the adulteress back into his house, and that if he turns her out again he does so with credit for necessaries. This case does not seem to assist in the decision of the one now before the court. LORD KENYON seems to found his judgment on the fact that she was sponte retracta. I think the judgment of the court below was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Munton & Morris*, for *Parker & Brailsford*, Sheffield; *Hickin, Graham & Fox*, for *Clegg & Sons*, Sheffield.

[*Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.*]

BUTLER v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAIL. CO.

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), June 11, 12, 1888]

[*Reported* 21 Q.B.D. 207; 57 L.J.Q.B. 564; 60 L.T. 89; 52 J.P. 612; 36 W.R. 726; 4 T.L.R. 607]

Carriage of Passengers—Condition requiring passenger to produce ticket—Failure to produce ticket—Refusal to pay fare.

A byelaw made by the defendant railway company, and referred to in the passenger tickets issued by them, provided: "Every passenger shall show and deliver up his ticket to any duly authorised servant of the company when required to do so for any purpose; any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." The plaintiff, a passenger, lost his ticket, was unable to produce it when required, and refused to pay the fare when demanded. Thereupon he was forcibly removed by the defendants' servants from the carriage in which he was travelling, no more force being used than was necessary. In an action by the plaintiff against the defendants in respect of the assault,

Held: the contract between the plaintiff and the defendants did not impliedly authorise the defendants to remove the plaintiff for failure to comply with the byelaw, and, therefore, the action was maintainable.

Notes. Considered: *Kerrison v. Smith*, [1895-9] All E.R. Rep. 215.

As to removal of a passenger for failure to produce a ticket, see 31 HALSBURY'S LAWS (3rd Edn.) 674; and for cases, see 8 DIGEST (Repl.) 124 et seq.

Cases referred to:

- (1) *Wood v. Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 488; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 19 Digest (Repl.) 26, 115.
- (2) *Saunders v. South Eastern Rail. Co.* (1880), 5 Q.B.D. 456; 49 L.J.Q.B. 761; 43 L.T. 281; 44 J.P. 781; 29 W.R. 56, D.C.; 8 Digest (Repl.) 122, 787.

Appeal by the plaintiff from a decision of MANISTY, J., giving judgment for the defendants in an action for assault.

The plaintiff took a return-ticket to travel upon the defendants' railway by an excursion train from Sheffield to Manchester and back. The ticket had upon the back of it the words,

"Issued subject to the conditions contained in the company's time-tables and advertisements."

Among the conditions contained in the time-tables were byelaws and regulations made by the company and approved by the Board of Trade. One byelaw provided:

"No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket to any duly authorised servant of the company when required to do so for any purpose; any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of the journey."

The plaintiff travelled to Manchester and delivered up the outward half of his ticket, but lost the return half, and was unable to produce it when it was demanded by the collector at a station about a mile outside Sheffield. Thereupon the collector demanded from the plaintiff the ordinary third-class fare from Manchester to Sheffield, which the plaintiff declined to pay, but offered his name and address. The collector then said that the plaintiff could not be allowed to proceed on the journey without paying such fare, and as the plaintiff declined to leave the carriage he was removed therefrom by force by the defendants' servants. In an action for assault the jury found that no more force had been used than was necessary to remove the plaintiff, and assessed the damages at £25. MANISTY, J., gave judgment for the defendants and the plaintiff appealed.

Waddy, Q.C., and *Lawson Walton* for the plaintiff.

Lockwood, Q.C., and *Cyril Dodd* for the defendants.

LORD ESHER, M.R.—In this case the plaintiff was a passenger on the defendants' railway. He had duly paid for his ticket, but had lost it, and when he could not produce it when demanded he was told that he must pay the fare for the journey, which he refused to do. Thereupon he was forcibly removed from the carriage by the defendants' servants, and hence this action for assault. The defendants contend that their servants were justified in removing the plaintiff from the carriage, using of course no more force than was necessary, and it was, I think, admitted in argument that a material allegation to that defence must be that the plaintiff was unlawfully upon the premises of the defendants. The question really is whether that proposition can be made out. I do not think it can. The relation between the plaintiff and the defendants is a contractual relation. The defendants' counsel were driven by stress of argument to contend that the contract was to give the plaintiff a right, in the nature of an easement, to go upon the defendants' premises, which was a mere revocable licence; but that contention seems to me contrary to good sense. It strikes me as ridiculous to say that a traveller from London to Liverpool has an easement over the line between those places, and when one remembers that the contract made is often to carry over the lines of other companies the absurdity is increased.

I think therefore that all those considerations upon which *Wood v. Leadbitter* (1) turned are not applicable. The real contract between the plaintiff and the defendants is, that on payment of the fare for his journey the defendants will carry the plaintiff in their carriage on his journey, and will use due care in doing so. It is said that there is something more, and that certain conditions are incorporated into that contract, and that notice of that is given upon the ticket. The condition relied on is one of the byelaws of the company, made under their statutory powers. I do not now stop to inquire whether it is a reasonable byelaw, or how far binding on the plaintiff if unreasonable: we must deal with that question when it arises. It may be that, if *Saunders v. South Eastern Rail. Co.* (2) is right, the byelaw is unreasonable; I express no opinion on the point.

For the present purpose I am dealing only with the effect of the byelaw, and the effect is that the passenger must show his ticket when asked for it, and if he fails must pay a certain fare. Does it follow that, if he refuses or fails, the company's servants may lay hands on him and remove him from the carriage? Certainly not. The company's remedy is to proceed against him for the fare to be paid. One thing is certain, that the plaintiff has never contracted that, if he refuses or fails to show his ticket or pay the fare, he may be removed by force: if there is no agreement to that effect, then the company, if they take that course, must have some legal authority for doing so. It is argued, and the court below has decided, that such a term of the contract is to be implied, but I do not think it can be said that any such term was in the contemplation of both parties at the time the contract was made, and if not, it cannot be implied by the court. I therefore think that the decision of MANISTY, J., was wrong, and that this appeal should be allowed.

LINDLEY, L.J.—I am of the same opinion. The question is important both to railway companies and to the public. One cannot shut one's eyes to the fact that the railway companies may have great difficulty in detecting and defeating the endeavours of unscrupulous persons to cheat them, and I am, for that reason, anxious not to express any opinion as to whether some properly worded condition might not be framed which would give the companies the right for which they are here contending. But I can find no byelaw which authorises the company to remove from the carriage a passenger who fails to produce his ticket or refuses to pay the fare demanded. That fact is really the solution of the case. The defendants must justify laying hands on the plaintiff. He had a contract with them to be carried to Manchester and back; that is a totally different thing from a contract for an interest in land, and to treat the case as one of revocable licence seems to me absurd.

The doctrine of *Wood v. Leadbitter* (1) does not appear to me applicable to a contract of carriage. Supposing that it was part of the contract of carriage that the plaintiff should produce his ticket or pay another fare, and that he broke that part of the contract; how does it follow as matter of law that he may be turned out of the carriage? Surely the remedy is in proceedings for the breach. Neither does it follow that, because he had broken his contract, he was no longer lawfully on the premises of the company; it does not seem to me that the contract of carriage was cancelled because the plaintiff had broken a term of it. The defendants having failed to show that the plaintiff was unlawfully on their premises, were not justified in removing him therefrom by force. I therefore agree that the appeal should be allowed.

LOPES, L.J.—I think the case is very clear. No byelaw exists which can protect the defendants for what their servants did. I doubt if one could be framed, but as none exists I need not express any opinion on that point. In the absence of any such byelaw, were the defendants' servants justified in removing the plaintiff by force? The effect of the admitted facts is, that the plaintiff was lawfully in the defendants' carriage, and as soon as that is stated it is shown that

A the defendants were not justified in removing him. If he had broken his contract, their remedy was by proceedings for the breach; to justify his forcible removal it must be said that he had by implication agreed to be removed if he broke his contract. I can see nothing to justify any such implication. *Wood v. Leadbitter* (1) was relied on by the defendants, but in my view that case has nothing to do with it; that case raised a question as to the right to go upon land, this case relates to a contract of carriage, and no question as to revocable licence arises. I agree in thinking that the appeal should be allowed.

! *Appeal allowed.*

Solicitors : *Hickin & Fox*, for *Clegg & Sons*; *Cunliffe & Davenport*, for *R. Lingard-Monk*.

C

[*Reported by A. A. HOPKINS, Esq., Barrister-at-Law.*]

D

COLQUHOUN v. BROOKS

E

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord FitzGerald, Lord Herschell and Lord Macnaghten), May 16, 17, July 1, 4, 5, August 9, 1889]

[*Reported* 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490]

F

Income Tax—Foreign possessions—Foreign partnership—Profits not remitted to the United Kingdom—Income Tax Act, 1853 (16 & 17 Vict., c. 34), s. 2, Sched. D.

G

The taxpayer resided in England, but was a partner in a business carried on in Australia. In the year ended April, 1884, he received in England £3,000 on account of profits of the Australian partnership. In addition to that sum there was standing to his credit in the books of the partnership £9,219, representing estimated profits due to him for the year ending April 5, 1885. None of the £9,219 was received in England. The taxpayer was assessed under the Income Tax Act, 1853, s. 2, and Sched. D., to income tax not only on the £3,000 remitted to him, but also on the £9,219.

Held: the taxpayer was liable to income tax only on the amount of the profits, i.e., £3,000, actually remitted to the United Kingdom.

Decision of the Court of Appeal, 21 Q.B.D. 52, affirmed.

H

Notes. The Income Tax Act, 1853, was repealed by the Income Tax Act, 1918. Section 2 and Sched. D. of the Act of 1853, are represented in the Income Tax Act, 1952, by s. 123.

I

Distinguished: *London Bank of Mexico and South America v. Apthorpe*, [1891] 2 Q.B. 378. Applied: *Bartholomay Brewing Co. (of Rochester) v. Wyatt*, *Nobel Dynamite Trust Co. v. Wyatt*, [1893] 2 Q.B. 499. Distinguished: *San Paulo (Brazilian) Rail. Co. v. Carter*, [1896] A.C. 31. Applied: *Mitchell v. Egyptian Hotels*, [1915] A.C. 1022; *Singer v. Williams*, [1921] 1 A.C. 41; *Foulsham v. Pickles*, [1925] All E.R.Rep. 706. Considered: *Alianza Co. v. I.R.Comrs.*, [1925] A.C. 644. Explained: *Fry v. Burma Corporation* (1929), 98 L.J.K.B. 693. Considered: *Fry v. Burma Corpn.*, [1930] A.C. 321; *Astor v. Perry (Inspector of Taxes)*, [1935] All E.R.Rep. 713. Distinguished: *McKenna v. Eaton-Turner*, [1936] 3 All E.R. 215; *Eaton-Turner v. McKenna*, [1937] A.C. 162; *Bennett v. Marshall*, [1938] 1 K.B. 591. Referred to: *Apthorpe v. Schoenhofen Brewing Co.*

(1899), 80 L.T. 395; *R. v. Clerkenwell General Taxes Comrs.*, [1901] 2 K.B. 879; *Kodak v. Clark* (1903), 4 Tax Cas. 549; *De Beers Consolidated Mines v. Howe* (1905), 21 T.L.R. 460; *Gramophone and Typewriter, Ltd. v. Stanley*, [1908-10] All E.R.Rep. 833; *American Thread Co. v. Joyce* (1912), 106 L.T. 171; *Brice v. Northern Assurance Co.* (1912), 6 Tax Cas. 327; *Drummond v. Collins*, [1915] A.C. 1011; *Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215; *Brooke v. I.R.Comrs.*, [1918] 1 K.B. 257; *Greenwood v. Smidth* (1921), 91 L.J.K.B. 349; *I.R.Comrs. v. Sansom*, [1921] 2 K.B. 492; *Williams v. Singer*, *Pool v. Royal Exchange Assurance*, [1921] A.C. 65; *Bradbury v. English Sewing Cotton Co.* (1923), 8 Tax Cas. 481; *Swedish Central Rail. Co., Ltd. v. Thompson*, [1924] All E.R.Rep. 710; *Whelan v. Henning*, [1925] 1 K.B. 387; *Whitney v. I.R.Comrs.*, [1926] A.C. 37; *Archer-Shee v. Baker* (1927), 11 Tax Cas. 749; *I.R.Comrs. v. Packenham*, *I.R.Comrs. v. Longford* (1927), 96 L.J.K.B. 882; *Proctor v. Ryall*, *Ryall v. Proctor* (1928), 14 Tax Cas. 204; *Spiers v. Mackinnon* (1929), 14 Tax Cas. 386; *Leaming v. Jones*, [1930] All E.R.Rep. 584; *Diggines v. Forestal Land, Timber and Rail. Co., Ltd.* (1930), 142 L.T. 509; *I.R.Comrs. v. Dalgety & Co., Ltd.*, [1930] All E.R.Rep. 779; *Ormunde v. Brown* (1932), 17 Tax Cas. 333; *Denny (H. & A.) v. Reed* (1933), 19 Tax Cas. 254; *Ryall v. Du Bois Co.* (1933), 150 L.T. 386; *Robinson v. Corry*, *Corry v. Robinson*, [1934] 1 K.B. 240; *Rye and Eyre v. I.R.Comrs.*, [1934] 2 K.B. 270; *I.R.Comrs. v. Broome's Executors* (1935), 19 Tax Cas. 667; *Duncan's Executors v. Adamson*, [1935] A.C. 398; *Kneen v. Martin*, [1935] 1 K.B. 499; *Browning v. Duckworth*, [1935] 1 K.B. 605; *Carter v. Sharon*, [1936] 1 All E.R. 720; *Trinidad Lake Asphalt Operating Co. v. Income Tax Comrs. for Trinidad and Tobago*, [1945] 1 All E.R. 9; *Bray v. Colenbrander*, [1952] 2 T.L.R. 499.

As to tax upon income arising from possessions out of the United Kingdom, see 20 HALSBURY'S LAWS (3rd Edn.) 276 et seq.; and for cases see 28 DIGEST (Repl.) 206 et seq. For the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.).

Cases referred to:

- (1) *Coltress Iron Co. v. Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 144, 546.
- (2) *Cesena Sulphur Co. v. Nicholson*, *Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 25 W.R. 71; 1 Tax Cas. 83; 28 Digest (Repl.) 252, 1113.

Appeal from an order of the Court of Appeal (LORD ESHER, M.R., and LOPES, L.J., FRY, L.J., dissenting), reported in 21 Q.B.D. 52, reversing a decision of the Divisional Court (STEPHEN, J., WILLS, J., dissenting), reported in 19 Q.B.D. 400, on a Special Case.

The respondent, Mr. Brooks, who resided solely in England, and was a partner in Henry Brooks & Co., of 70, Bishopsgate Street Within, was also a partner in the firm of Brooks, Robinson & Co., of Melbourne, Victoria. The two businesses were entirely distinct. Various sums of money had been from year to year remitted to Mr. Brooks in respect of his interest in the Melbourne firm, which he had duly returned for assessment to the income tax. For the year ending April 5, 1884, a certain sum was remitted to him. In addition to this sum there was standing to the credit of Mr. Brooks in the books of the Melbourne firm as representing the estimated profits due to him for the year ending April 5, 1885, a considerable further amount. No portion of this amount had been received in England. Mr. Brooks was assessed to the income tax under Sched. D. of the Income Tax Act, 1853, for the year ending April 5, 1885, not only on the profits he received from the London firm and on the sum received by him in this country from the profits of the Melbourne firm, but also on that further amount. The Income Tax Commissioners for the City of London reduced the assessment by

this amount, but stated a Case for the opinion of the court. By Sched. D. of the Income Tax Act, 1853, s. 2, duties are imposed

"for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere. . . ."

The Divisional Court were divided in opinion, STEPHEN, J., holding that the further amount was rightly brought into the assessment, while WILLS, J., held that it was not. The junior judge withdrew his judgment, and judgment was entered for the Crown. This judgment was reversed on appeal as above stated. From this reversal the Crown appealed.

The Attorney-General (Sir Richard Webster, Q.C.), the Solicitor-General (Sir Edward Clarke, Q.C.), and Dicey for the appellant, the surveyor of taxes.

Sir Henry James, Q.C., and Scrutton for the respondent.

Their Lordships took time for consideration.

Aug. 9, 1889. **LORD HALSBURY, L.C.**—I have had an opportunity of reading the opinion prepared by LORD HERSCHELL, and, although the question is a very difficult one, I am of opinion that the conclusion at which he has arrived is the true conclusion; and, therefore, I am prepared to assent to the opinion which he is about to deliver.

The following opinions were then read.

LORD FITZGERALD.—The respondent in this case resides solely in England, where he is a partner in an English firm, and we may assume him to be a domiciled British subject. No question arises on his income out of his English business. He is also a partner in an Australian firm carrying on business at Melbourne, in which he has a large capital invested, and he has actually received from it in this country £3,000 on account of profits for the financial year ending April 5, 1884, and on that he has paid income tax. The Case Stated further finds:

"The amount standing to the credit of Mr. Henry Brooks in the books of the Australian firm as representing the estimated profits due to him for the year ending April 5, 1885, would, if realised, amount to the sum of £9,219, in addition to the said sum of £3,000."

This sum of £9,219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day, after deducting therefrom the estimate and valuation of the preceding year, but, as a matter of fact, only a portion of the amount had been actually realised. No portion of the sum of £9,219 had been received in England, or had at any time formed part of the income of Mr. Brooks in this country.

At first sight it struck me very strongly that the defendant was chargeable here for income tax in respect of this sum of £9,219, though not actually received in this country, but as being income arising out of trade carried on in Melbourne, his share of the profits having been actually ascertained and fixed and accruing to him in this sense, that it was so completely under his control that by an act of his will he could have it actually transferred to his bankers here. There would be no hardship and nothing dangerous or to be deprecated in charging the defendant on his share of profits so ascertained; but the facts of the case do not warrant us doing so. On looking critically at the findings in the Case, it will be perceived that there is no sufficient finding to warrant us in coming to the conclusion that the profits of the Australian firm have been so ascertained for the year 1885 as to be legitimately the subject of taxation here. It is only put that the profits due to

him would, if realised, amount to £9,219, a sum "arrived at by an estimate and valuation" on stock-taking on some particular day (not stated), and "deducting therefrom the estimate and valuation of the preceding year," also made on a day not stated, "but, as a matter of fact, only a portion of the amount had been actually realised." What the meaning of the word "realised" there is, I do not know. A

The Australian firm does not appear to carry on any portion of the business in this country. The defendant does not appear to have taken or to take any active part in the conduct of its business, nor are its funds remitted to him, save so far as they may represent his actual ascertained profits not required for the purposes of the business of the firm, and remitted to him in this country so as to be at his disposal here as income. B

We are, therefore, remitted to and called on to decide whether the contention of the surveyor of taxes was right, that the defendant was liable to be assessed on the sum of £9,219, though he had not actually received it, nor had it actually come within the United Kingdom. The language of the Income Tax Act, 1853, s. 2, Sched. D. is so comprehensive that I doubt whether a net of language could be devised stronger and more apt to include the profits arising or accruing to the defendant from a business carried on elsewhere than in the United Kingdom, and must and ought to have full effect unless we can infer from the other provisions of the particular Act or of the code that it was not the intention of the legislature to tax income from trade carried on wholly and solely elsewhere than in the United Kingdom unless and until it has actually come to the United Kingdom as the income of some person residing in the United Kingdom. C D

I have not only conferred with my noble and learned friends on the construction of the Income Tax Acts in reference to this special and difficult question; I have had the great advantage also of reading and carefully considering an elaborate review of the Income Tax Acts which is about to be delivered by LORD MACNAGHTEN. I concur in the conclusion at which both my noble and learned friends have arrived, and I, therefore, confine myself to expressing concurrence in their conclusions. There are no doubt insuperable difficulties in giving full effect to the universal language of s. 2 of the statute and Sched. D. of that Act, and I am of opinion that the enactment must be controlled in the manner and to the extent which will be described by my noble and learned friends who are about to address the House, viz., that such profits derived from trade carried on entirely elsewhere than in the United Kingdom are not assessable for income tax until received here by the person entitled to them being a resident in the United Kingdom. E F G

LORD HERSCHELL.—This appeal arises on a Case stated by the Income Tax Commissioners. The respondent is a merchant residing in England and carrying on business there, and in respect of the profits or gains of this business he was duly assessed and has paid the tax. He paid the tax in addition on £3,000 received by him in respect of a remittance from Australia. This sum formed part of the profits of a business carried on at Melbourne, in which the respondent was a partner and had a large capital invested. The estimated profits due to him for the year in question in respect of his share of the business amounted to £9,219, in addition to the £3,000 already mentioned. The surveyor of taxes contended before the commissioners that the respondent ought to be assessed not only on the £3,000 received in this country, but on his entire share of the profits which accrued during the year of assessment. The commissioners rejected this contention, but stated a Case for the opinion of the court. On the argument of this Case before two learned judges of the Queen's Bench Division they were divided in opinion, but the junior judge having withdrawn his judgment to allow of an appeal, the Court of Appeal gave judgment in favour of the respondent, adopting the view of the commissioners. H I

The solution of the question raised by the Case depends entirely on the construction to be put on the provisions of the Income Tax Acts. The claim of the

A Crown is based on the terms of Sched. D., which imposes the tax on the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, whether carried on in the United Kingdom or elsewhere. The respondent does reside in the United Kingdom, profits did arise or accrue to him from a business carried on elsewhere than in the United Kingdom; therefore, say the learned counsel for the Crown, the case is within the very terms of the Act, and he must be held liable to assessment.

I think that it must be admitted that the words of the statute do *prima facie* support this contention; for, notwithstanding the ingenious criticism to which they have been subjected by the learned counsel for the respondent in their able argument, I think that, giving to the language of the enactment its natural meaning, the facts stated do apparently bring this case within it. It is urged, however, on behalf of the respondent, that if this construction be adopted a foreigner residing for a short time only in this country would be subjected to taxation here in respect of the whole of his business earnings in his own country or elsewhere; that so to tax him would be opposed to international comity, and that a construction which would involve such a consequence cannot be correct. I think the learned counsel for the respondent are right in saying that the result which they point out would follow in the case of a foreigner, but I do not feel satisfied that it would involve a violation of international law, and that the construction contended for by the Crown ought on that ground to be summarily rejected.

Reliance was placed on the decisions under the Legacy and Succession Duty Acts, which have imposed a limit on the broad language of the enactments subjecting legacies and successions to taxation. But it must be remembered that it was necessary to put some limit on these general terms in order to bring the matters dealt with within our territorial jurisdiction; without such a limitation the Legacy Duty Act, for example, would have been applicable, although neither the testator nor the legatee nor the property devised or bequeathed was within or had any relation to the British dominions. A construction leading to this result was obviously inadmissible. The Income Tax Acts, however, themselves impose a territorial limit, either that from which the taxable income is derived must be situated in the United Kingdom or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the legislature to determine the measure of taxation to be applied in the case of a person so resident. At the same time I am far from denying that if it can be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction.

I think it cannot be denied that if the view put forward on the part of the Crown be correct, the incidence of the tax will be strangely anomalous. Schedule D. imposes the tax on the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere. This in terms would apply to all such profits and gains, whether they found their way to this country or not. But by s. 100 of the Income Tax Act, 1842, the duties thus imposed are to be charged according to certain rules. One of these relates to the duty to be charged in respect of interest arising from securities in the British Plantations in America or any other of Her Majesty's dominions outside Great Britain (for which may now be read the United Kingdom) and foreign securities. The duty to be charged in respect of these is directed to be computed on a sum not less than the full amount of the sums which have been or will be received in the United Kingdom in the current year. Another of these rules, styled the Fifth Case, prescribes the duty to be charged in respect of possessions in the British Plantations of America or in any other of Her Majesty's dominions out of the United Kingdom and foreign possessions. The duty in respect of these is to be computed on a sum not less than the full amount of the actual sums annually

received in the United Kingdom, computing them on an average of the three preceding years. It is clear, therefore, that as regards income arising from investments or from possessions outside the United Kingdom the tax is only to fall on so much of the income as is received in this country.

I reserve what I have to say about the word "possessions," but I desire to point out that if the contention of the Crown be well founded, while the taxation of what I will term foreign income arising from the sources mentioned is limited to the amount which finds its way here, there is no such limit in the case of foreign income arising from a trade or profession or employment carried on abroad, the whole of which is subject to taxation, though no part of it ever reaches this country. No reason has been or can be suggested for so startling a difference. The distinction between the income from property such as a sugar plantation in the West Indies and from a business carried on there would often be a very fine one, and why a person interested in the latter should be burdened with taxation from which a person interested in the former is free was beyond the ingenuity of the learned counsel for the Crown to explain. Indeed in this very case, if the business in which the respondent is a partner were disposed of to a joint-stock company, and he retained his interest in the form of shares in that company, though the annual return to him might be precisely the same, he would, I take it, be clearly free from the taxation it is now sought to impose.

I am quite aware that there are inequalities in the incidence of the income tax, and that the anomalies I have pointed out, glaring though they be, will not avail the respondent if the taxation be imposed by the clear language of the statute. But LORD BLACKBURN, who pointedly dwelt on this in *Coltress Iron Co. v. Black* (1) said (6 App. Cas. at p. 330):

"The object of thus framing a taxing Act is to grant to Her Majesty a revenue. No doubt they would prefer if it were possible to raise the revenue equally from all, and as that cannot be done to raise it from those on whom the tax falls with as little trouble and annoyance, and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction upon them which will produce these effects."

It is beyond dispute, too, that we are entitled, and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light on the intention of the legislature, and may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. It is contended by the respondent that if we thus seek the aid to be derived from other provisions of the Income Tax Acts we shall be led to the conclusion that the view presented by the appellant is erroneous.

In the first place, it is said that, although elaborate machinery is provided for carrying out the taxing purposes of the Act, none of it is applicable to the assessment of the profits of a trade carried on entirely outside the United Kingdom no part of which is received here. If this be correct, it certainly goes far to show that the legislature cannot have intended to tax such profits. Section 106 of the Income Tax Act, 1842, provides, first, for the assessment of "every householder except persons engaged in any trade, manufacture, profession, or employment." It next deals with the case of "every person" so engaged, and enacts that he is to be chargeable by the commissioners acting for the parish or place where such trade, manufacture, profession, or employment is carried on or exercised, whether it be carried on or exercised wholly or in part in Great Britain. It next provides that every person, not being a householder nor engaged in any trade or profession, who shall have a place of ordinary residence shall be charged by the commissioners acting for the place where he shall ordinarily reside. Lastly, it deals with every person "not hereinbefore described." He is to be charged in the place where he resides at the time of beginning to execute the Act in each year.

Counsel for the Crown argued that the respondent fell within this last category. But I think this argument cannot be sustained. He certainly is a person engaged in a trade within the earlier description, and, therefore, cannot be included in a class not thereinbefore described. And there is no other provision to be found in the statute which seems to apply to the case of profits derived from a trade carried on entirely outside the United Kingdom.

Section 108 enacts that the duty to be assessed in respect of the profits or gains arising from foreign possessions or foreign securities, "or in the British Plantations in America, or in any other of Her Majesty's dominions," may be assessed by the commissioners acting for London, Bristol, Liverpool, and Glasgow, according to the regulations mentioned, "as if such duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively." It further provides that the assessment is to be made by the commissioners acting for such of the said places at or nearest to which the property shall have been first imported into Great Britain, or at or nearest to which the person who shall have received remittances or money arising from property not imported resides. I think that in this section, if anywhere, one would have expected to find a provision dealing with the profits of a business carried on outside the United Kingdom, the more so as the assessment referred to in the section is to be made by the commissioners as if it had been upon the profits of "a trade or manufacture" carried on in London and the other places named. But it is admitted that this section is confined to property or money brought to this country. It affords no aid, therefore, to the present appellant, though I shall have to ask your Lordships to consider presently whether, on the true construction of the statute, it does not cover the case with which we have to deal.

For the reasons I have given, I think the respondent has successfully shown that the Act has not provided the requisite machinery for assessing the duty on trade profits arising and remaining abroad, which is strong to show that it was not intended to tax them. But the difficulty of the appellant does not end here. The Act prescribes certain rules for ascertaining the duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade. One of these rules [Income Tax Act, 1842, s. 100, Sched. D., r. 3, of Rules applying to both First and Second Cases] provides that the computation of duty arising in respect of any trade carried on by two or more persons jointly shall be made and stated jointly and in one sum, and it designates the partner who is to make the return on behalf of himself and the other partner or partners, which is to be sufficient to charge the partners jointly. It further provides that no separate statement shall be made "in the case of any partnership" except for the partners separately claiming an exemption or accounting for separate concerns, and that if no such claim is made then such assessment shall be made jointly, according to the amount of the profits and gains of the partnership.

It is not pretended that the whole of the profits of the Australian firm are assessable. The shares of the Australian partners clearly cannot be taxed. Yet where is there any provision for a separate statement and assessment such as the Crown contend for here? If the result of rejecting the argument presented on behalf of the Crown were to land your Lordships in the conclusion that profits arising from a business carried on abroad, even though received here, were not subject to the tax, it would present a formidable obstacle to yielding to the argument of the respondent, though I am not sure that the difficulties you would have to encounter in refusing your assent to it would not even then be greater. But I do not think your Lordships are driven to this conclusion. The Rule, styled the Fifth Case, to which I have already referred, deals with the duty to be charged in respect of possessions in any of Her Majesty's dominions out of Great Britain, and foreign possessions. The word "possessions" is not used in the part of the Sched. D. which describes the subjects of the tax. Speaking generally, they are defined to be the profits arising from property and those arising from trades and professions. When, therefore, the term "possessions" is employed, it seems to indicate an

intention to cover by it something more than "property." It is difficult to see why, unless the intention were to embrace something more, the latter word was not used. "Possessions" is a wide expression; it is not a word with any technical meaning. The Act supplies no interpretation of it; and I cannot see why it may not fitly be interpreted as relating to all that is possessed in Her Majesty's dominions out of the United Kingdom, or in foreign countries. And, if so, I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere. So to construe the Act would have the advantage of removing the glaring anomaly to which I have referred as inevitably flowing from the rival construction, and of taxing alike such portion only of the profits arising abroad, whether from property or trade, as is received in the United Kingdom.

The conclusion at which I have arrived is greatly fortified by a consideration of s. 39 of the Act, which provides that no person who shall actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and shall not actually have resided in Great Britain for six months in one year, shall be charged with the duties mentioned in Sched. D. as a person residing in Great Britain, in respect of the profits or gains received from or out of any possessions in any of Her Majesty's dominions, or any foreign possessions, or from securities in any of Her Majesty's dominions, or foreign securities, but that every such person shall after such residence for such space of time be chargeable to such duties. The object of this enactment is plain. The Act contains no definition of the words "a person residing," and it was, therefore, apprehended that they might be held to embrace a foreigner sojourning in this country for a brief time, and for a temporary purpose only. It accordingly exempts such a person from taxation; the duties are only to be chargeable after a residence of six months. But from what does it exempt him? Only from moneys received here from foreign or colonial possessions. If the construction we are asked by the appellant to put on the statute be correct, a foreigner temporarily sojourning here for less than six months, though not liable to taxation even on the moneys transmitted to this country arising from his foreign possessions, is not exempted from liability in respect of the entire profits arising from a business carried on abroad, though not a penny of it be received here. That a foreigner in such circumstances should be bound to make a statement of these trade profits, and be assessed on them, would be so unreasonable that I think a construction of the statute leading to such a result should be rejected unless no other be possible. It was indeed said by the appellant that a foreigner so situated would not be within the description of a person "residing" in this country. But, if so, there was no need for the exemption, which assumes that the person dealt with would otherwise be chargeable, and it would be difficult to resist the argument that, except so far as he was exempted, he was intended to be charged with the duties imposed by the Act. The whole section points, to my mind, strongly to the conclusion that moneys received in this country arising from possessions or securities outside its limits were supposed to be the only portion of what I have termed foreign income which was taxable.

I do not think it necessary to dwell on *Cesena Sulphur Co. v. Nicholson* (2), on which much reliance was placed in support of this appeal. The head office, and, therefore, the principal place of business of the companies whose income was under consideration, was in England, and the argument turned principally on where those companies resided. I need not stop to inquire whether the facts raised the same questions as your Lordships have to determine. It is quite certain that the important considerations which have been pressed in argument on this House were not present to the minds of the learned judges who took part in these decisions; and they cannot, therefore, be regarded as authorities determining the question. I do not pretend to say that any construction of the Act is free from difficulty, or to deny that some anomalies may possibly result from that which I advise your Lordships to adopt; but it appears to me to be the one least open to

A objection, and most in accordance with the intention of the legislature, so far as I can gather it from the provisions of the Acts taken as a whole.

For these reasons I think the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN.—This is a case of great importance and no little difficulty; but, after the assistance afforded by the very able and elaborate arguments of counsel, I cannot say that I have any doubts as to what the decision ought to be.

C The case raises the question whether a person resident in the United Kingdom, and engaged in a trade carried on entirely abroad, is liable to income tax in respect of all the profits of that trade, or only in respect of so much of those profits as may be brought to this country, either in kind or money. The trading in the present case was carried on at Melbourne, in Australia. The business was a partnership business; but I apprehend the question would have been the same if no one but the respondent had been interested in the concern. Many topics which were discussed, and properly discussed, at considerable length during the argument may, I think, be laid aside. It does not appear to me that any light is thrown on the question by considering the Legacy Duty Acts or the Succession Duty Act, or the decisions on those statutes. Nor do I think that any assistance can be gained by referring to one or two cases in which perhaps the question was involved or suggested, but did not receive much attention. Nor is there, I think, any room for the argument that the expression “arising or accruing to any person,” in the first sentence of Sched. D., means “received by any person in the United Kingdom.” Moreover, although the contention on the part of the Crown, if carried to its legitimate conclusion, would certainly lead to startling results in the case of a foreigner temporarily resident in this kingdom, I do not think that even those results are so plainly at variance with what is due to the comity of nations as to compel your Lordships summarily to reject that contention without considering carefully what the legislature has actually said; and certainly, however unreasonable the consequences in other cases may be, there is nothing, I think, so very unreasonable in taxing a British subject who resides permanently in this country on the whole of his income, whether he chooses to bring it home or not.

F It seems to me that the question must be determined on a consideration of the language of the Income Tax Acts, under which the claim is made, with such assistance as may properly be derived from a reference to Acts *in pari materia*; and I think that the question, after all, really lies in a narrow compass. Does the case fall within the First Case of Sched. D. in the Income Tax Act, 1842, and under the head of

“Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act;”

I or does it fall within the Fifth Case under the head of

“The duty to be charged in respect of possessions in Ireland or in the British Plantations in America, or in any other of Her Majesty’s dominions out of Great Britain, and foreign possessions”?

J Or, to put the question more shortly still, what is the meaning of the term “possessions” in the Fifth Case of Sched. D., and in other places in the Act where it is used in the same connection?

In order to determine this question it is not, I think, immaterial to refer to the earlier Income Tax Acts, from which the existing Acts are more or less copied. The Income Tax Act, 1806 and 1803, in regard to the question before your Lordships, differ so little, if they differ at all, from the Acts now in force that I may pass them by, and turn at once to the original Act, the Act of 1799 (39 Geo. 3, c. 13). By that Act certain rates and duties therein specified were to be raised

"throughout the kingdom of Great Britain upon all income arising from property in Great Britain belonging to any of His Majesty's subjects, although not resident in Great Britain; and upon all incomes of every person residing in Great Britain, and of every body politic or corporate, or company, fraternity, or society of persons (whether corporate or not corporate) in Great Britain, whether any such income as aforesaid shall arise from lands, tenements, or hereditaments wheresoever the same shall be situate in Great Britain or elsewhere, or from any kind of personal property or other property whatever, or from any profession, office, stipend, pension, employment, trade, or vocation."

Section 77 enacted, in order that the estimates of annual income chargeable by virtue of the Act might be made according to known rules, and with as much uniformity as the respective cases would admit, that in all cases the income chargeable by virtue of that Act should be estimated according to the rules and directions prescribed by that Act and the schedule thereunto annexed, as far as the same respectively were applicable to such income; and in all cases where the same were not applicable, then according to the best of the knowledge and belief of the person making the return. Commissioners, to be styled Commercial Commissioners, "to ascertain the income of persons engaged in trade and manufacture" were to be appointed for certain districts, and it was enacted (s. 102) that income from property in the American Plantations, and imported into Great Britain, might be ascertained by the Commercial Commissioners for London, Bristol, Liverpool, and Glasgow in the same manner as if such income had arisen from trade or manufactures carried on in such places respectively, and (s. 103) that incomes received in Great Britain arising from property of persons in such plantations not imported into Great Britain might be also ascertained in like manner.

The schedule to the Act, in accordance with which the income chargeable by virtue of the Act was to be estimated, contains a collection of Cases and Rules not differing much from the Cases and Rules in the schedules to the present Income Tax Acts. It is headed "Rules for estimating the income to arise within the current year of persons to be assessed under the Act of the thirty-ninth year of his present Majesty." These Cases and Rules are arranged under four divisions, which are as follows:

"(i) Income arising from lands, tenements, and hereditaments. (ii) Income arising from personal property, and from trades, professions, offices, pensions, stipends, employments, and vocations. (iii) Income arising out of Great Britain. (iv) Income not falling under any of the foregoing Rules."

Division III is divided into two headings. "Seventeenth Case. 1st. From foreign possessions," where "the full amount of the actual net income received in Great Britain" was to be estimated according to the year immediately preceding, or the average of the three preceding years. "Eighteenth Case. 2nd. Money arising from foreign securities," where the annual income was to be estimated according to the produce of the preceding year, or the expected produce of the current year. It cannot, I think, be doubted that "foreign securities" are a class of foreign possessions, and that "money arising from foreign securities" was included in a separate subdivision merely because the income chargeable was to be estimated on a slightly different basis. It is obvious that the subjects comprised in the two subdivisions, whether the second is properly a separate subdivision or not, were meant to exhaust the whole category described in Division III, "income arising out of Great Britain."

It can hardly be supposed that the framers of the Act could have overlooked the possibility that "income arising out of Great Britain" might include income arising from trade carried on abroad. Indeed, in the very case mentioned in s. 102 and s. 103, the case of income arising from property in British Plantations in America, the income in produce or money would certainly, for the most part, be income arising from concerns in the nature of trade; and those sections show that that

A income was to be estimated in the manner in which "income from foreign possessions" was by the schedule directed to be estimated. I am, therefore, forced to the conclusion that in the expression "foreign possessions," as used in the Income Tax Act, 1799 (39 Geo. 3, c. 13), the word "possessions" is to be taken in the widest sense possible, as denoting everything that a person has as a source of income.

B I now come to the Act of 1842, and I think that it is only necessary to refer to a very few sections of that Act. For convenience' sake I will take the Act of 1842 as it stood before the passing of the Act of 1853, which substituted "the United Kingdom" for "Great Britain," and I will treat the case as if the Income Tax Acts had not been extended to Ireland. The income of the respondent from his business in Melbourne, whether he is to be charged in accordance with the contention of the Attorney-General or not, undoubtedly comes under Sched. D., and undoubtedly the portion of Sched. D. which is contained in Sched. II to the Act of 1842 is expressed in the most comprehensive terms possible; and, if not restrained or limited by what follows, would operate to charge the respondent in respect of the whole of his Melbourne income. I do not, however, agree with the argument urged at the Bar, that the rest of Sched. D., which is found in s. 100, is mere machinery, or a mere collection of examples, not diminishing the generality of the earlier part of the schedule, but intended only to furnish a guide where the particular rule applies. The whole schedule must be read together. Every case that can possibly happen under Sched. D. is enumerated in s. 100. For every case which cannot be brought under one or other of the first five Cases must fall under the Sixth Case.

E Unquestionably the rules applicable to a particular case may cut down, and cut down very materially, the charging words in the earlier part of Sched. D. For instance, it cannot, I suppose be denied that foreign securities are a "kind of property situate elsewhere than in Great Britain." By the earlier part of Sched. D. the rates and duties chargeable in respect thereof would be so much for every 20s. of the annual profits or gains arising or accruing therefrom. But the Rules under the Fourth Case limit the charge to the amount received in Great Britain. It seems to me that the profits or gains from the respondent's Melbourne business might be held to fall either under the First Case or under the Fifth Case, if one looked to nothing more than the language of those two Cases. The First Case deals with "duties to be charged in respect of any trade . . . not contained in any other schedule." In its terms no doubt that would include the respondent's business at Melbourne, as well as his business in London. The second rule of the First Case declares that

"the said duty is to extend to every person, body politic, or corporate . . . or society, and to every . . . concern carried on by them respectively in Great Britain or elsewhere, except such concerns as are mentioned in Schedule A."

Again in its terms this rule points to a business carried on out of Great Britain, as well as to one carried on in Great Britain. But then when one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad, one gets into hopeless difficulties. If it is a partnership business, as this is, the return is to be made by the senior partner resident in Great Britain. But then the partner is to make the return "on behalf of himself and the other partner or partners," and his return is "sufficient authority to charge such partners jointly," and "no separate statement" is to be allowed in any case of partnership except for "the purpose of the partners separately claiming an exemption," or "of accounting for separate concerns." Then, again, the computation of the duty to be charged in respect of any concern in the nature of trade is to be made exclusive of the profits or gains arising from lands occupied for the purpose of such concern. That rule hardly seems applicable to a foreign mine or a sugar plantation in the West Indies. Then, again, by s. 106 every person engaged in any trade is to be chargeable by the commissioners acting for

the parish or place where the trade is carried on, whether such trade is exercised wholly or in part only in Great Britain. And there are other provisions, which it is not necessary to go through, which seem to show that the First Case, though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad.

Turning now to the Fifth Case, I ask why are not the respondent's profits and gains from his Melbourne business within the Fifth Case? What is the meaning of the term "possessions" in that Case? The word "possessions" is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not "possessions in Ireland" mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not "profits from possessions out of Great Britain," which is to be found in Sched. G., No. XI, and recalls the expression "income out of Great Britain" in the Income Tax Act, 1799, mean profits from every source of income abroad? I use the expression "source of income" because it is as a source of income that the Act of 1842 contemplates and deals with property and everything else that a person chargeable under the Act may have, and the Act itself in s. 52 uses the expressions "sources chargeable under the Act" and "all the sources contained in the said several schedules" as describing everything in respect of which the tax is imposed.

There are two sections in the Act of 1842 to which I will refer as showing that the word "possessions" must have this meaning. Take s. 39. Under that section an Irishman who happened to be in Great Britain for some temporary purpose only, and not with any intent of establishing his residence there, and whose actual residence in Great Britain did not amount to a period of six months in any one year, was

"not to be charged with the said duties mentioned in Schedule D. as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland,"

or "from securities in Ireland." He was not even to be charged in respect of his receipts in Great Britain from those sources. It could not be suggested that as a temporary resident for less than six months he was to be charged in respect of any gains or profits from an Irish source which were not received in Great Britain. But then the section goes on to say that after six months' residence "such person is to be chargeable to the said duties"—that is to the duties "in respect of the profits or gains received from or out of any possessions in Ireland," or "from securities in Ireland. If profits and gains from an Irish business be not included in profits and gains from possessions in Ireland, it is certainly very singular that no mention of them is to be found in s. 39. It cannot be supposed that the presence in England of an Irishman engaged in business in Ireland was so rare a thing that it escaped the attention of the framers of the Act. Nor can it I think be supposed that a person made liable as a temporary resident in Great Britain by reason of six months' residence there was intended to escape altogether from the payment of income tax upon receipts from his Irish business. Yet what would there be to charge him if the appellant is right? The only way to give a rational meaning to s. 39 is to construe the expression "possessions in Ireland" as including every source of Irish income other than Irish securities which the person made chargeable by the section may happen to possess.

Section 106 seems to me to point clearly in the same direction. It explains in what districts the duties contained in Sched. D. are to be charged. After dealing minutely with the case of persons carrying on business either wholly or partly in Great Britain, it provides for the duty to be assessed in respect of the profits or gains arising from possessions or securities in Ireland, and there again there is no mention of profits or gains arising from trade or business in Ireland, and no provision for the place where such profits or gains are to be assessed unless they are to be taken to be included in the expression "possessions in Ireland." If not

so included the omission to mention them in that section is the more extraordinary because the greater part of the section is occupied with the subject of profits and gains from trade.

It is obvious, too, I think that if the expression "possessions in Ireland" be given a narrower meaning than that which I have suggested as its proper meaning endless difficulties would arise. However much you narrow the meaning of the word "possessions" you cannot narrow it so far as to exclude all trades or concerns in the nature of trade. Even in the rule applicable to the Fifth Case there is I think an indication that the case covers profits from foreign trades. It will be observed that the only deduction or abatement allowed is that allowed in the First Case. On referring to the First Case it will be found that that deduction or abatement is one applicable, and only applicable, I think, to the case of a trade.

On the whole, I have come to the conclusion that the profits and gains arising from the respondent's Melbourne business fall under the Fifth Case of Sched. D., and are chargeable accordingly on the actual sums received in the United Kingdom; and consequently I am of opinion that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue; Shepherds.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

NOTTINGHAM PATENT BRICK AND TILE CO. v. BUTLER

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), March 3, 5, 1886]

[*Reported 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391*]

Sale of Land—Title—Restrictive covenant—Non-disclosure—Special condition of sale precluding annulment of sale for omission—Purchaser's right to rescind—Return of deposit—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 3.

The owner in fee of land sold and conveyed it, during 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers restricting the use of the land as a brickyard, and in other respects. The purchaser of lot 11 subsequently sold that lot to the defendant, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 the plaintiffs, a company manufacturing bricks, contracted to purchase lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictive covenants was not mentioned in the contract; but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit on account of the purchase money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract, and sued the defendant to recover the amount of the deposit.

Held: if their contract with the defendant were carried out, the plaintiffs would be bound by the restrictive covenants; the existence of the covenants was

known to the defendant and nothing in the conditions of sale or in the Conveyancing Act, 1881, enabled the defendant to force a defective title on the plaintiffs, who were, therefore, entitled to recover the amount of the deposit. A

Notes. Applied and extended: *Collins v. Castle*, ante p. 699. Considered: *Sheppard v. Gilmore*, ante p. 1049. Applied: *Bower v. Sandford* (1889), 5 T.L.R. 570. Considered: *Saxby v. Thomas* (1890), 63 L.T. 695. Applied: *Re Birmingham and District Land Co. and Allday*, (1893), 1 Ch. 342; *Nalder and Collyer's Brewery Co. v. Harman* (1900), 82 L.T. 594. Considered: *Rogers v. Hosegood*, [1900-3] All E.R.Rep. 915. Applied: *Reid v. Bickerstaff*, [1908-10] All E.R.Rep. 298. Considered: *Simpson v. Gilley* (1922), 92 L.J.Ch. 194; *Kelly v. Barrett*, [1924] All E.R.Rep. 503; *Beyfus v. Lodge*, [1925] All E.R.Rep. 552; *White v. Bijou Mansions, Ltd.*, [1938] 1 All E.R. 546. Referred to: *Spicer v. Martin*, ante p. 461; *Davis v. Leicester Corporation*, [1894] 2 Ch. 208; *Formby v. Barker*, [1900-3] All E.R.Rep. 445; *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *Willé v. St. John*, [1908-10] All E.R.Rep. 325; *Newman v. Real Estate Debenture Corporation, Ltd. & Flower Decorations, Ltd.*, [1940] 1 All E.R. 131. B

As to defects of title, see 34 HALSBURY'S LAWS (3rd Edn.) 218 et seq.; and cases there cited. C

Cases referred to: D

- (1) *Keates v. Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, 2780.
- (2) *Master v. Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 19 Digest (Repl.) 47, 254.
- (3) *Renals v. Cowlishaw* (1878), 9 Ch.D. 129; 48 L.J.Ch. 33; 38 L.T. 504; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796. E
- (4) *Heywood v. Mallalieu* (1883), 25 Ch.D. 357; 53 L.J.Ch. 492; 49 L.T. 658; 32 W.R. 538; 40 Digest (Repl.) 115, 886.
- (5) *Harrison v. Good* (1871), L.R. 11 Eq. 338; 40 L.J.Ch. 294; 24 L.T. 263; 35 J.P. 612; 19 W.R. 346; 40 Digest (Repl.) 358, 2869. F

Also referred to in argument:

Wilson v. Hart (1866), 1 Ch. App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur.N.S. 460; 14 W.R. 748, L.JJ.; 40 Digest (Repl.) 355, 2845.

Patman v. Harland (1881), 17 Ch.D. 353; 50 L.J.Ch. 642; 44 L.T. 728; 29 W.R. 707; 40 Digest (Repl.) 350, 2823.

Western v. MacDermott (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, 2886. G

Nicoll v. Fenning (1881), 19 Ch.D. 258; 51 L.J.Ch. 166; 45 L.T. 738; 30 W.R. 95; 40 Digest (Repl.) 356, 2852.

Duke of Bedford v. Trustees of British Museum (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887. H

Mann v. Stephens (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, 2784.

Coles v. Sims (1854), 5 De G.M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.JJ.; 40 Digest (Repl.) 345, 2794.

Waddell v. Wolfe (1874), L.R. 9 Q.B. 515; 43 L.J.Q.B. 138; 23 W.R. 44; 40 Digest (Repl.) 83, 627. I

Smith v. Robinson (1879), 13 Ch.D. 148; 49 L.J.Ch. 20; 41 L.T. 405; 28 W.R. 37; 40 Digest (Repl.) 83, 628.

Appeal by the defendant from an order of WILLS, J., dated May 20, 1885, by which he gave judgment for the plaintiffs.

The facts as stated by WILLS, J., in his reserved and written judgment were as follows. The plaintiffs sued the defendant to recover £610 paid by the plaintiffs to

A the defendants as a deposit on the intended purchase by the plaintiffs from the defendant of a piece of land. The land was put up for sale by auction on Sept. 26, 1882, but was not sold at the auction. Immediately afterwards the plaintiffs, by their solicitor, Mr. Hind, entered into negotiations, first with the auctioneer, and then with the defendant himself, in the course of which the defendant told Mr. Hind that there were restrictive covenants applicable to the land, which would prevent its being used as a brickfield. The defendant's solicitor, Mr. Gilbert, who was present, was appealed to by Mr. Hind on the question whether this was correct, and he replied that he was not aware of any. Thereupon the defendant said that he had seen the restrictions in one of the old deeds; and, on Mr. Hind repeating his appeal, Mr. Gilbert again answered that he was unaware of any restrictions. Mr. Gilbert did not add that, without which his answers were misleading, viz., that he had not read the earlier deeds, and knew nothing of their contents. One of the directors of the plaintiff company, who was present, thereupon signed, on behalf of the plaintiff company, a contract to purchase the piece of land at the price of £6,100, and a deposit of ten per cent. was paid to the defendant.

The contract contained a description of the piece of land proposed to be sold, but was silent as to its being subject to any restrictions on the full proprietary rights of the purchaser of a freehold, and also contained the following conditions:

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Co. for removing from time to time, and laying down along the private road, called Plain's Road, new main water pipes, and also to the payment of a rateable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperly Plains in good condition, and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, 10. The title shall commence with an indenture of conveyance dated May 20, 1868, and made between Henry Conway Barnett of the first part, Harriet Maltby, spinster, of the second part, and William Windley of the third part. 12. The property is believed to be, and is to be taken to be, correctly described, and any incorrect statement, error, or omission found in the particulars of these special conditions is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof."

About Dec. 9, 1882, the plaintiff discovered that the property so bought was one of a number of bits of land which had in the years 1865, 1866, and 1867 been sold by the same vendor to different purchasers, subject in each case to conditions imposing restrictions on the costs and details of construction of any house to be built on the land bought, and forbidding the use of it for various purposes of trade or manufacture, and especially as a brickyard or for making bricks. The plaintiffs thereupon threw up the purchase, and brought this action to recover the deposit which they had paid.

It appeared that the plot in question (containing about six and a half acres) was part of a property about forty-two or forty-three acres, which was, on Mar. 24, 1865, put up for auction in thirteen lots. Among the conditions of sale were the following:

"15. All buildings to be erected on any part of the said lands shall be stone-coloured, with slated roofs, and no building to be occupied as a public-house, or workshop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purposes of using, working, or making any article of manufacture therein, shall be erected, or built, or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except lot 13; and in case the property shall be sold in lots,

no house shall be erected on any part of the said land, except on lot 13, at a less cost than £400. 16. The purchaser of the property, or of each lot in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of each purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."

At this sale lots 1 and 2 were sold. In February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold. In October, 1867, there was a third auction, at which lots 9 and 10 were sold. The whole of these lots were sold on the same terms.

Lot 11 (the lot contracted to be purchased by the plaintiffs in 1882, and now in question) was sold by private contract, and the deed of sale, bearing the date Sept. 4, 1866, contained the restrictive conditions. Lot 13 was sold by private contract in June, 1866, and the deed by which it was conveyed contained, with the exception of a permission to build a blacksmith's shop, such of the restrictions as were applicable to lot 13. That lot was then a brickfield, and the permission to build a blacksmith's shop was, under the circumstances, a matter of the smallest possible consequence to any person interested in the observance of the restrictions. There is, therefore, no doubt that the whole of the lots sold at the three auctions were sold subject to the restrictions in question, as well as lot 11 and (with the modification of them above mentioned) lot 13, both of which were sold by private contract; and as to lots 8, 9, 10, 11, 12, and 13, the matter was placed beyond a doubt by the production of the deeds by which the common vendor conveyed to the various purchasers. Some of the persons who had bought from the original vendor were shown to have re-sold without any restrictions being mentioned in the deeds by which they conveyed to their respective purchasers. Lots 2 and 3, part of lot 4, and lot 11 were shown to have been so dealt with. On the other hand lots 8, 9, 10, and 12 were shown to have been sold by every successive vendor by deeds containing the restrictions; and it appeared that every house that had been built on any part of the original estate had conformed to the covenant as to cost, and in part to the covenant as to colour; that is to say, the fronts of all the houses had been white, though in some instances the backs, and in many instances the stables, had been red. No shop or building for manufacture had been put up on any of the lots, and none had been used as a brickfield. Most of the houses had been slated. Under these circumstances the plaintiffs contended that they were not bound to complete their purchase; that they had bought a property which was, in fact, subject to serious restrictions on its profitable use by a contract which contained no reference to the restrictions, and that there was nothing in the contract to prevent them from taking advantage of this objection.

Arthur Charles, Q.C., and W. Graham for the defendant.

Montague Cookson, Q.C., Darling, Q.C., and R. M. Bray for the plaintiffs.

LORD ESHER, M.R.—In this case *WILLS, J.*, in a very elaborate and careful judgment, has gone through all the facts and the law affecting them. He has come to the conclusion that the purchasers, the plaintiffs, could not have enforced against them the contract into which they have entered, and that the deposit which they have paid ought to be returned. We come to the same conclusion in whatever way the facts as represented are to be taken. One fact, which we may assume would have been found differently from what *WILLS, J.*, found, was never brought before him; that is to say, not clearly brought before him so as to let him know that he had to decide on that footing. Another matter in which we may differ from him is that we may think he was too indulgent in the view he took of another fact in the

case. Assuming the facts to be as he considered them to be, I, for myself, think that his judgment was right in every particular.

The first point which he had to consider was whether there were, with regard to this property, restrictive covenants which might be enforced by any one of the purchasers of certain parts of the property against any other purchaser. It has been argued that there were no such restrictive covenants in this case, because there was no covenant, either in writing or otherwise in express terms, that each covenantor, or each original purchaser would consider himself bound to the other purchasers, and there was no covenant, as I understand, by the original vendor. But I think that WILLS, J.'s view of the law as to this matter is perfectly correct. In his judgment he dealt with all the cases, including those which have been cited to us of *Keates v. Lyon* (1), *Master v. Hansard* (2), and *Renals v. Cowlishaw* (3). In my view he is right in saying that where property is put up for sale in lots, and is sold under that sale, and where there are restrictive covenants to be entered into by each of the purchasers, and where the vendor is intending under that sale to sell the whole of his property, the question whether there is an intention that each of the purchasers shall be in respect of the restrictive covenants liable to the other purchasers is a question of fact, and has to be determined by the intention of the vendor and the purchasers; and that that question of intention must be found on the same rule of evidence with regard to intention as every other question of intention has to be dealt with. If it is found that that was the intention, then a court of equity will, in favour of each of the purchasers, insist on the performance by any one of them of the restrictive covenants. The court of equity will do so under such circumstances without introducing the vendor at all.

In this case the property was originally put up in lots. It seems to me that the evidence is conclusive to show that the vendor, who put up the property to be sold in lots at that time by auction, intended to sell the whole property in lots; and that his intention to sell the whole was clearly published, so that all persons who had been at that auction must have known that he was intending to sell the whole. As there were to be restrictive covenants, it would follow that they must have known that those covenants were really made in favour of each of them as against all the rest. But it is said that the property was not sold all at once; that some part of it was sold when it was first put up; and that other parts were not sold till afterwards. That is true as a matter of fact, and it is true that the subsequent sales were at considerable distances of time. That would be a circumstance to be taken into account as to what was the view of the later purchasers if that was material. But it is impossible, to my mind, to argue with any correctness that the mere fact of the lots not being all sold on one day can make any difference. If the sales on subsequent days cannot make any difference, the question of time cannot be a bar. It is a matter to be taken into consideration, but it is not a bar. I think that in this case the evidence is conclusive, again, to show that the sale of each and every one of the lots was a sale under the conditions, and under the authority that was given on the first occasion at the time when the vendor put up the whole of the lots for sale. The subsequent lots were not sold on the first occasion only, because there were no bidders for them. No new instructions were given to the auctioneer, no new bargain was made with the auctioneer, and no new charges were made by the auctioneer for altering any conditions, as the learned judge has shown. It seems to me, therefore, that all the subsequent sales were, under the one authority, given to the auctioneer to sell. Although the auctioneer did not sell some of the lots—but they were sold by private contract—yet they were all sold on the conditions which were contained in that auction which were not altered. Therefore, the lots were practically and legally all sold under the one putting up for sale, which was the original putting up at auction.

Under those circumstances it seems to me that there are two relevant lines of cases. In one of those lines of cases the facts arise where there has been a sale of part of the property with no intention then of selling the rest, and then there is a subsequent sale. In such a case, one cannot look, with regard to the later

sale, to the conditions of the former sale; one must look then to the conditions which are contained solely in the later sale. The other line of cases is where the whole property is put up, not only as a building scheme, but is put up to be sold in portions or lots, all under conditions; then it is a question of fact whether the intention was not that the covenant should be taken in favour of each purchaser with regard to all. A most material fact in that case is, whether the vendor reserves any part of the property for himself. When he does not, it is almost or quite conclusive to show (unless there is something contradicting) that the covenants which he takes are in favour of each purchaser as against the other. I think, therefore, that that first point which WILLS, J., decided, he decided rightly both in law and in fact.

It is said that there was nobody who could enforce these covenants. But if you take it that all those sales were part of one sale, and that the covenants were made in favour of the other purchasers, that argument seems to me to fall to the ground at once, because each purchaser could enforce the covenants. WILLS, J., took the case with regard to the previous sales to the defendant on this ground, that the original sale was in lots, with the intention which I have suggested. But then it appeared to him that, at all events, there was no evidence that the predecessors of the defendant did not buy those terms, and did not buy with the knowledge of those terms. It has been argued that the predecessors of the defendant did buy with notice of those terms; that there was no evidence that they did not buy with knowledge of those terms; and that, if that were true, the property came down to the defendant still bound by the restrictive covenants in favour of the other purchasers. Then came the contract from the defendant to the plaintiffs. It was argued that, even though there were restrictive covenants which would have been binding against the defendant, yet when he sold to the plaintiffs there was no covenant binding on them. I cannot follow that argument at all, and I cannot help thinking that the learned judge was right as to that.

It was said that, the defendant did not know, or at all events that he made no statement to the present purchasers with regard to this matter. But when one considers the conversation between the defendant and his solicitor, and the plaintiffs or the plaintiffs' agent, it seems to me that WILLS, J., has treated that matter very mildly indeed. But, supposing he were right in the view he took of that which I will presently for another purpose discuss, I think that the mildest way of looking at it would be to say that no statement was made. If no statement were made, then it is said that, by reason of the conditions and of the Conveyancing Act, 1881, although there was a defect in the title, yet it can be forced on the present plaintiffs, the purchasers. That, I confess, seems to me to be an astounding proposition, that one can, by the conditions of sale, force on a purchaser a defective title, even though the vendor knows of the defect. That the defendant, the vendor, knew of the defect seems to have been taken by WILLS, J., as proved. If one treats the vendor as dealing by himself he did know of the defect; then, if the conversation at which he was present amounted to nothing at all, the position is that he knew of the defect, and that he then, by his agent, promulgated and put forth the conditions of sale. If that is true, it seems to me that the case is absolutely within the authority of *Heywood v. Mallalieu* (4). It is impossible to say that the vendor, knowing of the defect, can by himself or his agent put forward conditions of sale which are to force on a purchaser a bad title of which he has knowledge, but which he did not disclose. I confess that the court of equity would not be anything of a court if it could not meet such a case as that. It seems to me clear that equity never would have enforced that contract.

If equity would not have enforced that contract, does the Conveyancing Act, 1881, affect the matter at all? I entirely agree that whatever construction one puts on the question it cannot have any effect. It could not have cured that defect in the title of the defendant. If that is true it was a bad title which the defendant insists that the court should enforce against the purchasers from him. The court will not do it on any ground. Therefore the vendor could not have specific performance

under those circumstances with a bad title which the vendor was attempting to enforce, and which bad title was in the knowledge of the vendor. It seems to me that he could not keep the deposit. Therefore, WILLS, J., was right in that view.

The case comes before us with another view of it. I will assume that the fact is found according to the argument, and that is, that the predecessor of the defendant bought for value without notice of the restrictions. Then it is argued that, if that were so, then when the defendant bought from that predecessor he did not buy subject to any restrictions, and that, if the plaintiffs had bought from the defendant, they would not have been subject to the restrictions. If there was that sale to the predecessor of the defendant without notice, as at present advised, I think the consequence follows that the plaintiffs would have bought from the defendant not subject to the restrictions. But if the rule were that, once there has been a purchaser for value without notice, then the previous restrictions are all gone, and the title can go on, there would be this result: that it would depend on the question whether or not the previous purchaser bought without notice. That must always be a question of fact, and a question of evidence. A title depending on questions of evidence is capable of being disputed and capable of being taken into a court of law. In the present case the probability was, and almost the certainty was, that the purchasers were buying a lawsuit in order to get their title clear. Under those circumstances, where the rectitude of the title depends on facts which very probably will be disputed, and are certainly capable of disputation, the court of equity, as I understand it, will not enforce the contract. Therefore, in that view, there could not have been specific performance. In that view, although the vendor could not have enforced the title, if nothing else had happened I should think that he would not have been compelled to give back the deposit.

In that view of the facts, we come to the question whether the vendor ought to keep the deposit. That obliges us to enter into a disagreeable question whether WILLS, J., in his comments on what took place at a certain interview, has not been too lenient. We have had the evidence as to that interview read to us. I am sorry to say that I have come to the conclusion that the solicitor, the younger Mr. Gilbert, allowed himself to be carried away by his zeal for his client, and that he did not act with that candour to the other side with which a solicitor of this court is bound to act under such circumstances. I am inclined to think that he had not fully considered the responsibility which rested on him, and, therefore, nothing more ought to be said against him. He is young, as I am told, and he has made a very gross mistake as to the duty of a solicitor under such circumstances. I think that he allowed himself, in that zeal for his client, to make statements which were calculated to lead the other side to believe that he was making statements of facts within his knowledge, and that therefore he made statements which misled them in point of truth, so that what he did amounted to a mis-statement of facts. If that is so, if what he said amounted to a mis-statement of facts, and that was said in the presence of the defendant, it seems to me that WILLS, J., was too lenient in holding that, under the circumstances, the solicitor was not the agent of the defendant. The circumstances are these: He is entrusted with the sale, and his client, the defendant, stands by him and makes a statement; but the solicitor, the person on whom the other side would rely more than they would on the client as to such a statement, immediately contradicts his client and makes a statement. That statement, to my mind, was equivalent to saying, "My client here, who says he has read the deeds, does not understand them; he is mistaken, and I tell you there is no such restriction." He so conducted himself that that was the natural interpretation of what he said. To my mind it is clear that the other side, in entering into the original contract of sale, and paying the deposit, relied on that statement of his, which was equivalent to a mis-statement. I think that the defendant cannot keep the deposit. On this mis-statement all other questions fall to the ground. The moment we find this mis-statement, it is obvious that the contract could not be enforced; that the contract was at an end; and that of itself would dispose of the

whole case. The result is that the learned judge is right, and this appeal must be dismissed.

• **LINDLEY, L.J.**—I am of the same opinion, and the view I take of it may be put in a very short compass. The most favourable way of looking at it from the vendor's point of view is to assume that to be correct which appears according to the evidence. We have not heard the matter discussed on the other side. Therefore, I assume it that he was himself a bona fide purchaser for value without notice of the restrictive covenants. Let us see how it would stand on that assumption which is most favourable to him.

I take it to be perfectly well settled, as is stated in *SUGDEN'S VENDORS AND PURCHASERS* (14th Edn.) p. 620, that a person with notice of an equitable claim may safely purchase of a person who bought bona fide and without notice of it. It is perfectly well established, therefore, that the defendant, being himself a bona fide purchaser for value without notice, had a good title, and he could give that title to anybody, even if that person should have notice of the restrictive covenants. Assuming that, then it is, in his point of view, equally plain, apart from all other considerations, and standing on that alone, that the defendant could not obtain specific performance. In the same book (p. 753) it is laid down that a purchaser will not be compelled to accept a title depending on proof of the vendor not then having had notice of the incumbrance. One sees the good sense of that. On this evidence it seems, so far as I can gather it, that the defendant had notice. But suppose litigation ensued between some other parties and the present purchasers after the conveyance to them, I do not know, and the court cannot tell, what evidence might be forthcoming. It is quite possible that, on a re-investigation of the facts, there might be evidence to show that the defendant had notice. It is to prevent purchasers being embarrassed by any such chance of litigation as that, that the court of equity never has compelled a purchaser to take that which might be a good title, but which would possibly, and very probably, lead to an immediate litigation with other people.

Assuming, therefore, that the defendant was that which I am now supposing him to be, he could not enforce specific performance of this contract against the plaintiffs. Nor are the conditions under which he sold so worded as to enable him to enforce such a contract. For assuming, as I do, that he was a bona fide purchaser for value, but at that time of the sale to the plaintiffs aware of this defect, then it would not be right, if he intended to cover that blot by saying to the purchasers, "You must take such title as I have got; I tell you I am a bona fide purchaser for value without notice of any restrictions; you must buy upon that condition." He ought to have some conditions pointing to that blot much more specifically than these conditions do. It would not be right, I apprehend, to enforce specific performance of a contract for sale, under the favourable circumstances I am supposing, on such conditions as these without the attention of the purchaser being more closely drawn to such a blot as that. Therefore, the counterclaim of the defendant for specific performance cannot be successful.

I now pass to the other point, which is whether the purchasers are entitled to rescind this contract, and have back their deposit. If there was nothing else in the case except that to which I have alluded, I should have thought that they could not have got back the deposit. The case would have stood in this way—that if they had liked they could complete and take the title. That title, on the circumstances I have assumed, would be a good holding title. If they did not choose to do that I do not think they would be entitled to get back that deposit. But then the case does not stand there. Their right to recover the deposit appears to me to turn entirely upon what took place at the sale. I will shortly repeat the evidence given by Mr. Gilbert, jun. On cross-examination he said:

"I knew they, [the plaintiffs] were a company for brickmaking. I had no doubt that they wanted the property for brickmaking purposes. I intended to convey to Hind that I did not know of the restrictions, and did not believe

there were any. We had the old deeds at the time of the sale. I did not tell him I had not read the deeds."

Taking that evidence with the rest, which has been alluded to by the Master of the Rolls, it seems to me that the inference is unavoidable that these plaintiffs have bought on the faith of there being no restrictions, and on the faith of the solicitor knowing that there were none, and after those statements were made by him to induce that belief. In that case—although I do not accuse Mr. Gilbert, jun., of anything like fraud—there is such a misrepresentation tainting the whole of this contract as entitles the purchasers to rescind it, and have back their deposit. It appears to me, therefore, that the appeal ought to be dismissed.

I wish to add one more word. I think, on reading WILLS, J.'s judgment, that the way in which he has treated that class of cases—*Keates v. Lyons* (1) and so on—is correct. I think that it is an inference of fact in each case whether the purchasers are bound inter se by such covenants; and that the mere fact that the vendor does not bind himself by express covenant to enforce the covenant which he takes for the benefit of the purchaser is not a material circumstance. That was decided in effect by BACON, V.-C., in *Harrison v. Good* (5). I wished to add that, although, looking at the matter from my point of view, it did not become material.

LOPES, L.J.—I am of the same opinion. I entirely agree with WILLS, J., in the court below, in respect of everything he has said, so far as he has decided the facts with which he dealt. But a point which was dealt with in a subordinate way before him has been brought before us. The point to which I allude is this: It is now said that the defendant was a bona fide purchaser from his vendor for value, without any notice of the restrictive covenants, and therefore was not bound by them; and that he is competent to transfer to the plaintiffs the property free from those restrictive obligations. I will assume that to be so; but whether or not he so bought without notice of those restrictive covenants is a matter of evidence. It is a matter which would have to be proved, and is a matter which might be more or less doubtful. The plaintiffs contracted to buy the property free from incumbrances, and without restrictive covenants. They did not agree to buy the property with a lawsuit. Under those circumstances, I think that the defendant cannot compel specific performance of this contract.

That would relieve the plaintiffs from the performance of this contract, but that would not entitle them to the return of their deposit. It becomes, therefore, necessary to consider another matter in the case. We must consider what happened at the time, or just before this contract was entered into, with regard to these restrictive covenants. It seems to me to be perfectly clear, according to the evidence, that the defendant knew of them. It seems equally clear to me that Mr. Gilbert knew of them. I quite agree with what has been said that his conduct was such as cannot be approved of. It may have been through over-zeal for his client as has been described, but he clearly endeavoured to suppress and conceal them, and I believe that the plaintiffs signed that contract, relying on what had been said by Mr. Gilbert with regard to those restrictive covenants, and bought or agreed to buy the property on the faith of the statements made by him. If that is so, the plaintiffs clearly are entitled not only to be relieved from the contract which they entered into, but also are entitled to a return of the deposit. The decision of the learned judge was therefore right, and the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Torr, Janeways, Gribble & Oddie*, for *Wells & Hind*, Nottingham; *Aldridge, Thorn & Morris*, for *Towle, Gilbert & Sons*, Nottingham.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re FRY. FRY v. LANE. WHITTET v. BUSH

[CHANCERY DIVISION (Kay, J.), October 25, 26, 27, 29, November 8, 1888]

[Reported 40 Ch.D. 312; 58 L.J.Ch. 113; 60 L.T. 12;
37 W.R. 135; 5 T.L.R. 45]

Undue Influence—Sale of property—Setting aside transaction—Sale by poor and ignorant vendor at undervalue.

Where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction, even in the case of property in possession and if a portion of the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw on the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just, and reasonable.

Dictum of LORD SELBORNE, L.C., in *Earl of Aylesford v. Morris* (1) (1873), 8 Ch. App. at p. 490, applied.

Notes. The Sales of Reversion Act, 1867, s. 1, has been repealed by the Law of Property Act, 1925. See now s. 174 of the Act of 1925.

As to unconscionable bargains, see 17 HALSBURY'S LAWS (3rd Edn.) 682 et seq.; and for cases see 25 DIGEST (Repl.) 287 et seq. For the Law of Property Act, 1925, s. 174, see 20 HALSBURY'S STATUTES (2nd Edn.) 788.

Cases referred to:

- (1) *Earl of Aylesford v. Morris* (1873), 8 Ch. App. 484; 42 L.J.Ch. 546; 28 L.T. 541; 37 J.P. 227; 21 W.R. 424, L.C. & L.J.; 25 Digest (Repl.) 291, 964.
- (2) *Wiseman v. Beake* (1690), 2 Vern. 121; Freem. Ch. 111; 23 E.R. 688; 25 Digest (Repl.) 296, 1019.
- (3) *Freeman v. Bishop* (1740), 2 Atk. 39; Barn. Ch. 15; 26 E.R. 420, L.C.; 25 Digest (Repl.) 296, 1020.
- (4) *Davis v. Duke of Marlborough* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E.R. 555, L.C.; 25 Digest (Repl.) 295, 1008.
- (5) *Earl of Portmore v. Taylor* (1831), 4 Sim. 182; 9 L.J.O.S.Ch. 203; 53 E.R. 69; affirmed (1832), 4 Sim. 216, n., L.C.; 25 Digest (Repl.) 293, 978.
- (6) *Boothby v. Boothby* (1852), 15 Beav. 212; 51 E.R. 518; 25 Digest (Repl.) 295, 1002.
- (7) *Foster v. Roberts* (1861), 29 Beav. 467; 25 Digest (Repl.) 292, 975.
- (8) *Beynon v. Cook* (1875), 10 Ch. App. 389; 32 L.T. 353; 23 W.R. 531, L.J.J.; 25 Digest (Repl.) 297, 1026.
- (9) *Earl of Aldborough v. Trye* (1840), 7 Cl. & Fin. 436; West. 221; 4 Jur. 1149; 7 E.R. 1136, H.L.; 25 Digest (Repl.) 300, 1070.
- (10) *Talbot v. Staniforth* (1861), 1 John. & H. 484; 31 L.J.Ch. 197; 5 L.T. 47; 7 Jur.N.S. 961; 9 W.R. 827; 70 E.R. 837; 25 Digest (Repl.) 300, 1071.
- (11) *Evans v. Llewellyn* (1787), 1 Cox, Eq. Cas. 333; 2 Bro.C.C. 150; 29 E.R. 1191; 25 Digest (Repl.) 288, 939.
- (12) *Haygarth v. Wearing* (1871), L.R. 12 Eq. 320; 40 L.J.Ch. 577; 24 L.T. 825; 36 J.P. 132; 20 W.R. 11; 25 Digest (Repl.) 287, 924.
- (13) *Wood v. Abrey* (1818), 3 Madd. 417; 56 E.R. 558; 40 Digest (Repl.) 392, 13131.
- (14) *Longmate v. Ledger* (1860), 2 Giff. 157; 2 L.T. 256; 6 Jur.N.S. 481; 8 W.R. 386; 66 E.R. 67; affirmed, see 4 De G.F. & J., p. 402, L.C.; 25 Digest (Repl.) 273, 821.
- (15) *Clark v. Malpas* (1862), 4 De G.F. & J. 401; 31 L.J.Ch. 696; 6 L.T. 596; 26 J.P. 451; 10 W.R. 677; 45 E.R. 1238, L.J.J.; 25 Digest (Repl.) 273, 817.
- (16) *Baker v. Monk* (1864), 4 De G.J. & Sm. 388, L.J.J.; 25 Digest (Repl.) 275, 835.

- (17) *Harrison v. Guest* (1860), 8 H.L.Cas. 481; 11 E.R. 517, H.L.; 25 Digest (Repl.) 288, 941.
- (18) *Gowland v. De Faria* (1810), 17 Ves. 20; 34 E.R. 8; 25 Digest (Repl.) 295, 1007.
- (19) *Twisleton v. Griffith* (1716), 1 P.Wms. 310; 24 E.R. 403, L.C.; 25 Digest (Repl.) 293, 977.
- (20) *Bromley v. Smith, Bonstead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; 29 L.J.Ch. 18; 33 L.T.O.S. 363; 5 Jur.N.S. 833; 7 W.R. 557; 53 E.R. 1047; 25 Digest (Repl.) 299, 1060.
- (21) *Nevill v. Snelling* (1880), 15 Ch.D. 679; 49 L.J.Ch. 777; 43 L.T. 244; 29 W.R. 375; 25 Digest (Repl.) 289, 956.
- (22) *Pennell v. Millar* (1857), 23 Beav. 172; 26 L.J.Ch. 699; 29 L.T.O.S. 35; 3 Jur.N.S. 850; 5 W.R. 215; 53 E.R. 68; 25 Digest (Repl.) 298, 1044.

Also referred to in argument:

- O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814; 26 W.R. 239, H.L.; 25 Digest (Repl.) 293, 985.
- Cragg v. Alexander*, [1867] W.N. 305; 35 Digest 509, 2405.
- Edwards v. Browne* (1845), 2 Coll. 100.

Actions by a legatee under the testator's will to set aside the sale of his reversionary share on the ground that he had been ordered to sell it for a grossly undervalued price, and by an assignee for value of the reversionary shares of three other legatees claiming administration of the testator's estate and the payment of the shares assigned to him.

- Sidney Woolf* and *Philip H. Clifford* for the plaintiff.
- Ralph Neville, Q.C.*, and *R. Conway Dobbs* for the defendant.
- Renshaw, Q.C.*, and *Edward Ford* for the trustees of the will.
- C. H. Turner* for other parties.

Cur. adv. vult.

Nov. 8, 1888. **KAY, J.**, read the following judgment.—Brown Fry, by his will in 1854, left the residue of his property to his widow for life *durante viduitate*, and on her death or second marriage, subject to two legacies of £250 each, he gave the residue to such of the children (excepting one Sarah) of his late brother George Fry as should be then living, the children then living of any who were then dead taking their parents' share. The testator died on Oct. 11, 1854. His widow survived and did not marry again. She lived until Aug. 17, 1886. The will was proved in January, 1855, and one of the legacies of £250 was satisfied by arrangement and released. The property constituting the residue then consisted of £823 18s. 2d. consols, a freehold farm three or four miles from Bristol, and a leasehold house in Milk Street, Bristol. The total net income produced was about £130 a year. There were five children of George Fry who or whose issue became entitled, namely, Mary Ann, who predeceased the tenant for life, leaving two children, Mrs. Brackstone and Mrs. Munns, who were each entitled in remainder to one-tenth. The other four children were William Fry entitled to one-fifth, John Brown Fry one-fifth, Harriet, since deceased, one-fifth, and George one-fifth. They were all poor persons in a humble position. William was a workman in the employ of the defendant Lane, a plumber at Notting Hill. John Brown Fry was a laundryman earning £1 a week. On Aug. 19, 1878, twenty-four years after the testator's death, William Fry and the defendant Lane called on the witness Oliver, a solicitor, then practising at Queen's Road, Bayswater. Oliver had been acting for Lane in winding-up the estate of his mother who had recently died, and Lane took William Fry to Oliver's office. They had a copy of the will of the testator with them, and instructed Oliver to inquire of what the property consisted, with a view to raising money on the shares of William and George.

Thereupon Oliver went to Messrs. Ray & Bush, solicitors at Bristol, who had acted for the trustees of the will, and, on Aug. 30, 1878, they wrote saying that the

trustees of the will had died, one new trustee had been appointed, the writer and another, Mr. Bush, being executors of the surviving trustee. The property was stated to consist of £823 18s. 2d. consols, and houses, and land let at £110. No mention was made of the fact that one of the legacies of £250 had been satisfied. On Sept. 12, Jane, William Fry, and his brother George Fry attended at Oliver's office, and Oliver says that, according to his recollection, the correspondence was then read. He took retainers on that occasion from William and George Fry to take proceedings for the appointment of new trustees and for the administration of the estate, and for this purpose partly he says that he was instructed to obtain a loan on their shares. Oliver says that he had also instructions from J. B. Fry to raise money on his share, and that, on Sept. 16, he wrote to three persons giving particulars, and that, on the 17th, he attended at the office of the Law Reversionary Society, and talked the matter over with one of their officers. He also corresponded with Mr. Henry, a young man who was then an articled clerk and was a friend of Oliver, and on the 19th he negotiated with some other persons. In the meantime, William Fry seems to have been arranging with Lane to buy the share of his brother, John Brown Fry, and Lane agreed to give £150 for it.

Lane says that he took the income to be £120, calculated that at twenty years' purchase to be £2,400, one-fifth of which would be £480, and deducted one-fifth of the two legacies of £250, supposed to be payable, i.e., £100, leaving £380. Then there would be expenses of insurance, costs of realising property and other contingencies, which he thought would much reduce the value. On Sept. 19, Lane informed Oliver that he had agreed to buy J. B. Fry's share for £150, and instructed him to go to Bristol and make further inquiries. Next day Oliver wrote to Messrs. Ray & Bush that he would call on them, and, on Sept. 21, Lane and J. B. Fry went to Oliver's office. Oliver prepared an agreement while they were waiting. He says that he asked J. B. Fry whether he would have his own solicitor, or whether he, Oliver, should act for him. J. B. Fry asked what would be his charges, and Oliver said £10; and it was arranged that he was to act. Oliver states that he then said to Lane that he did not think £150 a sufficient price. Lane answered that he did not feel inclined to give more. J. B. Fry said, "What ought I to have?" Oliver said, "£200." Lane said that he would not give it. Ultimately he agreed to give £170, out of which Oliver's costs, payable by J. B. Fry were to be retained, so that J. B. Fry should get a clear £160. Lane had already advanced to J. B. Fry £5. The agreement then drawn by Oliver was signed, with a receipt for £5 on account of the purchase money in the margin. On Sept. 23, Oliver went to Bristol, and was engaged that day and the 24th investigating the nature of the property, and on the 24th he learnt that one of the legacies of £250 payable on the death of the tenant for life had been satisfied and released. On the 26th, Oliver saw Lane, William Fry, and J. B. Fry, and told them, he says, of the result of his visit to Bristol, but he cannot remember if he told J. B. Fry that one of the legacies of £250 had been paid. I must infer that he did not, because it would have been his duty to advise him that the agreement had been made under a material mistake of fact, and to have insisted on an increase of price. Moreover, the deed of appointment which was prepared by Oliver should have mentioned that one legacy was released. But it does not.

On Sept. 27, Oliver received a letter from Ray & Bush in answer to an inquiry from him how much they would lend on two of the shares, offering to lend £400 on certain terms, one of which was that interest at 5 per cent. for three years was to be left in Ray's hands, and that his costs were to be £15. On the 28th, Oliver saw William Fry and his mother, and discussed the matter with them. On Oct. 4, he drew the appointment of the share of J. B. Fry to Lane. On Oct. 9, a mortgage from George Fry to Henry for £200 was completed, and on that day Oliver received £156 10s. for George Fry, the balance being retained by the lender Henry for two years' interest and premiums of policy, and a similar mortgage was made the same day by William Fry to Henry. On Oct. 11, J. B. Fry and Lane met at

Oliver's office, and the assignment of his share was executed. The purchase money was paid to Oliver, except the £5 received by J. B. Fry at the date of the agreement, and a further sum of £5 10s. received by him afterwards, making £10 10s. The balance of the £160, £149 10s., Oliver paid to J. B. Fry, and Lane paid Oliver £10 more for Fry's costs, and afterwards £10 for his own. With respect to the transaction with George Fry, Henry's was prepared by his own solicitors, Messrs. Turner & Co., and approved by Oliver, who was acting for George Fry. It contains what Oliver calls a very stringent power of sale without further notice on default in payment of principal or interest. Henry signed a contemporaneous memorandum, agreeing to return part of the interest if the tenant for life should die within two years. Throughout these transactions the exact age of the tenant for life was not ascertained, but William and George said that she was about the age of their mother, who was over seventy. Oliver retained the moneys received from Henry for George and William Fry, doling out small sums to them from time to time.

Under the retainer he had taken from them he presented a petition for the appointment of new trustees of the testator's will. This seems to have been resisted by Messrs. Ray & Bush. I am not informed on what grounds. The disastrous result was that it was refused with costs, which Oliver says amounted to £97 11s., and in respect of these costs he deducted £48 15s. 6d. from the mortgage moneys received by him from George Fry, and a like sum from William's money. He also deducted from George's money £20 for agreed costs of the mortgage, and thus George received only £100 of the £150 10s. which Henry had paid to Oliver on account of the loan of £200. George Fry had to pay heavy interest upon the whole £200. On April 15, 1879, new trustees of the will were appointed by the Court of Chancery. In 1880, George, being unable to keep down the interest on the £200, instructed Oliver to sell his reversionary interest. Oliver then applied to Whittet, who was a client of his, and who in 1879 had lent money on mortgage of the shares of Mrs. Brackstone and Mrs. Munns, and asked him to buy George's share, but he declined. Oliver says that the interest had been paid up to that time, so that he did not "bother" himself to effect a sale. However, in November, 1881, and January, 1882, Henry was pressing for his interest, and, after communication with George Fry, as he says, though there is no entry in his books confirming this, Oliver again applied to Whittet to purchase. He saw him and tried to get him to give £300; after some bargaining Whittet agreed to give £270. Oliver did not offer the share to any other persons; he says that it never occurred to him to get an offer from one of the London companies like the Law Reversionary Society, who buy this kind of property, nor was any valuation obtained.

On Feb. 14, 1882, the sale was completed by an assignment by the mortgagee and George Fry to Whittet. Of the purchase money £226 19s. 4d. went to pay the mortgagee, and £10 10s. to Oliver for G. Fry's costs of sale. Oliver paid to G. Fry £26 10s., and the rest he retained in satisfaction of a balance which he claimed for costs in the former transaction. G. Fry received in cash only £126 10s. altogether in respect of his share on the mortgage and sale. In September, 1885, William Fry's share was sold by the mortgagee at the Auction Mart in London, and was bought by Whittet for £330. The particulars of sale stated that the property was subject to legacies amounting to £500, payable on the death of the tenant for life, and were in other respects somewhat depreciatory. Oliver says that he told Whittet before this sale that one of the legacies had been paid, and Whittet bought with that knowledge, but the particulars do not seem to have been corrected. The tenant for life died, as I have said, on Aug. 17, 1886. Shortly before this date, George Fry, at Whittet's request, attended at the office of an insurance company to insure his life again, the original policy having lapsed. The property has since been sold. The freeholds and leaseholds produced £3,848. The amount of consols had been reduced, I suppose, by costs; they produced £627 16s., and there was a sum of £34 cash, making altogether £4,509 16s. This had been diminished by payment of the legacy of £250 and other costs, and the result is that there is now court in this suit £3,651 6s. 10d. consols, which is not subject to any further

deduction, except, possibly, costs in this action. One-fifth of that, supposing it not subject to any further costs, would be about £730. An actuary who has been called, who has had large experience in the purchase of reversionary interests, says that in 1878 the contingent reversionary interest of J. B. Fry in £730 would be worth £475. This is not disputed; no counter evidence of value has been given.

In 1883, an action for administration was instituted in the names of Mr. and Mrs. Munns and a daughter of Harriett Fry and her husband, Oliver, acting as their solicitor. That action was stayed, the costs of the trustees coming out of the estate. The property has been sold out of court, and the net residue paid into court in this action. J. B. Fry and George Fry both claim in this litigation to set aside the sales of their respective shares. I reserved judgment that I might more carefully consider the facts of the case, and the law which is applicable to them, since the passing of the Sales of Reversions Act, 1867. Long before the passing of this Act, it was settled that the Court of Chancery would relieve against a sale or other dealing with a remainder or reversion at an undervalue on that ground alone, and this even where the remainderman was of mature age, and accustomed to business: *Wiseman v. Beake* (2); *Freeman v. Bishop* (3); *Davis v. Duke of Marlborough* (4); *Earl of Portmore v. Taylor* (5); *Boothby v. Boothby* (6); *Foster v. Roberts* (7); *Beynon v. Cook* (8).

In such cases it was held that the onus lay on the purchaser to show that he had given "the fair value" as it was called in *Earl of Aldborough v. Trye* (9), or "the market value": *Talbot v. Staniforth* (10). By the Act of 1867, reciting that it was expedient to amend the law as administered in courts of equity with respect to sales of reversions, it was enacted, by s. 1, that

"no purchase, made bona fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue,"

and, by s. 2, the word "purchase" in the Act is to include every kind of contract, conveyance or assignment, under or by which any beneficial interest in any kind of property may be acquired. This Act came into operation on the 1st day of January, 1868.

It is obvious that the words "merely on the ground of undervalue" do not include the case of an undervalue so gross as to amount of itself to evidence of fraud; and in *Earl of Aylesford v. Morris* (1), LORD SELBORNE, L.C., said (8 Ch. App. at p. 490), that this Act

"leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the onus probandi in those cases, which, according to the language of LORD HARDWICKE, 'raise from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness,' a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."

The most common case for the interference of a court of equity is that of an expectant heir, reversioner or remainderman who is just of age, his youth being treated as an important circumstance. Another analogous case is where the vendor is a poor man with imperfect education, as in *Evans v. Llewellyn* (11); *Haygarth v. Wearing* (12). In the case of a poor man in distress for money, a sale even of property in possession at an undervalue has been set aside in many cases, as in *Wood v. Abrey* (13), where the only professional person employed was the purchaser's attorney, and the price was one-fourth of the value; SIR JOHN LEACH saying (3 Madd. at p. 423):

"A court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."

So in *Longmate v. Ledger* (14), where property in possession was sold for a price greatly below the value, and one solicitor acted for vendor and purchaser, and the vendor was a man advanced in years and known to have been of a weak and eccentric disposition. In *Clark v. Malpas* (15), an improvident sale of property in possession by a poor and illiterate man, the same solicitor being employed by both parties, was set aside. Again, the same thing was done in *Baker v. Monk* (16), where the vendor was an elderly woman in humble life and the purchaser a substantial tradesman, whose solicitor carried out the transaction for both parties, the consideration being an annuity of 9s. a week for the life of the vendor. In that case TURNER, L.J., distinguishes *Harrison v. Guest* (17), a case in which the transaction was allowed to stand on the ground that there the offer came first from the vendor, and the purchaser advised him to take time to consider and to consult someone else about it, no such advice having been given by the vendor in *Baker v. Monk* (16). The result of the decisions is that, where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction. This will be done even in the case of property in possession and if a portion of the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw on the purchaser, when the transaction is impeached, the onus of proving, in LORD SELBORNE'S words, that the purchase was "fair, just, and reasonable."

On the evidence before me, I cannot hesitate to conclude that the price of £170 in J. B. Fry's case and £270 in George Fry's case, were both considerably below the real value. The property had been subjected to the costs of appointing new trustees and also to part of the costs of an administration suit, and yet the net produce of one-fifth share is £730. Managed in a more careful manner it might have produced more. Both J. B. Fry and his brother George were poor, ignorant men, to whom the temptation of the immediate possession of £100 would be very great. Neither of them in the transaction of the sale of his share was, in the words of SIR JOHN LEACH, "on equal terms" with the purchaser. Neither had independent advice. The solicitor who acted for both parties in each transaction seems, from the LAW LIST, to have been admitted in March, 1877. In October, 1878, the time of completing the sale of J. B. Fry's share, he had not been more than a year and a half on the roll. His inexperience probably in some degree accounts for his allowing himself to be put in the position of solicitor for both parties in such a case. I think that in each transaction he must have been considering the purchaser's interest too much properly to guard that of the vendors. Nothing could be more obvious than to test the value by obtaining an offer from one or more of the leading offices in London which deal in purchases of this kind. But, although when borrowing money from one of the beneficiaries he did make some application to the Law Reversionary Society, when he had to effect a sale he says that it never occurred to him to do so. He found that it was easy to borrow £200 on an interest of this kind before he completed the sale of J. B. Fry's share for £170. He does not seem even to have informed either of the vendors that one of the £250 legacies had been satisfied, and he allowed the sale by auction of William's share to proceed without correcting the inaccurate statement in the particulars that this legacy was still due, though he says that he informed Whittet, the intending purchaser of William's share, that the legacy had been discharged.

I regret that I must, on the evidence, come to the conclusion that, though there was a semblance of bargaining by the solicitor in each case, he did not properly protect the vendors, but gave a great advantage to the purchasers who had been former clients, and for whom he was then acting. The circumstances illustrate the wisdom and necessity of the rule that a poor, ignorant man selling an interest of

this kind should have independent advice, and that a purchase from him at an undervalue should be set aside if he has not. The most experienced solicitor acting for both sides, if he allows a sale at an undervalue, can hardly have duly performed his duty to the vendor. To act for both sides in such a case and permit a sale at an undervalue is a position in which no careful practitioner would allow himself to be placed.

No case of delay or acquiescence is made in the pleadings by either Lane or Whittet, but the point was, nevertheless, suggested in argument. In *Gowland v. De Faria* (18), SIR WILLIAM GRANT in a like case said (17 Ves. at p. 25):

"There is I believe no case, in which during the continuance of the same situation, in which the party entered into the contract, acquiescence has ever gone for anything: it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract."

The same rule was applied in *Beynon v. Cook* (8) where SIR GEORGE JESSEL, M.R., whose judgment was affirmed, says that the state of distress is considered to continue till the reversion falls into possession.

I have, then, to consider what should be done with the costs of these two actions. In *Fry v. Lane* there are charges of fraud on the part of the defendant Lane, and in the defence of George Fry in *Whittet v. Bush* the allegations of misconduct on the part of Whittet go somewhat further, I think, than the evidence warrants. I am of opinion that no moral fraud has been proved in either case on the part of Lane or Whittet; but such transactions amount to unfair dealing, which equity considers a fraud, though I would rather the word were used only for moral delinquencies.

I am glad to find that no absolute rule as to costs has been laid down by the court in these cases. Sometimes, where the only ground was undervalue, the plaintiff has been relieved on payment of costs, as in *Twisleton v. Griffith* (19). In some cases no costs are given, as in *Bromley v. Smith* (20). Sometimes the costs are thrown on the defendant, as in *Nevill v. Snelling* (21). It seems to me to be just in this case to give no costs to Whittet, Lane, John Brown Fry, or George Fry. Bush & Wood, the trustees, must have their costs as between solicitor and client out of the fund. I have already dealt with the claim of Mrs. Brackstone; her costs must be paid by Whittet. I give no costs to her husband. With respect to Mr. and Mrs. Munns, notice was given that she would claim her equity to a settlement, but this has been abandoned. I think neither she nor her husband are entitled to costs.

What remains of the fund in court after payment of the trustees' costs must be divided into five shares. One of these fifths must be applied in payment to William Fry of £50, being one-fifth of £250 as claimed by him. Out of what remains of that fifth William Fry's costs of this suit, as between party and party, must be paid, and the remainder will be paid to the plaintiff Whittet. Out of a moiety of one other fifth £50 must be set apart, as I have directed, for Mrs. Brackstone. Out of the remainder of that one-tenth, provision must be made for her costs as between party and party, and the residue of that tenth must be paid to the plaintiff Whittet. The other half of that fifth share—that is, one-tenth—must be applied in satisfaction of what is due to Whittet for principal interest, and costs upon the mortgage of Nov. 20, 1879, and the residue (if any) be paid to Mrs. Munns on her separate receipt. Out of one other fifth there must be paid to Lane the money which he gave for purchase of John Brown Fry's share—that is, £170, together with interest on the same at 4 per cent. per annum from the date of payment; and the residue of that fifth must be paid to John Brown Fry. There must be a similar order as to the one-fifth of George Fry; £270, with interest at 4 per cent., must be paid out of it to Lane, and the rest to George Fry.

I do not think that Lane or Whittet are entitled to repayment of premiums of

insurance, or other money expended for their own benefit in transactions which are held by the court to be improper: *Pennell v. Millar* (22); *Bromley v. Smith* (20). The one-fifth share of Harriet Fry, deceased, must be paid to her children, if she predeceased the tenant for life. As I desire that each of these shares shall bear the costs which I have directed to be paid out of them, they may be carried to separate account pending the working out of this order. I should hope that all the amounts may be agreed, except the costs, which will have to be taxed, but, if not, proper accounts must be directed in each case, and I reserve the costs of those accounts for further consideration in chambers.

Solicitors: *Newman, Hays & Co.; Daubeney & Mead.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Re SMITH AND SERVICE AND NELSON & SONS

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Bowen, L.JJ.), July 16, 1890]

[Reported 25 Q.B.D. 545; 59 L.J.Q.B. 583; 63 L.T. 475;
39 W.R. 117; 6 T.L.R. 434; 6 Asp.M.L.C. 555]

Arbitration—Submission—Agreement to refer—Refusal of party to appoint arbitrator—Power of court to compel appointment.

The High Court has no inherent jurisdiction to compel one party to an agreement of reference to appoint an arbitrator.

Where, therefore, an agreement was made to refer disputes to three arbitrators, one to be nominated by each party, and the third by the other two, and one party, having been served with notice to appoint, failed to do so, the court was **held** to have no power to make an order compelling him to appoint.

Notes. Section 1 of the Arbitration Act, 1889, has been repealed and replaced by s. 1 of the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 91). Section 27 of the 1889 Act has been repealed and replaced by s. 32 of the 1950 Act (*ibid.* at p. 116).

Considered: *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q.B. 606; *Den of Airlie Steamship Co. v. Mitsui and British Oil and Cake Mills* (1912), 106 L.T. 451; *Simbro Trading Co. v. Posograph (Patent) Corpn.*, [1929] 2 K.B. 266; *Re British Metal Corpn., Ltd. and Ludlow Bros. (1913), Ltd.*, [1938] 1 All E.R. 135. Referred to: *Doleman v. Ossett Corpn.*, [1912] 3 K.B. 257.

As to appointment of arbitrator by the High Court, see 2 HALSBURY'S LAWS (3rd Edn.) 29, 30; and for cases see 2 DIGEST (Repl.) 528 et seq.

Cases referred to:

- (1) *Randell, Saunders & Co. v. Thompson* (1876), 1 Q.B.D. 748; 45 L.J.Q.B. 713; 35 L.T. 193; 24 W.R. 837, C.A.; 2 Digest (Repl.) 508, 538.
- (2) *Re Rouse & Co. and Meier & Co.* (1871), L.R. 6 C.P. 212; 40 L.J.C.P. 145; 23 L.T. 865; 19 W.R. 438; 2 Digest (Repl.) 508, 540.

Also referred to in argument:

- Gumm v. Hallett* (1872), L.R. 14 Eq. 555; 41 L.J.Ch. 514; 26 L.T. 468; 2 Digest (Repl.) 523, 649.
- Davila v. Dalmanser* (1702), 7 Mod. Rep. 8; 1 Salk. 73; 87 E.R. 1060; 16 Digest (Repl.) 42, 344.

Appeal by James Nelson & Sons from an order of the Divisional Court (LORD COLERIDGE, C.J., and WILLS, J.), affirming an order made by Master MANLEY SMITH

and affirmed by LAWRENCE, J., sitting at chambers, requiring Nelson & Sons within seven days to appoint an arbitrator under an agreement to refer contained in a charterparty, dated Nov. 28, 1889. A

Nelson & Sons chartered a vessel of Smith and Service, shipowners, under a charterparty entered into on Nov. 28, 1889, which stipulated that the vessel should arrive at a named port and be placed at the disposal of the charterers on a certain day, and which also contained a clause referring any dispute which might arise to three arbitrators, one to be appointed by each party, and the third by the two arbitrators so appointed. Nelson & Sons subsequently refused to carry out their contract, on the ground that the vessel did not arrive at the port named until after the appointed day. Smith and Service thereupon appointed an arbitrator under the reference clause in the charterparty, and served a notice upon Nelson & Sons to appoint another in accordance with the agreement. Nelson & Sons not complying with this notice, Smith and Service took out a summons at chambers for an order that they should do so. An order was made accordingly, and, on appeal, was affirmed by the Divisional Court. Nelson & Sons appealed. B C

French, Q.C., and *C. A. Russell* for Nelson & Sons.

Gorell Barnes, Q.C., and *Leck* for Smith and Service. D

LORD ESHER, M.R.—In this case, in an ordinary mercantile agreement, a charterparty, there is, as is not unusual, an arbitration clause. The clause in question provides that the reference shall be to three arbitrators. It is not a reference to two arbitrators and an umpire; it is a reference to three arbitrators. The distinction is that, in the latter case, all three persons, when they have been named, are to go simultaneously into the inquiry, and all three are to come to a conclusion upon it. There being, then, this agreement to refer disputes to three arbitrators, one of the parties, alleging that differences have arisen to which the agreement to refer is applicable, has appointed an arbitrator and called upon the other party to appoint one. The other party has refused to nominate any arbitrator. Then an application is made at chambers for an order against the party so refusing, calling upon him to appoint an arbitrator within seven days. The order was made at chambers, and has been affirmed by the Divisional Court; and from that order an appeal is brought to this court. It is obvious that, if the court had no jurisdiction to order the party who refused to appoint an arbitrator to do so, it had no jurisdiction to order him to do so within seven days. Therefore, the whole question is, whether there is any jurisdiction in such an arbitration as this for the court to order either of the parties to appoint an arbitrator. E F

The question depends on the construction to be placed on the Arbitration Act, 1889. It is obvious, in my opinion, that this submission is not within ss. 5 or 6 of that Act, because it is a reference to three arbitrators; and I think that the contention that either of those sections applied was abandoned in the course of the argument. But it is said that the order that has been made is authorised by s. 1 of the Act. Section 1 gives to the court, in every case of a submission to arbitration, the powers which the court had before the Act in cases where the submission had been made a rule of court. If the court had the power before the Act, when a submission had been made a rule of court, to order either of the parties to it to appoint an arbitrator, I think that s. 1 now gives them that power in all cases. If the court had not that power before the Act, notwithstanding that the submission had been made a rule of court, I think that such a power is not given by s. 1. G H

The argument in support of the order that has been made amounts to this, that the court has had the power in question ever since the time of William III, but that it has never occurred to anyone that there was such a power until the counsel in the present case thought of it. That is a proposition which I do not accept. We have the fact that no court has ever made such an order. It seems to me impossible for us to say that this is a power which has been overlooked for 190 years. Even supposing that the words of the Act of Will. 3, Arbitration Act, 1697 I

(9 & 10 Will. 3, c. 15), could be so construed as to comprise such a power, I should not, after that lapse of time, be a party to inventing a new practice founded upon a new construction of the Act.

Further, applications have from time to time been made to courts of equity to order specific performance of agreements to refer. These applications must have been founded upon the statement that the common law courts could not make an order calling upon the other party to appoint an arbitrator; otherwise, they would have been at once dismissed upon that ground alone. A court of equity would only entertain such an application when there was no remedy at common law. They refused the application on the ground that, under the Act of Parliament, they had no power to grant them, just as the common law courts had no such power. Before the statute 9 & 10 Will. 3, c. 15, was passed, there was no power to make a submission to arbitration a rule of court, unless the submission was made in an action. Then came the Act of Parliament which, by the preamble, is expressed to be

“for promoting trade and rendering the awards of arbitrators the more effectual in all cases,” etc.

The object was to enable the parties to obtain the assistance of the court, after the award was made, in order to enforce it. For that purpose the Act provided that, whenever a submission to arbitration contained an agreement that it should be made a rule of court, such submission might be made a rule of court accordingly. But, for some time after the passing of that Act, any party to a submission could revoke it, even after it had been made a rule of court. That is totally inconsistent with the argument which we have heard as to what the effect was of making a submission a rule of court.

Then came the Civil Procedure Act, 1833, which made the submission irrevocable if the parties had agreed that it should be made a rule of court except by leave of the court. Before that Act, one of the parties could not revoke the agreement to refer; but he could revoke the authority of the particular arbitrator. After the Act, he could not revoke the submission to a particular arbitrator if it had been made a rule of court. If that was so up to the time of the passing of the Arbitration Act, 1889, let us see if s. 1 of that Act has made any alteration. By that section

“A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge.”

Pausing there, that could not have meant that the agreement to refer was to be irrevocable, because it always was so. It means that the authority of the particular arbitrator is to be irrevocable. Then it goes on,

“and shall have the same effect in all respects as if it had been made an order of court.”

That is to say, it is to have the same effect in all respects as it would have had before this Act if it had been made a rule of court. The effect of making a submission a rule of court was, as I have said, to enable the assistance of the court to be obtained in carrying on the reference after arbitrators had been appointed, and to enable the award of the arbitrators to be enforced as if it had been a judgment of the court. That being the construction of s. 1 of the Act of 1889, if there was no power to order the appointment of an arbitrator in such a case as the present prior to the Act, there is no power to make such an order now.

It has been argued that the court had power to attach a party to a submission that had been made a rule of court for refusing to appoint an arbitrator. Even if the court had such a power, it would not necessarily show that there was power to order the party to appoint, as has been done in this case. But the court had no such power. The only remedy was to sue the party who refused to appoint for breach of agreement; and that is the only remedy in the present case. I do not

think that LORD COLERIDGE or WILLS, J., thought that this power existed before the Act of 1889, as has been argued before us; but I think that they gave to that Act an effect beyond what it was intended to have.

LINDLEY, L.J.—This is an appeal from an order that the charterers within seven days from the date of the order should appoint an arbitrator in the terms of the submission to arbitration contained in the charterparty dated Nov. 28, 1889.

The question is whether the court had any jurisdiction to make such an order. It seems to me to be clear that there is no precedent for any such order up to the year 1889, when the Arbitration Act was passed. It is said that, although no precedent can be cited, such an order as this could have been made whenever a submission was made a rule of court under the Act of Will 3. The argument is put in this way: that by making the submission a rule of court, the agreement to refer becomes a rule or order of the court and can be enforced like any other order. If that argument was sound, the court could have done a number of things that it has always refused to do. In the first place, I cannot see why, in that case, such an order as the one appealed from should never have been made before. Nor can I see why an order for specific performance should have been always refused in such a case. The truth is that, however the Act of Will. 3 might have been construed, it has not in fact been construed in the way suggested. The consequence of making a submission a rule of court under the Act of Will. 3 was, that a party who disobeyed the award might be attached; but, so far as I know, no order was ever made to attach a man for not appointing an arbitrator.

Then what is the effect of the Arbitration Act, 1889? Sections 5 and 6 of that Act are not applicable to the present case. Section 1 provides that a submission shall have the same effect as if it had been made an order of court. But the effect of making a submission an order of court before the Act was not to give power to make such an order as has been made here. The appeal must therefore be allowed.

BOWEN, L.J.—I am of the same opinion. Section 1 of the Arbitration Act, 1889, provides:

“A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court.”

The word “submission” has been used with some inexactness in the cases and textbooks, the same word having been used to express two different things. A general agreement to refer disputes to an arbitrator was always irrevocable. On the other hand, an agreement to refer a particular dispute to a particular arbitrator could be revoked by either of the parties before the Civil Procedure Act, 1833, was passed. The distinction between those two cases is pointed out by MELLISH, L.J., in *Randell, Saunders & Co. v. Thompson* (1). After the Civil Procedure Act, 1833, a submission to the arbitration of a particular person was under some circumstances revocable, and under others not. The present Act makes such a submission not revocable under any circumstances, unless a contrary intention is expressed or the leave of the court is obtained; because, by s. 27:

“In this Act, unless the contrary intention appears, ‘submission’ means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.”

The Civil Procedure Act, 1833, s. 39 [repealed], which, as I have said, first made a submission to a particular arbitrator irrevocable, in cases where there was a stipulation that the submission should be made a rule of court, recognises the distinction that I have referred to, because it directs that “the power and authority of any arbitrator . . . shall not be revocable” in such cases. The statute is dealing, not with the agreement to refer, which could never have been determined, but with the mandate to the particular arbitrator, which at that time could be determined in all cases, and it provides that for the future that mandate shall not be determinable if it has been made a rule of court.

A Then the present Act provides that every submission is to have the same effect as if it had been made an order of court. It is argued that, by reason of that provision, a general agreement to refer disputes contained in a charterparty is to have the same effect as if it had been an order of the court. It seems to me that the emphatic word "made" cannot be left out of view in construing the section. It is an act of the parties which is referred to. But no act of the parties could ever
B give the court the power, upon the application of either of them, to make an order compelling the other to appoint an arbitrator. I can find no case in which a party has been held liable to attachment for non-performance of an agreement to nominate an arbitrator. The judgment of WILLES, J., in *Re Rouse & Co. and Meier* (2), which was referred to, shows only that one of the parties to a submission, who revokes it after it has been made a rule of court, is liable to attachment. The
C object of making a submission a rule of court was to give the court authority over the conduct of the arbitration after it has been entered upon, that is, after the arbitrators have been appointed.

Appeal allowed.

Solicitors: *Rowcliffes Rawle & Co.* for C. A. M. Lightbound, Liverpool; *Field, Roscoe & Co.* for Bateson & Co., Liverpool.

[Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.]

E

Re ORIENTAL BANK CORPORATION

F

[CHANCERY DIVISION (Chitty, J.), May 20, 1887]

[COURT OF APPEAL (Cotton, Lindley and Bowen, L.JJ.), May 26, 27, 1887]

[Reported 56 L.T. 868; 3 T.L.R. 642, 659]

Company—Winding-up—Sale of property—Sanction by court—Discretion—Exercise—Review by Court of Appeal.

G

By s. 95 of the Companies Act, 1862 [see now Companies Act, 1948, s. 245, 2 (a) (3)], the liquidator in the winding-up of a company by the court had power, subject to the control of the court, to sell the real and personal property and things in action of the company by public auction or private contract, as a whole or in parcels.

H

Although, as a general rule, when a liquidator is proposing to sell the assets of the company with the sanction of the court, it is proper to obtain a valuation of the property to be sold, yet the court will, in the absence of such a valuation, sanction a sale under peculiar circumstances—e.g., when an early sale is desirable and the assets are large, in distant and different parts of the world, and of fluctuating value. When asked to sanction a contract for the sale of the assets of a company in liquidation, the court is justified in acting principally on the information of the court and the liquidator in the winding-up, without requiring strict proof of all the circumstances. It is a strong ground for ordering an early sale of the assets that the liquidator, by retaining possession of the assets, is, by reason of their peculiar character, carrying on a speculation which may involve the creditors in loss, or greatly diminish their chances of being paid.

I

Per the COURT OF APPEAL: The judge to whose court a winding-up is attached has a judicial discretion as to sanctioning a sale of the company's assets. An

appeal lies from the exercise of such discretion, yet the Court of Appeal will only interfere (i) when the judge has decided on a matter not within his discretion; (ii) when his assumed discretion has been exercised on wrong principles; (iii) when some great loss has been occasioned by a clearly erroneous exercise of discretion.

Notes. As to realisation of property in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 650, 651; and for cases see 10 DIGEST (Repl.) 967-969. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

- (1) *Re Bartlett, Newman v. Hook* (1880), 16 Ch.D. 561; 50 L.J.Ch. 205; 44 L.T. 17; 29 W.R. 279; 40 Digest (Repl.) 60, 422.

Also referred to in argument:

Re Northumberland and Durham District Banking Co., Ex parte Totty (1860), 1 Drew. & Sm. 273; 3 L.T. 94; 6 Jur.N.S. 849; 8 W.R. 713; 62 E.R. 383; sub nom. *Re Northumberland and Durham District Banking Co., Ex parte Totty, Re Northumberland and Durham District Banking Co., Ex parte Bartleman*, 29 L.J.Ch. 702, L.J.J.; 10 Digest (Repl.) 1138, 7924.

Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim (1872), 26 L.T. 755; 20 W.R. 621; reversed, 7 Ch. App. 646; 41 L.J.Ch. 732; 27 L.T. 88; 20 W.R. 762, L.J.J.; 10 Digest (Repl.) 982, 6759.

Re Paraguassu Steam Tramroad Co., Black & Co.'s Case (1872), 8 Ch. App. 254; 42 L.J.Ch. 404; 28 L.T. 50; 37 J.P. 309; 21 W.R. 249, L.C. & L.J.J.; 10 Digest (Repl.) 986, 6790.

Appeal from a decision of CHITTY, J., on a motion for the discharge of an order made in chambers.

On May 3, 1884, the Oriental Bank Corporation was ordered to be wound-up on a creditor's petition, under the provisions of the Companies Acts, 1862 and 1867. The order was made by CHITTY, J., and Mr. T. A. Welton was appointed official liquidator.

By an agreement under seal dated Mar. 18, 1887, and made between the corporation, by T. A. Abercromby, the official liquidator thereof of the first part, the said T. A. Welton of the second part, and the Assets Realisation Co., Ltd. (thereinafter called "the company"), of the third part, it was witnessed that, subject to the confirmation of the judge to whom the winding-up of the corporation was assigned, it was agreed, by cl. 1, (i) that the corporation and the official liquidator should sell, and the company should purchase, all the real, and personal, and immovable, and movable property, effects, and things in action of the corporation, and of the official liquidator in his capacity of official liquidator; and in particular, but not so as to limit the foregoing description, that such sale and purchase should comprise (a) certain specified estates in Ceylon and Mauritius, and all other the real estates of the corporation situate in Ceylon, Mauritius, or elsewhere which at the date of the agreement were vested in or belonged to the corporation or the official liquidator, or in or to any person or corporation in trust for, or on behalf of them, or either of them, with the rights, members, and appurtenances; (b) the rights at the date of the agreement possessed by the official liquidator and the corporation in the property comprised in the schedule, and in all accounts representing estates or outlay upon estates, and in all balances due to the corporation or the official liquidator on account of the cultivation of any estates, and in all securities real or personal held by the corporation or the official liquidator, and in all sums of money secured thereby, and in all notes, bills, book and other debts, cash balances and other credits, and in all sums due, or which might become due, from any contributory of the corporation of whatever class, and in all claims in the bankruptcy, liquidation, winding-up, or insolvency of any person or company, and in all goods, chattels, effects, and personal property whatsoever and where-soever which at the date of the agreement was or were vested in or belonged to the

A corporation, or the official liquidator, or in or to any person or corporation in trust for, or on behalf of them or either of them. By cl. 4 it was agreed that the official liquidator would apply to the court for such order or orders as might be required for making calls on and ordering payments thereof by all or any of the contributories of the corporation then settled or thereafter to be settled on the list of contributories, to the extent of their liability for or towards payment of all or any sums the court might deem necessary to satisfy the debts and liabilities of the corporation, and the costs, charges, and expenses of winding it up, and would do all such acts and things as might be proper to augment the assets of the corporation intended to be thereby sold, and to diminish the liabilities thereof.

By way of consideration the agreement provided (cll. 6, 7, and 8) that in the case of all claims admitted, or proved against the corporation, in respect of which the claimants had agreed to accept, in final settlement, a dividend of 17s. in the pound, and in respect of which such dividend of 17s. in the pound had not been paid, the company should authorise the official liquidator to retain out of the moneys in his hands for distribution among the claimants such a sum as should bring the dividend paid to such claimants respectively up to 17s. in the pound; that in the case of all claims against the corporation which had been, or should be, before the date of the order dissolving the corporation, admitted or proved, except those in respect of which the claimants had agreed to accept, in final settlement, a dividend of 17s. in the pound, the company should in the first place authorise the official liquidator to retain out of the moneys in his hands such a sum for distribution among the said claimants as should bring the dividend paid to them up to 15s. in the pound, unless dividends amounting to 15s. in the pound had been already paid to them, that the company should also concur in the arrangement then in progress for the distribution out of the funds of the corporation of a further dividend of 1s. 3d. in the pound, or $6\frac{1}{4}$ per cent., and at the date following should make such payments to the official liquidator for distribution amongst the said claimants in respect of their said claims as, added to the available funds in the hands of the official liquidator, would produce the following dividends, viz.: A dividend of 1s. 3d. in the pound, or $6\frac{1}{4}$ per cent., on Feb. 28, 1888; a dividend of 1s. 3d. in the pound, or $6\frac{1}{4}$ per cent., on Feb. 28, 1889; a dividend of 1s. in the pound, or 5 per cent., on Feb. 28, 1890. But the official liquidator might pay such dividends at earlier dates if the funds in his hands should, without any payment by the company, be sufficient to pay the same, and he was not to appropriate, or set aside, any funds to meet dividends upon debts or claims which might, by the books of the corporation or otherwise, appear to be owing by, or provable against, the corporation, but in respect of which no claim should have been actually made in the winding-up. The company were also, on Feb. 28, 1890, or, if the aforesaid dividend of 1s. in the pound should be paid before that date, then, when the same should be paid, to make to the official liquidator for the benefit of the Crown, in respect of the debts due to the Crown already provisionally settled by payments amounting to 19s. in the pound, a further payment of 9d. in the pound. Subsequent clauses of the agreement provided for the payment by the liquidator of the costs and expenses of the winding-up, and his own remuneration out of the funds of the corporation, and for the upkeep of the corporation's estate in Ceylon and Mauritius by the liquidator out of the assets until the company should take possession, and after that date for their upkeep by the company, the company being, however, responsible as from Dec. 1, 1887, for all expenditure in respect of such upkeep.

On May 12, 1887, CHITTY, J., made an order in chambers sanctioning the agreement. The New Oriental Bank Corporation moved, before CHITTY, J., in court, that the order made in chambers might be discharged.

Romer, Q.C., and F. B. Palmer for the applicants.

Latham, Q.C., and T. H. Wright for the official liquidator.

Maclean, Q.C., and Vernon R. Smith for the Assets Realisation Co.

CHITTY, J.—It would be difficult for me to compress into the shape of an ordinary judgment all the grounds which actuate me in this case. But there have been questions before me continually with regard to the assets of this corporation, and I have become, in the course of this liquidation, fully acquainted with the nature of these assets. I have had the advantage of having as the liquidator a gentleman who has acted with discretion and judgment, and, I need not say, with perfect honesty. The official liquidator is the officer of the court under the statute to do certain things, and one of the main things is to sell the property of the company. Another power which he has is to carry on the business so far as may be necessary for the beneficial winding-up and sale. In addition to my having an excellent liquidator, and I being told rather, at the commencement of this liquidation, that the assets were of a very difficult character to manage and maintain, situated in all parts of the world, and liable to remarkable fluctuations in value, I consented to appoint a consultative committee. With great care, and after consulting all the various interests, as far I think as it was possible for a judge to do, I appointed a committee which consists of independent gentlemen with knowledge of the affairs relating to the assets of the company. These gentlemen were chosen to assist the liquidator; they were not entrusted with any authority, for this reason, that in liquidations there is a great advantage in having one man who is responsible. If, as has been very often the case, two or three persons are entrusted with authority, they sometimes begin to think they are representatives of this interest or that interest, and this divided responsibility leads very often, and I may say almost inevitably, to much larger expenditure. Then there come between those various liquidators compromises, arrangements, and so forth, and the matter is not so well or so skilfully conducted as when there is only one man, though, of course, one man assumes and has to bear a much greater responsibility.

Where the judge finds there is an excellent liquidator, he must, to a considerable extent repose confidence in him. It would be impossible for any judge of the Chancery Division to go through all the mass of details relating to such a failure as this. It is the most gigantic liquidation that has yet occurred, the largest in point of money, the largest in point of assets, and the largest in point of indebtedness; and it has not been a sham but a real liquidation. The sums go into millions, the claims of creditors amounting to about £7,000,000. I quite agree with the argument that when a liquidator comes for the sanction of the court to a contract the judge must exercise judicial discretion. In this case the assets are of the most speculative character. They are for the most part in the island of Mauritius, and are not simply ownership of estates, but to a large extent charges upon estates—not merely first charges, but charges of every degree. Besides that, the corporation is interested in companies which are interested in charges or in ownerships. The estates in Mauritius are a great distance from this country, and in order to keep up the value, such as it is, of the assets, it has been constantly necessary to make large advances to prevent foreclosure by persons claiming a prior interest, to prevent, in some way or other, the company's assets being sacrificed. At the same time that has had to be done as judiciously as can be, so as not to throw away any money. In the result, to put it shortly, something like £180,000 in hard cash has been necessarily advanced yearly for the up-keep.

That is not the kind of thing that, in my opinion, ought to be allowed to go on. It was necessary not to let these assets go in the first instance, because if one, or two, or three had gone cheaply, down would have gone the price and value of the assets in the island; and it was necessary, in order to harden the market, not only in Mauritius, but in Ceylon and other places, to sustain and nourish the assets so as to prevent them falling rapidly in the market, one after the other, in which case there would have been a great loss. That has been done, with a view to prevent loss to the creditors, under s. 95 of the Companies Act, 1862, which enables the liquidator, with the sanction of the court, to carry on the business of the company so far as may be necessary for the beneficial winding-up of the same. The assets are not only distributed in the way I have mentioned, but they are peculiarly open

to risk by reason of the region in which they are situated. As the liquidator says in his affidavit, the value of the return for the money expended year by year is liable to very great risks. In Mauritius a hurricane may occur and destroy the benefit, to a large extent, of all the expenditure. There is a risk, therefore, from the ordinary operations of nature. There is risk, too, of another thing, which has not occurred in this case, and that is the risk of having large sums of money out in foreign agents' hands. The liquidator cannot go to Mauritius, or to Ceylon, or to Natal, or to the other various parts of the world where these assets are, but he is obliged to act by agents under power of attorney. So far as I know, everything has gone on smoothly in that respect, but there is a risk all this time from large sums of money having to remain in various parts of the world.

Assets have been sold from time to time, and it has been the endeavour of the liquidator, and I have sanctioned all he has done, to bring the assets, whenever he reasonably can, into the market. The liquidation has been going on for three years, and there remains a considerable portion of assets of the class which I have been describing, undisposed of. In these circumstances, six months ago, to speak roundly, the liquidator considered it right to try to sell the remaining assets. Negotiations took place with persons who were likely to bid. It was impossible to sell them except in some special manner, because there is no person who could take the risk of buying those foreign assets in this kind of way. The result was that a certain other corporation allied to the present bank, made a proposition, and at last, after considerable discussion, the matter was brought to a head by a firm offer on the part of the Assets Realisation Co. That offer assumed a definite shape as long ago as Jan. 18, and it has been put into the perfect shape of a contract, with all the details and conditions of such a contract as is required in a matter of this kind, because a simple contract with a few clauses, such as would be proper in the case of a sale of land in England, would have been entirely inadequate. There were all kinds of provisions and stipulations which had to be put in, and the contract was sealed by the Assets Co. Then the summons was taken out, and that came before the chief clerk a few days afterwards.

Up to this time the new bank had made no proposition, I think, and from that time until it came before me a few days ago in chambers the new bank were really only asking for delay. I do not mean by that to impute anything to them beyond that they were anxious to be obstructive; but nothing more would they do. When the matter came before me at chambers, I still asked whether they had any proposition to make. The other corporation had retired. They made their offer and found they could not go on; they could not offer so much as the present assets company, and the new bank had an opportunity then and there of making an offer or of getting a respite or delay, which would have been granted to them readily if they had said by their counsel or solicitor that they were ready to make some offer. But the effect of the evidence which was put forward before me was that they could not make any offer at all, and the statement of their counsel was to that effect. I would willingly have given them more time to consider the matter if it had been with a view of doing business, but the sort of thing which was suggested was: "You have not a proper valuation of these assets." Counsel for the applicants put that proposition before me, and it seems to me that was one of the grounds, if not the principal ground, upon which they rested. I say emphatically that no man on earth could put anything like a mathematical value upon these assets. I asked whether I was to send a valuer to travel through the colonies. Of course, the answer was "No," because as he was valuing first one estate, and then another, and then another, the value would have fluctuated day by day, for remarkable variations occur from time to time in the value of the produce of the estates in the London and other markets—sugar, for instance, going up and down a half-penny or a penny, which makes a considerable difference with regard to the value of the property.

These are some of the principal reasons, and, to put it shortly, the liquidation has gone on long enough, and the estate has been put to great risk by these

advances. The contract was carefully considered by the liquidator and his consultative committee, who had advised him to hold out for a little more, and who had got, I think, some extra fraction in the pound, making the total price come up to such a sum as would give 19s. 9d. in the pound to every creditor in this liquidation. They thought that was proper and beneficial; the liquidator, whose oath I am not bound to require to every proposal he submits to me, had by his affidavit said in plain terms that in his opinion it was beneficial; and a member of the committee appeared before me personally, and entered into explanations and stated the resolutions I have mentioned. I think the matter was long enough open and fairly considered, and that the result was and is that the discretion was reasonably and properly exercised in chambers, and I think the order made was right.

I have inquired of counsel upon this point, and counsel for the applicants was not able to produce any authority where a judge at chambers had sanctioned a sale by private contract and the court had afterwards set it aside (I mean set it aside merely on the ground of a better offer being obtained). I also inquired at chambers, and found there was no precedent for it, and there is a decision of MALINS, V.-C. (*Re Bartlett, Newman v. Hook* (1)), who declined to set aside the order after the sale had been once confirmed. He considered that the whole practice—and I understand him to mean that he was applying those observations to the practice which he was then asked to introduce with regard to private contracts—to be a pernicious practice, unfair to purchasers, and most prejudicial to vendors. I think that it would be a breach of faith, where everything has been done as it has been done here, were the court to say that the judge, believing he has come to a right conclusion in the first instance, in the exercise of his discretion was entitled to change his mind, and by reason of subsequent events deprive the purchaser of what he was fairly entitled to. Counsel for the applicants says the offer now made shows the purchasers were getting a very good bargain. It has never been concealed from me, nor could it be, that the purchasers think that they are buying at a price something that is worth their getting at that price. The purchasers are willing to take this speculation. What should I do, if I acceded to this part of the argument? I should have to let this matter stand over for something like a month, or two months, before I could come to a conclusion. I am not satisfied at the present moment that the new bank have, under their memorandum or their articles of association, power to enter into any such contract. That power would have to be considered, the liquidator would have also to consider the whole matter, and there are other points, which I will not allude to further, which would require consideration. That, during all this time, I should have to keep the purchasers bound by the order that was made, and there might come news of a hurricane, and that the estates had been half destroyed, and I should still hold them bound by their contract during this period. I will reduce the time for the purpose of argument, I will not say two months but one month, or I will suppose what is very unlikely, a fortnight. Still, something might happen to these very speculative estates in the meantime, and the purchasers are kept bound all that time. It seems to me it would be most unfair to them to postpone the decision in this case, and that is the reason I have given my judgment to-day.

The other alternative, which is the one which would be least unfair, would be to say: "I make a temporary order today; I will discharge the contract on the faith of this offer, which I cannot accept," and then I should discharge the former order and let the purchasers, the Assets Realisation Co., be free, and in the meantime, when it came to a bidding or a tender, or to bringing in some new contract, the present purchasing company would say: "Oh no, not now. We will not give 3d. beyond the 19s. 9d., or a sum which will make up 20s. in the pound; we will reduce our offer, we will only give 2d.," or something of that kind. And the result would be that I should be throwing away a firm offer, a binding offer, a contract which has been secured for the benefit of these creditors for the chance, for that is what it is really according to law, of a better offer. In my judgment—and I hope I have not missed anything, after having very carefully considered this matter,

and having great sympathy, as I have had, with the shareholders and the other creditors—that which has been done is the best thing that could be done for them. The event may prove otherwise, but I do not desire to go on with this speculation any longer, and I think what has been done is the most judicious thing that could be done. If the event should prove otherwise, the purchasers will get the benefit of it, but they will get it honestly. The motion will be dismissed with costs.

The New Oriental Bank Corporation appealed.

Rigby, Q.C., Romer, Q.C., and F. B. Palmer for the corporation.

Sir Horace Davey, Q.C. (Latham, Q.C., and T. H. Wright with him), for the liquidator.

Sir Henry James, Q.C. (Maclean, Q.C., and Vernon R. Smith with him), for the Assets Realisation Co.

COTTON, L.J.—This is an appeal from an order of CHITTY, J., affirming a provisional contract entered into by the liquidator of the Oriental Bank Corporation with the Assets Realisation Co. for a sale to the company of the whole property still remaining to the corporation which is being wound-up.

To a very great extent an order of that kind is and must be in the discretion of the judge (though of course it was not disputed that an appeal lay in this case), and I certainly feel the very great risk there might be if we interfered in this case with the discretion exercised by the judge; because, even although we were to come to the conclusion that this was not a proper sale, yet we can see that the setting aside of the provisional contract would considerably damp other persons who might be willing to tender for these estates. However, we must consider whether we ought to uphold the order or set it aside, and, although one is unwilling to interfere with the discretion of the judge, yet one always considers whether he has exercised a discretion within the powers given to him by the Act of Parliament or by the general law?

In this case the discretion is given by an Act of Parliament, and the first question about which at one time I had considerable doubt was whether this sale was one of the character recognised by s. 95 of the Companies Act, 1862, so as to entitle us to say that there had been an exercise of the discretion of the judge with reference to a sale under that section. That is a most material question. The doubt I had as to this was whether there was a sufficient definition of what was to be bought and sold to make it a sale within the fair meaning of that section. The contract is to sell all the property of the company, both real and personal, but I doubted whether there had been any sufficient definition by the liquidator of what was to be bought and of what he proposed to sell. However, there is a statement in his affidavit that in the interval between the first proposal and the sealing of the provisional contract he gave information of the assets and liabilities to both parties in a confidential way, and offered in writing to give further private information to either of the parties who would like to see him; and then what is strongest to my mind is that in the protest made on Jan. 18 by the Assets Co., no objection is made that the details of the properties to be sold are not sufficiently stated. It is rather assumed that the information given is sufficient to enable the Assets Co. to judge what the properties to be sold are, but it raises the objection that there is not sufficient information given or time allowed to obtain knowledge of what the value of this property is. In my opinion, therefore, this was a sale which was justified within the terms of s. 95 of the Companies Act, 1862, and the order is a good one, provided the judge has properly exercised his discretion.

To justify the Court of Appeal in interfering with the discretion of the judge, it must be shown that he has exercised it on a matter not within his discretion, or that there has been an exercise of his assumed discretion on wrong principles, or that there has been some great loss occasioned to someone or other by a clearly erroneous exercise of his discretion. It occurred to me at first: Why was no attempt made to realise these estates, the market being, as the liquidator tells us, in a better state? I think the answer is that the applicants do not contend that

these estates could be better and more profitably sold by being put up for sale separately, as estates for sale in the market, than en masse under the existing contract. What is proposed is, not that the course which it occurred to me ought to be attempted should be taken, but that effect should be given to a rival scheme under which a company should be formed for the express purpose of taking over in a more beneficial way all the estates which the corporation in course of winding-up still have. That, in my opinion, gets rid of what first of all looked like a serious difficulty in the way of our saying that this was a proper exercise of the discretion of the court. It seemed to me that it would be the more reasonable course to sell piecemeal, although I could not say, even though that would have been, possibly, more beneficial, that the judge had exercised his discretion wrongly. A B

What else is there? The great point taken by counsel for the applicants is that there was no evidence before the court from which it could judge of the value of these properties, and that there was no such information in the possession of even the liquidator. To a great extent that is true. As far as one can see, this property is of such a character that it could hardly be the subject of a valuation in the proper sense of the word. It is most speculative, and, in support of that, I think there is a passage in the affidavit of the liquidator. As a general rule undoubtedly, if in the liquidation the liquidator is proposing to sell, and the court is asked to sanction the sale, it is right to obtain a valuation, as far as possible, of the estates to be sold. But one must consider whether the judge had sufficient information with reference to this particular case, which is, undoubtedly, one of great magnitude, and in which the assets still remaining are certainly of a speculative character. Then one must not forget that the judge had to consider the fact that, if these estates (which could not be sold if put up in the market in the ordinary way at once) were continued, it would be necessary that a very large annual expenditure should be incurred, because, if they went out of cultivation, one could not but come to the conclusion, even without any evidence on the point, that they would very much fall in value and become unsaleable except at a very small sum indeed. That being so, it is undesirable that the creditors and shareholders of the corporation (the shareholders have no interest certainly under this contract) should be called upon to put forward year by year this very large sum of, we will say £180,000, or even £100,000, to keep the estates in cultivation. C D E F

It not being practically possible to get a valuation, in the proper sense of the word, of these estates, they being speculative entirely, in my opinion what the judge had before him was reasonably sufficient to enable him to form a correct conclusion as to what was best to be done. He saw that this vast expenditure year by year ought to be avoided; he knew that the consultative committee approved of this sale, which, to my mind, is a very considerable matter; and one cannot, in determining whether it has been shown that the discretion has been wrongly exercised (for that the applicants must make out), disregard the fact that the judge had before him the whole course of the liquidation and winding-up. I should not consider that alone to be sufficient; but, taking into consideration all the facts of the case—the impossibility of sale in the ordinary way in the market, the fact that the only proposal made in opposition to this, with the exception of the offer made by the new bank, was that a new company should be formed in order to make a scheme to work these estates—I cannot say that the judge exercised his discretion in this matter without sufficient data for him to exercise his discretion upon. I do not think it was—so far as I can see it was exercised rightly. [His LORDSHIP dealt with two minor questions of fact, and concluded:] In my opinion, it would be wrong for us to interfere with the discretion of the judge, not only on the ground of the probable effect on the interest of the creditors, but also as regards this, that I am not at all satisfied that we should not do them grievous wrong if we were to interfere. In my opinion, it was a matter in the discretion of the judge, and it is not shown that he has exercised that without sufficient materials before him on which to form an opinion in this particular case. So far as I can judge he exercised his discretion rightly. G H I

LINDLEY, L.J.—I am of the same opinion. The first question is whether this proposed sale, or so-called sale, is authorised by the Companies Act, 1862. The only section which does authorise it, is admitted on all hands to be s. 95. When I look at s. 95, it appears to me that this is a transaction which falls strictly within it. Section 95 authorises the liquidator to sell all the assets, real and personal, of the company in liquidation—to sell choses in action, debts to the company, as well as other assets, to sell by private contract or by auction, and to sell en bloc as well as in parcels. Having regard to the very extensive power which is to be found in that section, it appears to me to be impossible to say that this is not a sale within the meaning of that section. It is a transfer of the remaining assets en bloc for a valuable monetary consideration, to be paid in the mode and by the instalments described by the agreement. The first question, therefore, appears to me to be answerable only in one way, namely, that this is a sale within the meaning of that section, and within the competence of the liquidator and of the court.

The next question is whether the judge who has the discretion in sanctioning this sale has proceeded upon erroneous principles, or has proceeded without that information which is necessary to give him or anybody else the means of judging as to what is expedient. It appears to me that it is entirely for the applicants to satisfy us on that point. In that they have failed; and not only have they failed to do it, but, in my opinion, the judge has exercised his discretion wisely and well. I say that for this reason. What is the drift of the argument against this agreement? It is closely reducible to one point, or mainly to one point—that these assets are wholly incapable of valuation. Let us take Mr. Macdonald's own affidavit with reference to that. He says:

"I have exceptional facilities for determining the value of the assets of the corporation. . . . The conditional agreement deals with a great variety of assets, some of great magnitude, and the value of which it is impossible to ascertain with even approximate accuracy."

One must look at the question from this point of view—what are you to do with such assets? The object is to turn them into money, that is the object of the whole proceeding. You have here assets, the general nature of which is well known to the person who is advising the applicants, and represents their knowledge, and although he says he has exceptional facilities for determining the value, yet he cannot give the court any idea of the value. What are we to do? Let us see what the liquidator knows about it. I take it from his affidavit, and from the statements which have been made to us, that he feels the same difficulty. He does not know the value of these things. But what does he know? He has had them on his hands for more than four years; he knows what is the cost of keeping them going, and he knows what he gets out of them. Knowing so much, he seeks the advice of the consultative committee—to which I attach considerable importance in this case—a committee of gentlemen exceptionally well acquainted with matters of this description. He lays before them this proposed agreement, and they are all unanimously of opinion that the best thing to do is to accept this offer. In addition to that, the judge himself (who has, of course, no better materials than those which are accessible to the liquidator and to the consultative committee), has given his mind to this matter, and has come to the conclusion that this is the best thing to be done. Can we say, judicially, that it is not? Look at Mr. Macdonald's own rival scheme. It proceeds on the theory that you can form some idea, at all events, of the nature of this property. He knows enough about it to make it worth his while to make a competitive offer. What can that proceed upon except that, although he tells us, and tells us truly I have no doubt, that it is perfectly impossible to arrive at what is the maximum value of this property, yet, as a business man, he does see his way to make another offer upon his own terms. If that be so, why cannot the liquidator see his way to accept a modified offer upon some other terms? It appears to me, that, so far from there being any ground for our

saying that this discretion has been improperly exercised by the learned judge, or that he proceeded in the dark, the evidence points the other way. I come to the same conclusion, and I think, on the whole, it being a peculiar case, that this is the best thing that can be done for the company.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Hollams, Son & Coward; Linklater, Hackwood, Addison & Brown; Freshfields & Williams.*

[*Reported by FRANK EVANS, Esq., Barrister-at-Law.*]

Re HOTCHKYS. FREKE v. CALMADY

[COURT OF APPEAL (Cotton, Lindley and Lopes, L.JJ.), May 7, 8, 1886]

[Reported 32 Ch.D. 408; 55 L.J.Ch. 546; 55 L.T. 110;
34 W.R. 569]

Will—Residue—Right of legatee to accept one item comprised in gift and reject another.

Settlement—Repairs—Liability to bear cost of repairs—Liability of tenant for life—Liability to pay cost of repairs out of rents of other property.

At the date of her death the testatrix was absolutely entitled in remainder (subject to the life interest of M.L.H.) to the B. estate, which was subject to mortgages. She was absolutely entitled in possession to the P.W. estate. By her will the testatrix gave all her freehold, leasehold and copyhold lands and all her real and personal estate to trustees on trust at their discretion to sell the same, and, after payment of her debts and funeral and testamentary expenses, to invest the residue. She directed her trustees to stand possessed of her real and personal estate and the money and securities representing the same to pay the annual income to E.T. on protective trusts during her life, and from and after the death of E.T. to stand possessed of the corpus for V.C. absolutely. After the death of the testatrix, E.T. entered into possession of the P.W. estate. When M.L.H. died the B. estate was still mortgaged and it was much dilapidated. The remainderman, V.C., contended that in so far as the income from the B. estate was insufficient to keep down the interest on the mortgages on that estate and to pay for repairs, the rents of the P.W. estate must be used for those purposes.

Held: it was not open to E.T. to accept the P.W. estate and refuse the B. estate since they both formed part of a single gift; but the burden of repairing the B. estate did not fall on income alone.

Guthrie v. Walrond (1) (1883), 22 Ch.D. 573, followed.

Syer v. Gladstone (2) (1885), 30 Ch.D. 614, distinguished.

Notes. Applied: *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511. Considered: *Re Montagu, Derbyshire v. Montagu*, [1897] 1 Ch. 685. Applied: *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28. Considered: *Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203. Applied: *Re McClure's Trusts, Carr v. Commercial Union Insurance* (1906), 76 L.J.Ch. 52. Considered: *Re Wagstaff's Settled Estate*, [1909] 2 Ch. 201; *Re Lysons, Beck v. Lysons* (1912), 107 L.T. 146. Distinguished: *Re Johnson, Cowley v. Public Trustees*, [1915] 1 Ch. 435; *Re Gray*.

Public Trustee v. Woodhouse, [1927] 1 Ch. 242. Applied: *Re Robins, Holland v. Gillam*, [1928] All E.R.Rep. 360. Considered: *Re Joel, Rogerson v. Joel*, [1943] Ch. 311. Referred to: *Conway v. Fenton* (1888), 40 Ch.D. 512; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Willis, Willis v. Willis*, [1902] 1 Ch. 15; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; *Re Farnham's Settlement, Law Union and Crown Insurance v. Hartopp*, [1904] 2 Ch. 561; *Gresham Life Assurance Society v. Crowther* (1914), 111 L.T. 887; *Re Conquest, Royal Exchange Assurance v. Conquest*, [1929] All E.R.Rep. 608; *Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 662; *Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88.

As to acceptance and disclaimer of blended gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 933; and for cases see 44 DIGEST 400 et seq.

Cases referred to:

- (1) *Guthrie v. Walrond* (1883), 22 Ch.D. 573; 52 L.J.Ch. 165; 47 L.T. 614; 31 W.R. 285; 44 Digest 402, 2339.
- (2) *Syer v. Gladstone* (1885), 30 Ch.D. 614; 34 W.R. 565; 44 Digest 401, 2334.
- (3) *Powys v. Blgrave* (1854), Kay, 495; affirmed, 4 De G.M. & G. 448; 2 Eq. Rep. 1204; 24 L.J.Ch. 142; 24 L.T.O.S. 17; 2 W.R. 700; 43 E.R. 582, L.C.; 40 Digest (Repl.) 699, 1951.

Also referred to in argument:

- Doughty v. Bull* (1725), 2 P.Wms. 320; 24 E.R. 748, L.C.; 20 Digest (Repl.) 367, 903.
- Re Raw, Morris v. Griffiths* (1884), 26 Ch.D. 601; 53 L.J.Ch. 1051; 51 L.T. 283; 32 W.R. 986; 20 Digest (Repl.) 968, 906.
- Robinson v. Robinson* (1854), 19 Beav. 494; 52 E.R. 442; 20 Digest (Repl.) 367, 904.
- Minors v. Battison* (1876), 1 App. Cas. 428; 46 L.J.Ch. 2; 35 L.T. 1; 25 W.R. 27, H.L.; 44 Digest 1170, 10125.
- Revel v. Watkinson* (1748), 1 Ves. Sen. 93; 27 E.R. 912, L.C.; 40 Digest (Repl.) 755, 2421.
- Tidd v. Lister* (1820), 5 Madd. 429; 56 E.R. 959; 43 Digest 800, 2369.
- Taylor v. Taylor* (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 23 W.R. 719; 20 Digest (Repl.) 483, 1898.
- Pugh v. Vaughan* (1850), 12 Beav. 517.
- Vyse v. Foster* (1872), 8 Ch. App. 309; 42 L.J.Ch. 245; 27 L.T. 774; 21 W.R. 207, L.J.J.; 43 Digest 916, 3571.
- Re Leigh's Estate* (1871), 6 Ch. App. 887; 40 L.J.Ch. 687; 25 L.T. 644; 19 W.R. 1105, L.J.J.; 11 Digest (Repl.) 252, 1247.
- Re Aldred's Estate* (1882), 21 Ch.D. 228; 51 L.J.Ch. 942; 46 L.T. 379; 30 W.R. 777; 11 Digest (Repl.) 261, 1398.
- Talbot v. Radnor (Earl)* (1834), 3 My. & K. 252; 40 E.R. 96; 43 Digest 776, 2163.
- Fowler v. Odell* (1881), 16 Ch.D. 723; 44 L.T. 99; 29 W.R. 891; 43 Digest 800, 2372.
- Re Box* (1863), 1 Hem. & M. 552; 3 New Rep. 65; 33 L.J.Ch. 42; 9 L.T. 372; 12 W.R. 67; 71 E.R. 242; 44 Digest 397, 2301.
- Dixon v. Peacock* (1855), 3 Drew. 288; 61 E.R. 913; 40 Digest (Repl.) 743, 2312.
- Howe v. Earl of Dartmouth, Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.
- Lord Kensington v. Bouverie* (1855), 7 De G.M. & G. 134; 3 Eq. Rep. 765; 24 L.J.Ch. 442; 25 L.T. 169; 1 Jur.N.S. 577; 3 W.R. 469; 44 E.R. 53, L.J.J.; on appeal (1859), 7 H.L.Cas. 557; 29 L.J.Ch. 537; 34 L.T.O.S. 16; 6 Jur.N.S. 105; 11 E.R. 222, H.L.; 35 Digest 528, 2601.

Appeal by the remainderman from an order of BACON, V.-C.

Under a marriage settlement, dated Feb. 12, 1822, a freehold estate in Devonshire called the Blatchborough estate was limited in fee to Arundel Calmady Hotchkys, subject to a life interest in his father, C. H. Hotchkys. A. C. Hotchkys mortgaged the Blatchborough estate to secure £1,000 and at the time of his death

it was mortgaged to secure £10,000 and interest. A. C. Hotchkys died in 1866 having by his will devised the Blatchborough estate to his wife Maud Louisa. with remainder to Bertha Caroline Hotchkys for life, with remainder to C. H. Hotchkys in fee. C. H. Hotchkys died intestate in May, 1869, whereupon the estate descended to B. C. Hotchkys as his sole heiress. In June, 1869, B. C. Hotchkys concurred in a transfer of the mortgages from the then mortgagees to other persons who paid them off, and she and M. L. Hotchkys mortgaged their interest in the estate to secure a further sum, but B. C. Hotchkys did not render herself personally liable except in certain events which never happened. B. C. Hotchkys died in November, 1869, being then entitled to the remainder in fee in the Blatchborough estate (subject to the mortgages) and in fee simple in possession to an estate called the Pancras Week estate.

By her will, dated in 1868, B. C. Hotchkys devised as follows :

"All my freehold, leasehold, and copyhold lands and hereditaments, and all my real and personal estate of what nature or kind soever, and wheresoever situated, I give, devise, and bequeath unto and to the use of my cousin Vincent Calmady, Ambrose Denis Hussey Freke, and Wm. Hussey, their executors, administrators, and assigns, upon trust at their discretion to sell and dispose of all such parts thereof as shall not consist of money, and, out of the produce of such sale, shall first pay all my just debts, and funeral and testamentary expenses, and shall then invest the residue of such moneys in the Government stocks or funds of Great Britain, or by mortgage of any real estate in England or Wales, but not in Ireland, and shall stand possessed of such real and personal estate, money, and securities, upon trust to pay the rents, interest, and dividends and annual produce thereof unto my dear friend Emily Tuson, for and during the term of her natural life, and for her separate estate, and so that the same shall not be subject to the debts or control of any husband of hers, and that her receipts alone be a sufficient discharge for the same. And I direct that, if the said Emily Tuson shall alien or dispose of the same, or charge the same or any part thereof by anticipation, whether by her own act or by the act of the law, the same shall be thenceforth forfeited to the use of the said Vincent Calmady, his heirs, executors, administrators, or assigns. And I do hereby authorise and empower my said trustees, and the survivor of them, and the heirs and assigns of such survivor, to sell and dispose of all or any part of my said real and personal estate, either by public auction or private contract, and to convey the same to the purchaser or purchasers thereof; and I declare that the receipt or receipts of my said trustees, or the survivor of them, shall be a sufficient discharge for the purchase moneys to such purchaser or purchasers, who shall not be answerable for the mis-application or non-application of such moneys, or any part thereof. And from and after the decease of the said Emily Tuson, I give, devise, and bequeath my said real and personal estate, and the securities on which the same may be invested, unto and to the use of the said Vincent Calmady, his heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively."

M. L. Hotchkys died in 1875. On the death of B. C. Hotchkys, Emily Tuson entered into the receipt of the rents and profits of the Pancras Week estate, and after the death of M. L. Hotchkys the trustees of B. C. Hotchkys' will entered into receipt of the rents of the Blatchborough estate, and from that time continued to manage that estate. The rental of the Pancras Week estate was about £200 per annum. At M. L. Hotchkys' death, and at the date of the present application, the mortgages remained on the Blatchborough estate; it was in a state of much dilapidation, and the rents were insufficient to pay the interest on the mortgages and to keep up the repairs. V. Calmady contended that both the properties must be treated as one, and that so far as the rents of the Blatchborough estate were insufficient to keep down the interest, and for repairs of that estate, the rents of the Pancras Week estate must be devoted to those purposes. Miss Tuson con-

A tended that, as she had been let into possession of the Pancras Week estate, the rents of that estate were not applicable during her lifetime to the purposes aforesaid. An originating summons was accordingly taken out by the trustees, asking for a declaration whether the rents of the Pancras Week estate were liable, as between the tenant for life and remainderman or otherwise, to be applied for the purpose of keeping down the interest on the mortgages on the Blatchborough estate, and for the necessary repairs and other outgoings connected with the management of the last-mentioned estate, and whether the trustees were entitled to take possession of the Pancras Week estate for the purpose. BACON, V.-C., held that the rents of the Pancras Week estate were not so liable to be applied.

Marten, Q.C., and Medd for the remainderman, V. Calmady.

Millar, Q.C., and Cecil Russell for Miss Tuson, the life tenant.

C **COTTON, L.J.**—This is an appeal from an order made by BACON, V.-C., on an application made to him by the trustees of a will to ascertain what were their rights and powers with regard to the rents and profits of certain estates devised by the will of the testatrix, Miss Bertha Hotchkys. By the will, which is dated in 1868, the testatrix, without specifying distinct estates, devised all her real and personal estate to trustees—I will consider shortly what the effect of the trusts was —to the life tenant for life, and the remainderman in remainder in fee. The question really arises between the tenant for life and the remainderman, because the question is how the rents ought to be applied. The Vice-Chancellor made a declaration that the rents and profits of the Pancras Week estate should be free from encumbrances, or not liable, as between the defendants or otherwise, to be applied for the purpose of keeping down the interest on the mortgages, charged solely on the Blatchborough estate, or for the necessary repairs and other outgoings connected with the management of the last-mentioned estate and the rents thereof.

E This appeal is brought by the remainderman, and the contention which was put forward on his behalf was, that the rents were to be applied for both these purposes. In the first place, it was said that there was a trust for sale or absolute conversion under the will, and that such a trust necessarily gives the trustees, in whom the legal estate is vested, the power of management, and enables them to apply the property comprised in their trust in order, and in such a way as, to keep the whole of the property in repair. But, to my mind, that is not the real question; it is not the question whether the trustees have the duty and power of keeping the property in repair cast on them, but what fund they are to take in order to keep the property in repair—whether they are to take the rents, which are the income of the tenant for life, or whether they are to take the corpus, which, by making a deduction from the rents, as it necessarily must do, would throw the burden equally on both the tenant for life and the remainderman.

H With reference to the question whether there is a trust for sale so as to create an absolute conversion, in my opinion, the Vice-Chancellor is right in the view which he has expressed, that there is not. It is very true that after the gift to the trustees the testatrix continues as follows:

I “Upon trust, at their discretion, to sell and dispose of all such parts thereof as shall not consist of money, and out of the produce of such sale shall first pay all my just debts, and funeral and testamentary expenses, and shall then invest the residue of such moneys . . . and shall stand possessed of such real and personal estate, money, and securities, upon trust to pay the rents, interest, and dividends, and annual produce thereof unto my dear friend Emily Tuson for and during the term of her natural life as and for her separate estate, and so that the same shall not be subject to the debts or control of any husband of hers, and that her receipts alone be a sufficient discharge for the same.”

Then, further on in the will, there is an intermediate direction how the trustees are to sell, with reference to that which has gone before; and then the testatrix says:

"And from and after the decease of the said Emily Tuson, I give, devise, and bequeath my said real and personal estate, and the securities on which the same may be invested, unto and to the use of the said Vincent Calmady, his heirs, executors, administrators, and assigns, for ever, according to the nature and quality thereof respectively."

In my opinion, although, as I have said before, the direction as to the sale is in form a trust, it is not a trust for conversion of the whole of the estate immediately on the death of the testatrix, when the will comes into operation; but it is in the form of a trust giving them the power to sell such part of the real estates as they shall in their discretion think it desirable to sell. Undoubtedly they may, if they think it desirable, either for the purpose of payment of the debts or otherwise, sell the whole. It is clearly not a direction to them to sell the whole, but simply a trust giving them a power to sell such part of the real estate as they shall think right. In my opinion, that is not only shown by the ultimate devise in fee, but also by the direction in the will, that the rents, interests, and dividends, and annual produce thereof, are to be paid to Emily Tuson, the tenant for life. That being so, it seems to me a great part of the argument is got rid of.

Then arises this question: What, in that state of facts, is the duty of the trustees as between the tenant for life and the remainderman? Then the estate was to be vested in the trustees during the tenancy for life, and, in my opinion, where property is vested in trustees under circumstances like these, there is an obligation on them, for the purpose of properly carrying out and performing their trust, to see that the property does not fall into decay from want of proper repair; but, of course, the question will often arise, whether there is any necessity to preserve the property in repair—is it worth while to do so? Where there is a devise by the testatrix of certain estates, I will say two estates, one encumbered and the other unencumbered, it may not be worth while or for the benefit of the residuary estate to expend any money out of the unencumbered estate in the repair of that which is mortgaged, having regard to the amount of the mortgage debt on it and to the amount which must necessarily be spent in putting the property in such a proper state of repair as to preserve it from ruin; such an expenditure might in some cases be throwing away money. In such a case, of course, the trustees would be wrong in applying anything not in mortgage to repair a property which, when repaired, would not be worth anything to the estate. No doubt the court would say, in a case where there was no question that it was for the benefit of the whole residue to repair the mortgaged property, that the repairs must be done, and the money must be raised in such a way as not to throw the burden unequally or improperly either upon the tenant for life or upon the remainderman. In the present case, it might be a question whether the trustees could mortgage the Pancras Week estate, and whether, if it was for the benefit of the entire residuary estate to expend any money in repairs of the mortgaged estate, they ought not to relieve the Pancras Week estate, and do it by selling a portion of the Blatchborough estate.

The opinion of the Vice-Chancellor (and this was the contention of the tenant for life) was, that under this devise it was perfectly possible for the equitable tenant for life, the cestui que trust, to throw up this mortgaged estate, and to decline to take it while keeping the other estate. In my opinion, that was wrong. It is very true that here two legacies are given to one person by a will, the legatee may say: "I am much obliged to the testator for legacy A., and I will take it, but legacy B. I decline to take," but that is only where the two things are not connected together so as to be part of the one thing given to the legatee. Where two entire and separate things are given to the legatee the legatee is in no way bound to take one if he does not like to take it, but he may take the entire and separate thing without taking the other. In my opinion, it does not at all depend on the question whether the things are given in one sentence or in two sentences; and that explains the decision of PEARSON, J., in *Syer v. Gladstone* (2), which was pressed on us in support of the contention of the life tenant. In that case there were two

A bequests, one of land or houses, and the other of chattels. In my opinion those were two separate gifts, as to which the legatee might accept one and reject the other. But here, what is given to the tenant for life and to the remainderman is an aggregate, and what results from that aggregate is given to both of them. In my opinion, under those circumstances, if the tenant for life likes to accept the gift by entering into possession of part of the property, she cannot say she will take possession of one part and take it with the obligation thus thrown on her, but at the same time reject another part of that one integral gift which is given to her by the testatrix.

According to my view, as I have already expressed it, the burden of repairing, if it is necessary and proper, ought to be thrown on the estate in such a way that it may not be borne entirely either by the tenant for life or by the remainderman. I should add (and perhaps I should have said this before) that, in my opinion, the effect of such a gift as this is not, as regards any equitable tenant for life taking property under it, to alter the general rule, which is undoubtedly that where an estate is given to an equitable tenant for life, the equitable tenant for life cannot be called on to repair. In my opinion, although this gift is one that is inseparable, it does not throw on the tenant for life, or enable the trustees to throw on the tenant for life, a greater burden, as regards repairs, than she would have been subject to if it had been simply a gift to her, as equitable tenant for life, of one estate.

There is, I think, only one other question, namely, as to the interest on the mortgage. That question does not seem to me to arise after the opinion which I have expressed as to repairs, as the rents of the mortgaged estate are sufficient to keep down the interest; but it does arise, in my opinion, where there is an aggregate gift in this way to trustees, and the income of the total property may be applied by the trustees in keeping down annual charges, or anything in the nature of charges, on the entirety, and the income arising from the unencumbered part might, in the case of rents of the encumbered part not being paid, in their discretion be applied by the trustees in keeping down the interest on the mortgage. There might be a question how far, as between the tenant for life and the remainderman, there might be some equity to be adjusted between them; but that is not the question that arises in this case. As regards the interest, the question will probably not arise, having regard to our decision as to the repairs, if the rents of the mortgaged property are sufficient to pay the interest, and if they are not applied, as in my opinion they ought not to be applied, in making repairs on the mortgaged property.

LINDLEY, L.J.—I am entirely of the same opinion. It appears to me that, having regard to the terms in which the will of the testatrix is framed in this case, and the controversy raised by the tenant for life and the remainderman, each of them is claiming a little too much. The will is peculiar in some respects. There is a trust for sale which, when you come to spell it out, I think it is tolerably plain is much more in the nature of a power. I cannot read the will as operating as a conversion on the argument which has been raised here. I think that is utterly inconsistent with the expressions which are used. I treat it rather as a power than as a trust. There is a trust for sale, and there is unfortunately nothing whatever in the will pointing to what was to be done in the event of its being considered judicious to postpone the sale, beyond this, that Miss Tuson was to have the rents for her life. Nothing is said about repairs or management, and therefore we must apply the ordinary rules of law to that condition of circumstances.

The tenant for life has, I think, put her case rather too high when she contends, as apparently she does, that she is at liberty, having nothing whatever to do with the Blatchborough estate, to take the other estate without reference either to the charges on the Blatchborough estate, or the repairs, or anything else. It appears to me that, having regard to the terms of this gift, she is to be considered, for the purpose of the construction of this will, as having had one aggregate gift to her for her life. I cannot say that the interest on the charges is not to be paid out of the

aggregate income of the whole. I must say I think that she has claimed too much in that respect, and I cannot but agree with the view taken by COTTON, L.J., that *Guthrie v. Walrond* (1) is a case that is more applicable to this particular devise than was *Syer v. Gladstone* (2), which is to be explained by the fact that in the latter case there were two separate gifts, according to the proper construction of the will.

The contention of the tenant for life when one considers it, does not come to a great deal, because it appears that the rents of the Blatchborough property are more than sufficient to keep down the interest on the encumbrances, although it is of course just possible they might not always be so. If they were not, this point might arise.

As regards the important and substantial question as to the repairs, it appears to me there is no method for getting out of the application to this case of the rule which is laid down by LORD HATHERLEY in *Powys v. Blagrave* (3). Miss Tuson is equitable tenant for life, and the remainderman is not entitled to throw on her the burden of keeping the property in repair. I think that is perfectly plain. On this point, whether the property is to be regarded as one property or as two, appears, to my mind, to be immaterial. The remainderman cannot be entitled to call on the tenant for life to repair, or otherwise to throw the burden of the repairs on her in the sense which is contended for in this case, by making her repair out of the rents of the other property. I quite agree with what COTTON, L.J., has said, that, if the case arises in which it may be judicious to come to this court for authority to make the repairs, that authority will be given, but it will be given only on proper terms as to how the expenses are to be borne as between the tenant for life and the remainderman. It would be monstrous, as it appears to me, and contrary to law, if it were otherwise. When the question arises, it will have to be considered on the point whether the repairs are beneficial, whether they ought to be made, and how they ought to be paid for. It is unnecessary now to consider the question whether the trustees would be enabled to raise it by sale or mortgage, or in any other way, but it must be something equitable between the tenant for life and the remainderman, and the remainderman should not have to pay the whole.

LOPES, L.J.—I entirely agree with the opinion of the rest of the court, and what has been stated leaves me nothing to add.

Decision of BACON, V.-C., affirmed, with a variation as to the interest on the mortgages.

Solicitors: *R. W. Childs & Batten for Venning & Goldsmith, Devonport; Davidson, Burch & Co.*

[Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

A

Re JOY. PURDAY AND OTHERS v. JOHNSON AND OTHERS

[CHANCERY DIVISION (Chitty, J.), December 5, 6, 1888]

[Reported 60 L.T. 175; 5 T.L.R. 117]

B

Will—Bequest—Separate legacies to two societies—Amalgamation of societies.

A testatrix, who died in 1885, by a codicil made in 1882 to her will dated 1879, bequeathed to the "Anti-Vivisection Society" a legacy of £200 and to the "International Anti-Vivisection Society" a legacy of £200. These two societies amalgamated in 1883, their objects being identical. The question was whether the united society was entitled to both legacies, one legacy, or nothing at all.

C

Held: for the purpose of the will, both societies must be deemed to be still in existence, and, therefore, the united society was entitled to £400.

Will—Bequest—Lapse—Gift to society conducted by testatrix—Society having no existence apart from testatrix.

D

Charity—Charitable bequest—Gift to society for suppressing cruelty through united prayer.

A legacy of £1,000 was bequeathed by the testatrix to a clergyman for the benefit of the "Society for Suppressing Cruelty by United Prayer," and for accomplishing its purposes and objects. The so-called society had been originated by the testatrix herself in 1876, and had, at various times, had some thousands of members. The society had no rules, save that the members were required to buy a card at the cost of twopence, and to use a prayer which was printed on the card. The testatrix caused the cards to be printed at her own cost, and received the money for the cards, but published no accounts. The society had, in fact, been founded, managed and maintained by the testatrix alone, and when, sometime before her death, the testatrix became ill, its affairs ceased to be carried on.

E

Held: (i) on the evidence, the society had no existence apart from the testatrix, and, therefore, it ceased to exist on her death, and the gift to it lapsed; (ii) the gift was not for general charitable purposes because, in the first place, the gift was a particular one for the named society, and, secondly, the purposes of the society were not charitable; (iii) the gift could not be construed as one to the clergyman beneficially.

G

Notes. Considered: *Re Pritt, Morton v. National Church League* (1915), 85 L.J.Ch. 166; *Re Watt, Hicks v. Hill*, [1932] 2 Ch. 243, n.; *Re Coats' Trusts, Coats v. Gilmour*, [1947] 2 All E.R. 422; *Re Dawson's Will Trusts, National Provincial Bank v. National Council of Y.M.C.A., Incorporated*, [1957] 1 All E.R. 177. Referred to: *Re Rymer, Rymer v. Stanfield* (1894), 42 W.R. 581; *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; *Re Hutchinson's Will Trusts, Gibbons v. Nottingham Area No. 1 Hospital Management Committee*, [1953] 1 All E.R. 996.

H

As to change of circumstances between date of will and date of death, see 39 HALSBURY'S LAWS (3rd Edn.) 1010, and cases there cited.

Cases referred to:

1

- (1) *Cocks v. Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 331, 128.
- (2) *University of London v. Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.JJ.; 8 Digest (Repl.) 348, 285.

Also referred to in argument:

Re Douglas, Obert v. Barrow (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 348, 290.

Re Lea, Lea v. Cooke (1887), 34 Ch.D. 528; 56 L.J.Ch. 671; 56 L.T. 482; 35 W.R. 572; 3 T.L.R. 360; 8 Digest (Repl.) 455, 1534.

Adjourned Summons.

Sarah Elizabeth Joy, late of Ashley Grove, Box, in the county of Wilts, by her will, dated May 26, 1879, after appointing Saffery William Johnson and Charles Henry Purday her executors and trustees, gave to each of them a legacy of £200, and then gave to the United Kingdom Beneficent Association a legacy of £500 free of legacy duty, and gave to every other charity to which she might have subscribed within one year preceding the day of her death, legacies of £100 each free of legacy duty, and declared that such charitable legacies and the legacy duty thereon respectively should be paid exclusively out of such part of her personal estate as might be legally bequeathed for charitable purposes. Then followed a number of pecuniary and other legacies, and the residue the testatrix gave to her trustees on trust to sell and pay her debts and her funeral and testamentary expenses, legacies, and legacy duty, and to stand possessed of the residue on trust to invest the same, and as to one moiety, to pay the income thereof to her niece, Mary Eliza Haweis (the wife of the Rev. Hugh Reginald Haweis) for her life, with remainder to her children absolutely; and as to the other moiety, to pay the income thereof to her niece, Edith Susannah Joy, for her life, with remainder to her children absolutely.

By a first codicil to her will, dated Nov. 15, 1882, the testatrix confirmed the gift of £500 to the United Kingdom Beneficent Association but revoked the gift of £100 to every other charity as mentioned in her will to which she might have subscribed within one year preceding her death, and in lieu thereof she gave to the London Anti-Vivisection Society, in the Brompton Road, London, £200; "to the Anti-Vivisection Society in Victoria Street, Westminster, £200; to the International Anti-Vivisection Society £200"; to the Scottish Anti-Vivisection Society £200 and to the Irish Anti-Vivisection Society £50, all free of legacy duty. By a second codicil, dated Dec 2, 1882, the testatrix gave a legacy as follows:

"I give to my friend, the Rev. R. A. Chudleigh, rector of West Parley, in the county of Dorset, the sum of £1,000 upon trust, to apply the same for the benefit of the Society for Suppressing Cruelty by United Prayer, of which society I have for some time been the treasurer, and to be applied by him in such way as he may consider most for the benefit of the said society, and for accomplishing the purposes and objects thereof, and I trust to his acting in the matter in such a way as he may consider will best carry out my desires, wishes, and intentions, which to him are well known."

The testatrix died in August, 1885, and her will and codicils were proved on Sept. 17, 1885, the personal estate being sworn of the value of £5,211 12s. 3d. At the date of the first codicil, viz., Nov. 15, 1882, the Anti-Vivisection Society, in Victoria Street, Westminster, and the International Anti-Vivisection Society referred to by the testatrix, were separate and distinct societies, each having its own board of management, officers, and offices, the former being located in Westminster, and the latter in Brompton. The objects, however, of the two societies were identical, namely, the total suppression of vivisection. Subsequently to the execution of the codicil, but prior to the date of the death of the testatrix, namely, sometime in 1883, the two societies amalgamated and united, and the funds of the united societies were lodged in a common fund, and the rules and byelaws of the Victoria Street society were accepted and adopted by the united societies. The testatrix was cognisant of the fact of the fusion of the two societies. The title of the united societies was "The Victoria Street society for the Protection of Animals from Vivisection united with the International Association for the Total Suppression of Vivisection," and the headings of all documents and letters written on behalf of the united societies bore this title.

This action was commenced in 1886 by originating summons for the administration of the real and personal estate of the testatrix, and after certain accounts

A and inquiries had been taken and made, the action now came on for hearing on further consideration.

The plaintiffs were a pecuniary legatee, and the residuary legatees under the will of the testatrix. The defendants were the executors and trustees of the will, and the infant children entitled in remainder under the will, the Rev. Richard Augustine Chudleigh, named in the second codicil, and the Attorney-General.

B The plaintiffs contended that the legacies to the two Anti-Vivisection Societies lapsed, inasmuch as the societies had ceased to have a separate existence prior to the death of the testatrix; or, in the alternative, that one at least of the legacies must fail, as there existed but one society at the time the will became operative. The united societies contended that, for the purposes of the will, each society still existed, and that it was clearly the intention of the testatrix to bequeath the sum of £400 for the purpose of forwarding the objects of the united societies. C Another question of construction arose on the second codicil. The contention of the plaintiffs was, that the so-called society for the suppressing cruelty by united prayer had never had any existence, but was a mere name given by the testatrix to a private undertaking of her own; or, in other words, that she herself alone constituted the society; and that if it had ever existed it was not a charity, and D that the gift was therefore void, as being to create a perpetuity, or that it was void for ambiguity. The legatee, on the other hand, submitted that the gift was for an existing society, and that if there was no society, it was a gift either for charitable or for benevolent object, and that the cy-pres doctrine should be applied.

Romer, Q.C., and W. G. Robinson for the plaintiffs.

E *Byrne, Q.C., and C. E. Bovill* for the defendant, the Rev. R. A. Chudleigh.

Radcock for the united societies.

Wigle-Joyce for the Attorney-General.

CHITTY, J.—By codicil to her will, dated Nov. 15, 1882, the testatrix has given a legacy of £200 to a society which she calls the “Anti-Vivisection Society, in F Victoria Street, Westminster.” At that date there was such a society in Victoria Street, Westminster, and the name is sufficiently described. She also gave another legacy of the same amount to the “International Anti-Vivisection Society,” and there was at the same date a society existing which again was sufficiently G described by those words. The two societies have, since that date, united themselves; and I take it, on the evidence before me, that it was within the scope and constitution of each one of the societies to unite itself with the other. No suggestion has been made against that proposition. The result of the union—the objects of the two societies being either exactly the same, or so nearly the same that there is no H substantial difference between them—is that the two societies now appear under one name, and they have got rid, which I have no doubt is a great advantage to all these societies, of double management expenses. Substantially, however, I think, for the purpose of this codicil, and so far as the legacies are concerned, the two societies continue to exist, although they now bear the name of one, and one only.

These societies are not corporations. At common law they have no existence at all; that is to say, no recognised existence. They cannot sue and be sued; but in cases of this kind, some slight alterations made in the constitution of the society as it existed at the date of the will do not avoid the legacy, and have not the effect I of justifying the court in saying that because there has been some alteration the identity is lost. I do not say it is the same, but it is somewhat analogous to the case which was put during the argument, of a legacy to A., a man, and legacy to B., a woman, who afterwards married. The answer to it is, that the two individuals remain, and the existence of one cannot be said to merge in the other. I think, similarly and analogously, these two societies do continue for the purpose of this will to exist, although they have combined and now exist under one name. The united societies were entitled to appear, inasmuch as it was contended that the legacies had failed altogether, and, therefore, that there was no money payable

to them at all, not even one sum of £200. That I consider to be an ill-founded argument. A

A second point has arisen on the construction of this will. By a second codicil, the testatrix gives to her friend, the Rev. Mr. Chudleigh, the sum of £1,000 on trust—on which trust I have heard long and intricate and subtle arguments—

“to apply the same for the benefit of the Society for Suppressing Cruelty by United Prayer, of which society I have for some time been the treasurer, and to be applied by him in such way as he may consider most for the benefit of the said society, and for accomplishing the purposes and objects thereof, and I trust to his acting in the matter in such a way as he may consider will best carry out my desires, wishes and intentions, which to him are well known.” B

On the face of the codicil it is a gift in trust for a particular society, and it is well established that, if there is a gift, either direct or through the medium of a trust, to a particular society, and that society ceases to exist during the lifetime of the testatrix, the case stands just on the same footing as a gift to an individual who dies. In other words, such a legacy as that would be subject to the ordinary law of lapse. I must consider shortly what the result of the evidence is in reference to this so-called society. So far as I know, no case has ever been presented to the court which has the main features of this case. I cannot go through the evidence at full length, but I will state what appears to me to be the substantial case made by the evidence before me. C

This lady was desirous of protecting animals from cruelty, and she was an opponent of vivisection. With this desire she caused a card to be printed. On one side of the card there is a prayer, and on the other side of the card there is this, after a quotation from scripture, “The Society for United Prayer for Protection of Animals from Cruelty.” Then there follow three rules only: the first is, that each member will be required to purchase a card, price twopence, or for the poor one penny. The testatrix was, in point of law, the seller of the card. She caused it to be printed at her own expense, and it is plain, on the evidence, that, on the sale of these cards, she received a certain sum of money, which, taking one thing and another, was about sufficient to recoup her the expenses of printing and distributing the cards, including the postage where postage was required. No accurate accounts were ever kept by her. There is one account book which covers a short period of time, about 1876 I think. The testatrix, I am satisfied, would never have thought of appropriating to her own purposes a surplus, if any surplus there was, of this small fund; but in point of law it was her money, and when I have read the rest of the rules it will be apparent that I am right in the statement I am now making, that she was under no liability to account to any of the persons who purchased the cards. D

The next rule is to use the prayer. Of course, in a society of this kind, there could be no other than a moral obligation; in other words, what lawyers call an imperfect obligation. It was left to the good sense of the purchasers of the card to use the prayer or not; but there is no rule as to the prayer to be used, except that it is to be used. There is no rule as to the manner, the time, the place, the circumstances, and there is nothing on the face of the rule, nor in the rest of the evidence, to show that the rule meant (and it could have been perfectly expressed) that the prayer should be a public prayer. As far as I can see, the intention was that each individual should use the prayer, or that it should be used in an ordinary private way in the family circle. E

The other and third rule is not fit to be called a rule. It is only an expression of hope, for she says, “I leave it to your free and honourable obligation to do as I hope you will do.” I will read the rule: F

“It is hoped that each member will use his or her influence in gaining additional members, in circulating pamphlets, articles, and leaflets, so as to disseminate facts relative to vivisection and all other cruelty.” G

A It seems to me, that that cannot be described fairly as an object of the so-called society.

The lady had some leaflets printed, again at her own expense, and circulated among the persons who bought the cards, who in their turn were to circulate the leaflets. The money which was received from the leaflets was her money. She was not bound to account for that any more than she was for the money received

B from the sale of the cards. So also during the years 1880 and 1883 she, at her own expense, caused to be printed and published two pamphlets which are called "The Ashley Grove Annual," which were distributed in a similar manner; the profits, if there were profits, were entirely her own. The accounts which she did keep were only for a short period and for her private satisfaction. She was under no liability to keep accounts.

C Then the enrolment of members is spoken of, both in a notice on the title-page of the Annual for 1883, and in Mr. Chudleigh's affidavit. It was rather a grandiose term to apply to such a matter as this. The lady appears to have kept a book in which, when and as she thought proper, she wrote down the names of the persons who bought the cards. That was called enrolment, but there was no rule for enrolment. The book was the lady's own book, and it was perfectly optional on her

D part whether she wrote down the names or not. Then in this book appear in the handwriting of the testatrix—I cannot tell when written, but I presume everything was perfectly regular—against the names of some of the purchasers of the cards, the words "local secretaries." I am told that there were officers of this society. There were secretaries, but again solely the creation of this lady; and I think they were neither more nor less than her agents, responsible to nobody but to her. She, as

E Mr. Chudleigh in his letter, written after the lady's death in 1886, states, was secretary, president, and treasurer, and he says that she received and answered all letters that were required, and defrayed all expenses out of her own purse, and that is a very correct description of the result of the evidence. The so-called society was founded, managed, and maintained by the testatrix alone.

The testatrix fell ill sometime before her death, and the result was that the

F affairs of this so-called society were no longer carried on. For the purpose of the transaction of the affairs of the so-called society, it is plain to my mind that its affairs ceased to be transacted when the lady fell ill. The society had no place of meeting, nor any rules as to meeting. Such affairs as were called the affairs of the society that were transacted, were, according to the evidence, transacted by the lady herself in her drawing-room, or in some other convenient room in her house.

G If it be, as it appears by this evidence, that there was no bond of union between the persons who bought the card, and that there was nothing sufficient really to constitute a society, there was no such association as would make it proper for me to suppose that there was a society in any other sense than in a mere name. I think that the testatrix herself was the society. It seems to me very much like a case of this kind. By the law a man may carry on his affairs, or a portion of his affairs,

H under any name he chooses; a man may carry on the business of a wine merchant, and he may call himself the Pure Wine Society or some such name; but that after all it is his own business. I should be prepared to declare that in such circumstances as these, if a man made a bequest to the Pure Wine Society, he would be only making a gift to himself, which would fail, because, of course, he could not himself take under his own bequest. But if it should be thought that this curious

I concern was a society, I think its existence terminated, if not when the testatrix fell ill, at any rate when she died, and so I think that *prima facie* the gift has lapsed. That is to say, I think it has lapsed so far as concerns the first question, namely, that it was a gift in trust for a society.

Counsel for the Rev. Chudleigh raised a point that on the face of the testatrix's will and codicils there are general purposes indicated, and that those purposes are charitable. With a considerable amount of ingenuity, he turns the argument with regard to the gift being in trust for the particular society to his own advantage by saying that, as there was no society, and the testatrix must have known it, it follows

that she could not have intended to make a gift to herself, or to the thing which she was aware did not exist, but she must be considered to have made a general gift for charitable purposes. To put it as counsel put it, it was a gift in trust to carry on her own good work.

As to that, the first answer appears to me to be that it was not so: that it was a gift for the purposes of this society; and that the gift is circumscribed and limited to the society itself. I am not prepared to accede counsel's argument as to the purposes disclosed being charitable purposes. That may be; but it is a question of some considerable nicety, and possibly does not arise. But, as I stated, the opinion I have formed with reference to this point is, that the trust is for the benefit of the "Society for the Suppression of Cruelty by United Prayer." It is said by counsel that a society for suppressing cruelty to animals is a charity, or a charitable society, and a gift for the purpose of suppressing cruelty to animals is a good charitable gift. With that I do not in any sense quarrel; but this is not a gift for the suppression of cruelty to animals generally. The object is to suppress it by united prayer. What I mean by this is, that you cannot cut the sentence into two parts, and say there were two objects. There is one object, and one object only, and that is by united prayer to suppress cruelty to animals. Then I have to inquire what the meaning of "united prayer" here is. I turn to the rules of the society, on which I have made some observations already, in anticipation of this point. It was not by public prayer. It was by what the lady termed "united prayer" which means prayer of the description I have already stated—private prayer—and it is clear that if the purpose is a mere improvement of the individual by private prayer that is not a purpose of public or general utility within the statute, or within the analogy in the statute of Elizabeth. That, I understand, to be the opinion expressed by WICKENS, V.-C., in *Cocks v. Manners* (1).

In one sense the improvement of the individual results in the improvement of the community, and the more the individual members of the community can be improved by prayer, or by any other means, the greater must be the general improvement. Though it may result in public benefit, and be a matter of public utility, it is clearly to my mind not within the statute, as I have said, or within the analogy of the statute. The case that was relied on on this particular argument was the well-known case of *University of London v. Yarrow* (2). There it was considered by LORD CRANWORTH, L.C.—and, indeed, I consider it settled law now—that a gift (I am not using the exact expressions, but I am sufficiently stating them) for the purpose of establishing a hospital for animals useful to man is a good charitable gift, and if the establishment was by means of delivering public lectures against cruelty to animals, or, in other words, preserving them, or tending to preserve the animals, that would be a good charity. But I think that the substance of this case is, that it was to be by means of the improvement of the individual that the lady desired that the objects which she had in view should be accomplished. The result is, that I think this is not a good charitable gift. Of course, this point, as I have said, does not arise if I am, as I think I am, right on the first question. If it was a gift to a society which has failed during the lifetime of the testatrix, then the court does not fasten hold of the fund as devoted to charitable purposes and apply the doctrine of *cy-pres*, the case being a different one where there is a charitable institution existing at the date of the death, or when the will comes into operation, and which subsequently fails.

Counsel for the Rev. Chudleigh had a third point, and he says the gift is to Mr. Chudleigh for benevolent purposes. First, it was argued that the persons who are the objects of the benevolence would be those who took the card. I should have said that it appears that within a few years after the testatrix began issuing and selling these cards some seven thousand persons took them. But in 1883 the number who had got cards appears to have amounted to seventeen thousand. The result of this part of the argument would be that the seventeen thousand persons, of some of them, would be *cestuis que trust*. That part of the argument it was seen was only part of the same argument which was addressed to the question

A of the society. Then the argument went on, that the gift was to Mr. Chudleigh, who could apply it for benevolent purposes; and so, in point of law, the argument resulted in this, that it was a gift to Mr. Chudleigh for his own benefit. It was like the case of a gift to trustees to buy an advowson, or to buy an annuity for a man. The person in whose favour such a gift is made being *sui juris* could take the money and not apply it to that purpose. Here, there being no benevolent purposes specified, and the purpose, if benevolent, not falling within the reach of the Attorney-General, who could only make a complaint where the purpose is charitable, the result would be that Mr. Chudleigh would, in point of law, be entitled to put this money into his own pocket. I think that there, again, the real answer is in the codicil itself in the language of the testatrix, and that this argument also fails. The result, in my opinion, is, that in this, as I think, somewhat difficult case, the legacy has lapsed and falls into the residue.

Solicitors: S. W. Johnson & Son; W. Eley; Henry Cotton; Solicitor to the Treasury.

[Reported by A. COYSGARNE SIM, ESQ., Barrister-at-Law.]

D

E

LAPINGTON v. LAPINGTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Butt, J.), October 26, 1888]

[Reported 14 P.D. 21; 58 L.J.P. 26; 59 L.T. 608; 52 J.P. 727; 37 W.R. 384]

F *Divorce—Desertion—Petition filed before expiration of statutory period of desertion—Expiration of statutory period before hearing of petition—Amendment of petition to plead desertion—Need for new petition.*

If desertion did not exist at the date of the institution of a suit, but before the hearing the necessary period to constitute statutory desertion has elapsed, it is not possible to amend the existing petition or to file a supplemental petition to allege desertion. A new petition must be filed.

G

Notes. Considered: *Kay v. Kay*, [1904-7] All E.R.Rep. 429. Followed: *Stevenson v. Stevenson*, [1911] P. 191; *Sandler v. Sandler, Davies & Johnstone*, [1934] All E.R.Rep. 213; *Cohen v. Cohen*, [1940] 2 All E.R. 331.

As to the institution of divorce proceedings in general, see 12 HALSBURY'S LAWS (3rd Edn.) 314 et seq.; and for cases see 27 DIGEST (Repl.) 447 et seq.

H

Cases referred to:

(1) *Farmer v. Farmer* (1884), 9 P.D. 245; 53 L.J.P. 113; 33 W.R. 169; 27 Digest (Repl.) 347, 2878.

(2) *Wood v. Wood* (1887), 13 P.D. 22; 57 L.J.P. 48; 27 Digest (Repl.) 450, 3820.

I **Undefended Petition** for divorce by the wife, Kate Lapington from her husband, Thomas Samuel Lapington, on the grounds of his cruelty, adultery, and desertion.

The parties were married at St. Michael's parish church, Gloucester, on May 9, 1881. In June, 1886, the husband left the wife. Two months later she filed a petition for divorce on the grounds of the husband's cruelty and adultery. On July 5, 1888, the original petition was amended, in pursuance of an order, to add an allegation of desertion in the following terms:

"That on or about June 6, 1886, the said Thomas Samuel Lapington deserted your petitioner without reasonable excuse, and from that time down to the

present, being for the space of two years and upwards, has continued to desert your petitioner."

When the suit came to be heard counsel abandoned the allegations of cruelty as there was no corroboration of them, the adultery was proved, and it was then sought to give evidence of desertion.

BUTT, J.—I cannot quite see how, if a cause of action did not exist at the institution of the suit, you can, by simply amending, have relief on that ground. At common law, if a man issues a writ before the credit has expired, he cannot, by amending his declaration, have judgment on that writ. He must enter a fresh action. Surely the practice of this court is, where the desertion occurs after the commencement of the suit, to file a fresh petition. In *Farmer v. Farmer* (1), **SIR JAMES HANNEN, P.**, said (9 P.D. at p. 246):

"It will be for the petitioner to consider whether or not she will take a decree for judicial separation or file another petition when the two years have elapsed."

Searle for the wife, cited *Wood v. Wood* (2), in which a supplemental petition was filed, and asked to have the case adjourned in order that that might be done.

BUTT, J.—You may take the course here if you choose, but I do not think "supplemental" is the right word. I think it ought to be a new petition. I do not see on principle the difference between amending this petition as it stands, and allowing a supplemental petition to be filed. If there is anything at all in the objection, it is that the cause of action was not complete when the suit was commenced, and the principle involved is that the cause of action must be complete at the commencement of the suit. In my opinion it is only paltering, to talk about a "supplemental" petition or "amended" petition. I will, if you like, grant you a decree for judicial separation. That decree, if I make it, will not interfere with the cause of action which was complete on June 6, 1888. The further action turning that decree into a decree nisi for divorce will not be grounded on the husband's living apart from his wife after my decree ordering him to live apart, but on his having done so before for the space of two years and upwards. The suit, to entitle you to a divorce, must be a fresh suit. I will not pronounce the decree for judicial separation now, but I intimate that I am prepared to pronounce it if you ask me to do so. You had better think whether there may be any difficulty in the course I have suggested.

Oct. 27, 1888. *Searle* stated to the court that, in view of possible difficulties which might arise if the course suggested by **BUTT, J.**, were adopted, he had advised the wife to withdraw the petition and commence de novo.

BUTT, J.—I think that is the better and safer course, and I accede to it.

Dec. 5, 1888. Upon a fresh petition filed on Nov. 2, charging adultery and desertion, the court pronounced a decree nisi, with costs against the husband.

Solicitors: *Digby & Little*, for *H. Morton-York*, Gloucester.

[Reported by *H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

A

Re MARSDEN'S ESTATE. WITHINGTON *v.* NEUMANN

[CHANCERY DIVISION (Chitty, J.), January 18, 1889]

[Reported 40 Ch.D. 475; 58 L.J.Ch. 260; 37 W.R. 525;
60 L.T. 696]

B

Costs—Administration action—Interest on costs—Costs payable out of trust funds—Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44), General Order, r. 7—Judgments Act, 1838 (1 & 2 Vict., c. 110), s. 17, s. 18—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 27—R.S.C., 1883, Ord. 41, r. 3, Ord. 43, r. 16.

C

Where the costs of an administration action have been ordered to be taxed, and, when taxed, to be paid by the trustees out of the testator's estate, with a direction that, subject to the payment of such costs, the trust funds are to be transferred to the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs.

D

Notes. The Solicitors Remuneration Act, 1881, was repealed by the Solicitors Act, 1932, itself repealed by the Solicitors Act, 1957, but the Solicitors Remuneration Order, 1883, made under the Act of 1881 is continued in force by virtue of s. 88 (2) of the Act of 1957.

E

As to interest on costs, see 36 HALSBURY'S LAWS (3rd Edn.), 167, 168; and for cases see 42 DIGEST 226 et seq. For the Judgments Act, 1838, s. 17, s. 18, see 13 HALSBURY'S STATUTES (2nd Edn.) 369-371. For the Solicitors Act, 1860, s. 27, see 24 HALSBURY'S STATUTES (2nd Edn.) 15. For the Solicitors' Remuneration Order, 1883, as amended, see 20 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 217.

Case referred to:

F

(1) *A.-G. v. Nethercote* (1841), 11 Sim. 529; 10 L.J.Ch. 162; 59 E.R. 978; 30 Digest (Repl.) 203, 455.

Also referred to in argument:

Blair v. Cordner (1887), 19 Q.B.D. 516; 56 L.J.Q.B. 642; 36 W.R. 109; 3 T.L.R. 796; 42 Digest 226, 2576.

Stanford v. Roberts (1884), 26 Ch.D. 155; 53 L.J.Ch. 338; 50 L.T. 147; 48 J.P. 692; 32 W.R. 404; 42 Digest 232, 2648.

G

Motion by the plaintiff to discharge an order made in chambers dismissing a summons taken out by the plaintiff for payment of interest at 4 per cent. on two sums certified to be due to her for costs in an administration action.

H

The action was commenced in January 1883, by Ellen Withington, a beneficiary under the will, against the trustees and executors, for administration of the estate of the testator Richard Marsden, and by the judgment, dated July 7, 1883, the usual inquiries were directed. By the order on further consideration, dated July 29, 1885, the costs of the defendants were directed to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by them as executors and trustees of the will; the defendants to be allowed one set of costs only, and the taxing master to certify to whom and in what proportion such last-mentioned costs

I

were payable; and it was ordered that such costs when taxed should be retained and paid by the defendants out of the testator's estate generally, with liberty to apply as to the sale of the testator's leasehold estate, and as to raising and paying subsequent costs. By an order made in chambers, dated April 12, 1886, on the application of the defendants, it was ordered that the leasehold estate should be partitioned and new trustees appointed, and that the costs of the plaintiff and the defendants of such application and relating thereto and consequent thereon, and of the conveyances and indentures appointing new trustees to be made and executed under the order, should be taxed, the costs of the defendants to be taxed as between

solicitor and client, and to include any costs, charges and expenses properly incurred by them in the action, or in or about the execution of the trusts of the testator's will, not being costs in the action, such costs when taxed to be raised and paid in like manner and out of the same funds as the costs directed to be taxed and raised and paid by the order of July 29, 1885. Subject to the raising and payment of the costs, the defendants were ordered to transfer the trust funds to the persons beneficially entitled, and under this order the shares of some of the persons beneficially entitled had been transferred to them. By the taxing master's certificate dated Dec. 20, 1886, the plaintiff's costs taxed under the first order were certified at £174 3s. 9d., and by the certificate dated Jan. 27, 1888, her costs under the second order were certified at £168 0s. 2d. These costs were paid to the plaintiff's solicitors on Nov. 2, 1888, and were received by them without prejudice to their claim for interest on the amounts respectively from the dates of the respective certificates. On Nov. 7, 1888, a summons was taken out by the plaintiff for payment of interest on the costs, which was dismissed by the judge in chambers with costs on Dec. 10, 1888. The plaintiff now moved to discharge or vary the decision in chambers, and that the defendants be ordered to pay to her or her solicitors interest at 4 per cent. on the sum of £174 3s. 9d. from Dec. 20, 1886, and on the sum of £168 0s. 2d. from Jan. 27, 1888.

Macaskie in support of the motion.

H. Walters Horne for the defendants.

CHITTY, J.—When the matter was before me in chambers, the only evidence produced was the orders of July 29, 1885, and April 12, 1886. It was stated on behalf of the trustees that they had divided the funds according to the order. That statement was accepted, and I decided, as my chief clerk had considered, that the application was too late. But, as a fact, there was an affidavit in existence which was not drawn to my attention. Nothing is adjourned to me unless it is ready for decision, as I will not have adjournments from time to time for fresh evidence. The affidavit was not tendered, and no leave has been given to alter the case made before my chief clerk and read a new affidavit, and, indeed, it would require a very strong case to induce me to give such leave after the matter has been gone into before me. Consequently, that affidavit cannot now be used.

On the main question, I am of opinion that the solicitors have no right to interest. Under the Judgments Act, 1838, s. 17, s. 18, costs carried interest, not from the date of the judgment, but from the date of the taxing master's certificate. Then come the rules under the Supreme Court of Judicature Act, 1883, Ord. 41, r. 3, and Ord. 43, r. 16, the effect of which, combined with the Judgments Act, 1838, s. 17, s. 18, in the case of an ordinary action where costs are ordered to be paid adversely, is to give solicitors the right to interest from the date of the judgment. But it is plain that the sections of the Judgments Act, 1838, and the orders have no reference to the payment of costs directed to be paid out of a fund. Without relying on *A.-G. v. Nethercote* (1), decided in January, 1841, this has been the constant practice; and where the fund is in the hands of the Paymaster-General, he is not at liberty to make any payment of interest, unless there is a direction to that effect in the order. In this case the order is for taxation and payment of the costs by the trustees out of a particular fund, and there is no ground for saying that anything more than the amount of the taxed costs should be paid. If any interest was to be paid by the trustees, the order ought to have directed it. In special circumstances, such a direction might have been given, but the order is silent in that respect. Thus far, therefore, the solicitors are not entitled to interest.

It is suggested that they are entitled to interest by reason of r. 7 of the General Order under the Solicitors Remuneration Act, 1881. On reading r. 7, I should say that it does not apply to such a case as this. The fund is in the hands of trustees, who are directed by the order on further consideration to pay the taxed costs and then to divide the fund. The rule shows that there must be demand and default, and, if there has been a demand and default, and interest is payable out of the

A fund, the result would be that the beneficiaries who are entitled to the balance of the fund would be mulcted by the trustees, though if any persons are liable it would be the trustees who are personally liable.

A higher point has been taken, that the power to make orders under the Act of 1881 is limited to non-contentious business, and, therefore, that the rule does not apply to the costs in an action. Without any evidence to that effect, it is suggested that some part of these costs are conveyancing costs. They are not costs in respect of conveyancing done within the scope and meaning of the Act; they have been taxed and paid, and I cannot listen to the ingenious suggestion which has been made and send the matter back in order to ascertain whether some part of these costs were conveyancing costs or not, so as to allow interest on items which may be thus picked out. Such a course would not be in accordance with the order of the court directing execution of the trust and division of the fund after payment of the costs; and if there were any ground for the contention, it should have been put forward at the time of making the order. Further, to refer the matter back to the taxing master now would be keeping back the distribution of the fund.

The result, therefore, is that there is no right to interest in this case. Whether interest on a portion of the costs might or might not be allowed is a matter of doubt, but it is now too late to raise the question and attempt to sever the costs. The trustees have partially divided the fund, and, if I order them to pay interest out of funds not divided, injustice would be done, because in that case the trustees would not be paying it out of the whole fund. The application, therefore, fails on principle.

Solicitors: *Nicholson & Graham; Pollock & Co.*

E [Reported by G. WELBY KING, Esq., Barrister-at-Law.]

F

Re LORD EGMONT'S SETTLED ESTATES

G [COURT OF APPEAL (Lord Esher, M.R., Lindley and Bowen, L.JJ.), August 1, 1890]

[Reported 45 Ch.D. 395; 59 L.J.Ch. 768; 63 L.T. 608; 38 W.R. 762;
6 T.L.R. 461]

H *Settled Land—Improvements—Money borrowed to meet cost—Rentcharges—Redemption—Payment of bonus to lender on redemption—Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict., c. 30), s. 1.*

The tenant for life of settled estates borrowed money in order to carry out improvements on the settled property, and rentcharges were created on the estates as a mode of repaying these loans. The rentcharges were not redeemable, but by special arrangement the lender was willing to accept redemption on condition that he was paid all sums due thereunder and in addition a bonus to compensate him for any loss he might suffer as a result of having to re-invest his money. The tenant for life requested the trustees to redeem the rentcharges on the terms proposed including the payment of the bonus.

I **Held:** the trustees could validly pay the sum required for redemption including the bonus since they were authorised to do so by s. 1 of the Settled Lands Acts (Amendment) Act, 1887.

Re Lord Sudeley's Settled Estates (1) (1887), ante p. 200, distinguished and doubted.

Notes. The Settled Land Act, 1882, and the Settled Land Acts (Amendment) Act, 1887, have been replaced by the Settled Land Act, 1925 (23 HALSBURY'S STATUTES (2nd Edn.) 12). A

Considered: *Re Howard's Settled Estates*, [1891-4] All E.R.Rep. 601. Applied: *Re Verney's Settled Estates*, [1898] 1 Ch. 508. Considered: *Re Sandbach*, [1951] 1 All E.R. 971. Referred to: *Re Dalison's Settled Estates*, [1892] 3 Ch. 522.

As to statutory powers in relation to capital money under settlements in general, see 34 HALSBURY'S LAWS (3rd Edn.) 540 et seq.; and for cases see 40 DIGEST (Repl.) 806 et seq. B

Cases referred to:

- (1) *Re Lord Sudeley's Settled Estates* (1887), ante p. 200; 37 Ch.D. 123; 57 L.J.Ch. 182; 58 L.T. 7; 36 W.R. 162; 4 T.L.R. 139; 39 Digest 172, 626.
- (2) *Re Knatchbull's Settled Estates* (1885), 29 Ch.D. 588; 54 L.J.Ch. 1168; 53 L.T. 284; 33 W.R. 569; 1 T.L.R. 398, C.A.; 30 Digest (Repl.) 317, 65. C

Appeal from an order of NORTH, J., on a summons taken over by Lord Egmont, the tenant for life of certain settled estates, asking (i) for a declaration that certain charges on the settled estates were rentcharges within the meaning of s. 1 of the Settled Land Acts (Amendment) Act, 1887 [repealed]; and (ii) for a declaration that any money from time to time in the hands of the trustees of the settlement (being capital money arising under the Settled Land Act, or applicable as such) might properly be applied by the trustees in the redemption of such charges, and the balances remaining due thereon, by payment of the sums specified in the schedule. D

Lord Egmont had created terminable rentcharges on the settled estates for the purpose of repaying with interest sums of money borrowed by him from the Lands Improvement Co., and expended upon the land in erecting farm-buildings, draining, road-making, and in carrying out various other improvements. The rentcharges were payable by equal yearly or half-yearly instalments during fixed terms of years, each instalment consisting in part of principal and in part of interest. In every case the tenant for life was bound, as between himself and the remaindermen, to pay the instalments payable during the continuance of his interest. Lord Egmont now desired to redeem these rentcharges with capital money in the hands of the trustees of the settlement, which was applicable for this purpose under the Settled Land Acts, 1882 and 1887. The owners of the rentcharges were willing that they should be redeemed, but upon the terms of being paid, in addition to the unpaid principal, a bonus representing the difference between the interest at the rate of 4 per cent. per annum, which was by agreement payable, and the smaller rate of interest they would be able to obtain by re-investment. NORTH, J., allowed the redemption as far as he thought he could, but he thought himself restrained by the logical result of the decision of KAY, J., in *Re Lord Sudeley's Settled Estates* (1) from sanctioning the payment of that part of the sum demanded for redemption called the bonus. E

By the Settled Land Act, 1882, s. 21: F

"Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others of the following modes, namely . . . (ii) In discharge, purchase, or redemption of encumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land; (iii) In payment for any improvement authorised by this Act." G

By the Settled Land Acts (Amendment) Act, 1887, s. 1: H

"Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, I

A whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882."

B *Crackanthorpe, Q.C.*, and *Reginald Winslow* for the tenant for life.
Onslow for the trustees of the settlement.

LORD ESHER, M.R.—In this case money has been borrowed on several occasions by Lord Egmont, the tenant for life of certain settled estates, for the improvement of them, and therefore the case is brought within the Settled Land Act. He has for many years paid the rentcharges which were created on the estates as a mode of repaying these loans. Certain instalments, consisting of principal and interest, were to be paid half-yearly until the whole amount borrowed should be repaid with interest. Now, he wishes to have these rentcharges redeemed by the trustees of the settlement under s. 1 of the Settled Land Acts (Amendment) Act, 1887, out of "capital money" in their hands. The trustees had doubts whether they could do this on the terms proposed to them, and have consequently asked the advice of the court upon the point.

D NORTH, J., was of opinion that the money had been properly borrowed for purposes of improvements authorised by the Settled Land Act, 1882, and that the trustees had in their hands "capital money" which might properly be used for the redemption of the rentcharges, and he was willing to allow the redemption as far as he could. But he thought himself restrained by the logical result of the decision of KAY, J., in *Re Lord Sudeley's Settled Estates* (1), from sanctioning the payment of that part of the sum demanded for redemption, called the bonus. The lenders of the money are satisfied with their security, and have no desire for redemption; but they are willing to accept immediate redemption upon the payment, in addition to the unpaid principal, of a bonus representing the difference between the amount of the interest they would receive by the instalments of the rentcharges and the amount of the interest they might get if they invest their capital in other securities. In other words, the lenders are willing to be redeemed, but at a certain price. The words of s. 1 of the Settled Land Acts (Amendment) Act, 1887, are, that

E "any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882."

G Taking these words in their ordinary sense, that means the money which must be paid for the redeeming of the rentcharge, the money which the owner of the rentcharge will take for the redemption.

H Therefore, the words of the section include the payment of this bonus. So that the question now comes to this: Was NORTH, J., correct in saying that he was constrained to decide as he did by the decision in *Re Lord Sudeley's Settled Estates* (1)? I think not. That case was not one of redemption at all. There it was asked that the trustees might pay out of capital money the instalments as they became due, including, that is to say, both principal and interest. KAY, J., was of opinion that the interest was due from the tenant for life, and he did not think I it right that the trustees should pay that out of capital money. Even if he was right in his conclusion, that does not affect this case; but I will say this, that I think that he took too strict a view of the statute. What he was there asked to do did not come within the words "redeeming such rentcharge"; but I think it did come within the meaning of the words "otherwise providing for the payment thereof." *Re Lord Sudeley's Settled Estates* (1) is, therefore, one with which I could not agree, even if it governed the case now before us; but I do not think it does govern this case, which is one merely for redemption.

In my opinion, therefore, NORTH, J., had power to allow the trustees to pay

this bonus, and should have allowed them. I may add that, if the trustees desire to have an inquiry as to whether the amount of the bonus is a proper one for them to pay, the summons must be referred back to NORTH, J., for his decision. The appeal will be allowed. A

LINDLEY, L.J.—This case turns upon the true construction of s. 1 of the Settled Land Acts (Amendment) Act, 1887. That Act was passed to remedy a defect in the Settled Land Act, 1882, which was discovered in *Re Knatchbull's Settled Estates* (2), in which the court decided that the "encumbrances" in s. 21 of the Settled Land Act, 1882, which the trustees may redeem did not include terminable rentcharges. The words of s. 1 are very wide. No distinction is drawn between rentcharges redeemable by contract and those which are not redeemable by contract. The section applies to all rentcharges equally. In the present case we are asked to apply it to a rentcharge which is not redeemable by contract, so that the owner of it cannot be forced to accept repayment of the loan in any other way than that which has been agreed upon, namely, by instalments extending over a number of years. Therefore, in order to redeem this rentcharge, it is necessary to come to terms with the lender. He is willing to accept redemption, but he requires a bonus to compensate him for the loss he will sustain in re-investing the money. If he asked an extortionate sum the trustees should not listen to him; but if they are in doubt whether the sum demanded is a proper one they can ask for the opinion of the court. If the lender only asks a reasonable sum, then, as the section enables capital money to be employed in redemption of rentcharges, the trustees must pay that sum, or else the section will remain a dead letter. B

It is said that this view is not in accordance with the decision in *Re Lord Sudeley's Settled Estates* (1). That case is a little peculiar. The summons did not ask for more than the payment of that part of each instalment which represented capital, but in the course of the argument a larger order was asked for, that the whole of the instalments, representing interest as well as capital, might be paid, and that order KAY, J., refused. I think he put too limited a construction on the statute, and the section does not limit the use of capital moneys merely to the redemption of the principal sum. C

I think this appeal must be allowed, and that we ought to make a declaration that the trustees will be justified in paying a reasonable and proper sum by way of bonus for the redemption of the rentcharge, and then remit the case to NORTH, J., that he may decide whether the sum demanded is reasonable and proper. D

BOWEN, L.J.—I am of the same opinion. E

Appeal allowed. F

Solicitors: *H. T. Boodle; Frere, Forster & Co.* G

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

A

HORLOCK v. WIGGINS

[COURT OF APPEAL (Cotton, Bowen and Fry, L.JJ.), June 19, 20, 1888]

[Reported 39 Ch.D. 142; 58 L.J.Ch. 46; 59 L.T. 710]

B Will—Satisfaction—Covenant in separation deed to pay sum to wife—Gift in will of same sum after payment of all husband's "just debts"—Deed and will contemporaneous.

C Under a deed of separation, dated Sept. 7, 1884, a husband covenanted that on his decease his estate would pay to his wife, if she survived him, the sum of £100 with a proviso that, if £6 per month was paid to her for six months from his death, the balance should be paid at the end of that period. By the husband's will, dated Sept. 5, 1884, which had been executed on Sept. 9, 1884, it was provided: "after all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation."

D **Held:** the gift in the will was not received by the wife in satisfaction of the gift under the separation deed as (i) the direction in the will to pay the gift to the wife after the payment of all the husband's "just debts," of which his liability to his wife under the deed of separation was one, made it plain that two separate gifts of £100 were intended; and (ii) the fact that the two documents were contemporaneous was also an important consideration and indicative of the husband's intention that his wife should receive both gifts.

E **Notes.** Considered: *Re Van den Bergh's Will Trusts*, *Van den Bergh v. Simpson*, [1948] 1 All E.R. 935. Applied: *Re Manners, Public Trustee v. Manners*, [1949] 2 All E.R. 201. Referred to: *Re Haves, Haves v. Haves*, [1951] 2 All E.R. 928.

F As to satisfaction and ademption by a legacy for a particular purpose, see 14 HALSBURY'S LAWS (3rd Edn.) 599; and for cases see 20 DIGEST (Repl.) 481 et seq.

Cases referred to in argument:

G *Chichester v. Coventry* (1867), L.R. 2 H.L. 71; 36 L.J.Ch. 673; 17 L.T. 35; 15 W.R. 849, H.L.; 20 Digest (Repl.) 473, 1814.
Wathen v. Smith (1819), 4 Madd. 325; 56 E.R. 725; 20 Digest (Repl.) 510, 2183.
Edmunds v. Low (1857), 3 K. & J. 318; 26 L.J.Ch. 482; 30 L.T.O.S. 81; 3 Jur.N.S. 598; 5 W.R. 444; 69 E.R. 1130; 20 Digest (Repl.) 511, 2198.
Hinchcliffe v. Hinchcliffe (1797), 3 Ves. 516; 30 E.R. 1134; 20 Digest (Repl.) 495, 2037.
Chaplin v. Chaplin (1734), 3 P.Wms. 245; 24 E.R. 1047; 20 Digest (Repl.) 497, 2053.
H *Montagu v. Earl of Sandwich* (1886), 32 Ch.D. 525; 55 L.J.Ch. 925; 54 L.T. 502; 2 T.L.R. 392, C.A.; 20 Digest (Repl.) 502, 2101.

I **Appeal** from an order of KEKEWICH, J., in an action brought by the plaintiffs, Sarah Wiggins, widow of Frederick Wiggins deceased, and David Horlock, trustee of a deed of separation made between Sarah Wiggins and Frederick Wiggins, against the defendants, the executors of the will of Frederick Wiggins. Sarah Wiggins claimed to be entitled to immediate payment of £100 under the separation deed, and also to the payment of a further sum of £100 under the deceased's will. Horlock claimed £100 as principal due on the covenant in the separation deed with interest from the date of the writ. The defendants contended that nothing was due to the plaintiff under the deed, and, alternatively, that the sum of £100 therein mentioned was payable by the instalments mentioned in the deed and not otherwise, which instalments they were willing to pay. The defendants also counterclaimed for a declaration that the gift in the will was to be deemed to

have been given in satisfaction of the covenant in the deed. KEKEWICH, J., had given judgment in favour of the plaintiffs. A

By a separation deed, dated Sept. 7, 1884, and made between Frederick Wiggins, of the first part, Sarah Wiggins, his wife, of the second part, and David Horlock, referred to therein as "the trustee," of the third part, Frederick Wiggins covenanted for himself, his heirs, executors, and administrators, with the trustee, his executors and administrators inter alia as follows: B

"And further that he the husband will, during the joint lives of himself and the wife, pay and allow her the sum of £78 per annum, without power of anticipation, to be payable by twelve equal payments in every year, the first of such payments to be made on Oct. 1, next. And, further, that the heirs, executors, or administrators of the husband shall, out of his estate, and immediately after his decease, pay to the wife, her executors, administrators, or assigns, the sum of £100 if the wife shall survive the husband: Provided always, that, if the sum of £6 per calendar month shall be paid to the wife, her executors, administrators, or assigns, for the six months immediately following the death of the husband, the first of such payments being made within one calendar month from such death, then, notwithstanding anything hereinbefore contained, the said sum of £100 shall be payable, as to £36, by such monthly instalments of £6, and the balance of the said £100, namely £64, shall be paid immediately after the expiration of such six calendar months from the death of the husband." C D

Frederick Wiggins, by his will, dated Sept. 5, but alleged to have been executed on Sept. 9, 1884, bequeathed as follows: E

"I will and bequeath to my wife Sarah the sum of one hundred pounds (£100), payable within six months after my decease, six pounds (£6) to be paid to her on her order until my estate is finally settled, the same to be deducted from the said one hundred pounds as per indenture stated in our mutual separation." F

Frederick Wiggins died on Feb. 14, 1887, and his will was proved on Mar. 9, 1887, by the defendants, the executors thereby appointed.

P. F. Stokes for the defendants.

F. T. Procter for the plaintiffs.

COTTON, L.J.—This is an appeal from a decision of KEKEWICH, J., that Mrs. Wiggins is entitled both to the £100 covenanted to be paid by the separation deed and to the legacy of £100 bequeathed to her by her husband's will. The will and the deed were substantially contemporaneous. Whichever of the two was prepared first, they were executed so nearly at the same time that they must be looked upon as contemporaneous. The question, then, is whether the testator intended the legacy to be in satisfaction of what was given by the deed. The gift by the will is this: G H

"After all my just debts, funeral and testamentary expenses are paid, I will and bequeath to my wife Sarah the sum of £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." I

There was a direction in the covenant that if £6 per calendar month was paid to Mrs. Wiggins for six months after the decease of Mr. Wiggins, the amount of these sums should be deducted from the £100, and the balance only paid at the end of the six months. What is the meaning of the will, apart from any presumption as to satisfaction? It amounts to a gift of £100. The only argument against its being an independent gift is founded on the words at the end, and I do not think they are sufficient to show that the testator intended by his will only to provide for payment of the sum referred to in the covenant in the separation deed.

A It is contended that there is a presumption that one gift was intended to be in satisfaction of the other, and that Mrs. Wiggins must elect which sum she will take. In my opinion no such presumption arises in this case. The direction is to pay the legacy after payment of all the testator's just debts, and the instrument creating an obligation to pay the £100, which would be a debt, is so nearly connected in point of time with the execution of the will that they must be treated

B as contemporaneous. I do not say that in no case can a presumption of satisfaction arise where the documents are contemporaneous; but their being so is an important consideration, and I can hardly conceive the possibility of two documents, each giving the wife £100, being executed at the same time, if it was intended that she should only have one sum of £100.

C **BOWEN, L.J.**—I am of the same opinion. On the construction of the will I think there is not enough to show that the £100 there mentioned was the same as the £100 covenanted to be paid by the separation deed. But it is urged that the presumption ought to be applied that a gift by a subsequent will of the same amount as that which has been given by deed is to be received in satisfaction of the prior gift. But what is the character of this presumption? It goes on the ground that

D the benefit given by the will is to be taken as given on an implied condition that it is to be taken in satisfaction of the benefit given by the deed. Though this presumption is artificial, we ought to act upon it in cases in which, according to the authorities, it is applicable; but we ought not to create fresh artificial presumptions. The language of this will falls short of the conclusion that the testator intended by it the same £100 as was mentioned in the covenant. The will directs

E payment of the bequest after payment of the testator's just debts, and the £100 in the separation deed was a debt existing when the will was made. Then, again, the two documents, as regarded the testator's mind, were contemporaneous, which is a circumstance to be considered, for the presumption arises, not on the will, but on the circumstances of the case. We ought, therefore, to look at all the circumstances, and the relative positions of the two documents in point of time may be

F decisive, is often material, and is always relevant. I think it would be wrong to raise the presumption in this case.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Armstrong & Lamb; Blewitt & Tyler.*

G [Reported by FRANK EVANS, ESQ., Barrister-at-Law.]

Re SPACKMAN. Ex Parte FOLEY (No. 1)

[QUEEN'S BENCH DIVISION (Cave and A. L. Smith, JJ.), February 17, 18, 1890]

[Reported 24 Q.B.D. 728; 62 L.T. 266; 38 W.R. 368; 6 T.L.R. 210;
7 Morr. 100]

Bankruptcy—Property available for distribution—Payments by bankrupt—Costs incurred by bankrupt's solicitor after notice of act of bankruptcy—Need for costs to be incurred in respect of strict necessity.

The rule laid down in *Re Sinclair, Ex parte Payne* (1), that a money payment made by a debtor bona fide to his solicitors to defray costs incurred in opposing bankruptcy proceedings which have been commenced against the debtor cannot be recovered from the solicitors on bankruptcy ensuing, only applies to costs incurred in respect of what is strictly a necessity and not, e.g., to costs incurred in endeavouring to make arrangements with creditors to prevent bankruptcy proceedings being taken. It is not to be extended so as to allow solicitors who have money in their hands on which the debtor has given them a charge for general costs to retain that money to meet costs incurred for the debtor after knowledge of an act of bankruptcy.

Notes. The decision of the Divisional Court in this case was subsequently reversed by the Court of Appeal, on the ground that no act of bankruptcy had been committed on Nov. 22, 1886. The decision of the Divisional Court is reported on the question whether, assuming there had been an act of bankruptcy, the principle in *Re Sinclair, Ex parte Payne* (1) would be applicable. On this point, LORD ESHER, M.R., expressed no opinion in the Court of Appeal, nor did FRY, L.J.; LOPES, L.J., said: "I desire to express no opinion as to the case of *Re Sinclair, Ex parte Payne* (1), but it seems to me that the present case would not come within the principle of that case."

The decision of the Court of Appeal is reported post, p. 1131.

The Bankruptcy Act, 1883, s. 4 (1), has been repealed and replaced by the Bankruptcy Act, 1914, s. 1 (1).

Distinguished: *Re Hughes, Ex parte Hughes* (1893), 68 L.T. 629. Considered: *Lipton v. Bell*, [1924] 1 K.B. 701. Referred to: *Re Pollitt, Ex parte Minor* (1893), 68 L.T. 366; *Re Simonson, Ex parte Ball* (1894), 1 Q.B. 433.

As to payments by a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 449-450; and for cases see 5 DIGEST (Repl.) 688-692. For the Bankruptcy Act, 1914, s. 1 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 324.

Case referred to:

- (1) *Re Sinclair, Ex parte Payne* (1885), 15 Q.B.D. 616; 53 L.T. 767; 2 Morr. 255; 5 Digest (Repl.) 690, 6064.

Appeal by Messrs. May, Sykes & Batten, solicitors, from the decision of the county court judge of Bristol disallowing a portion of their claim for a charge on certain property of the debtor for their costs, and ordering them to repay the sum of £56 to the trustee in bankruptcy of the debtor.

In 1886 the debtor, Spackman, got into difficulties, and on Nov. 9 of that year gave to his solicitors, the appellants, authority to sell certain horses and carriages, and charge the proceeds for their costs incurred. The bankrupt also instructed a Mr. Redway, an auctioneer at Swindon, to sell all his furniture and other effects at Swindon. This came to the knowledge of Mr. Jones, a solicitor who was acting for several of the largest creditors, and he threatened to take proceedings in bankruptcy unless an undertaking was given that the proceeds of sale should be secured to the creditors. Thereupon the appellants on Nov. 22, 1886, wrote to the London agents of Mr. Jones a letter as follows:

"We have seen Mr. Spackman this morning, and have arranged that all money received from the sale of furniture and other effects shall be retained

A for the benefit of creditors, and shall not be handed over to Mr. Spackman. We have, moreover, taken his authority to pay any such moneys into the Wilts and Dorset Bank, at Swindon, in the names of this firm and Mr. Redway, the auctioneer at Swindon."

On the same day, Nov. 22, 1886, the bankrupt wrote to the auctioneer as follows :

B "I hereby authorise you to retain the proceeds of my furniture and effects, and to pay the same into the names of [the appellants] and yourself."

It was alleged that this amounted to an act of bankruptcy under the Bankruptcy Act, 1883, s. 4.

On Dec. 4, a petition was presented against the debtor, on which, on Dec. 14, a receiving order was made. The solicitors had, on the debtor's behalf, prior to the
C presentation of the petition, entered into negotiations with the creditors with a view of coming to some arrangement with them whereby bankruptcy proceedings might be prevented, and had incurred costs in so doing. The solicitors sought to retain the proceeds of the sale of the horses, etc., to indemnify them against all costs incurred by them on the debtor's behalf down to the date of the receiving order. The county court judge allowed the claim in so far as it related to all costs incurred
D down to Nov. 22, the date on which the alleged act of bankruptcy of which the solicitors were cognisant had been committed, but disallowed their claim for the costs incurred after that date. The solicitors appealed.

Bigham, Q.C., and *F. C. Willis* for the solicitors.

Poole, Q.C., for the trustee in bankruptcy.

E **CAVE, J.**—There are two questions here. The first is: Was there an act of bankruptcy committed on Nov. 22? and the second, does the case fall within the decision of *Re Sinclair* (1)? I am of opinion that there was an assignment for the benefit of creditors on Nov. 22, and this was an act of bankruptcy within the meaning of s. 4. [*Note: This finding was reversed by the Court of Appeal (see notes ante, p. 1128.)*]

F As to the second point, in *Re Sinclair* (1) it was held that where a man goes to a solicitor and asks the solicitor to represent him and act for him upon the hearing of a petition for adjudication, and pays the solicitor a sum of money in order to secure his services, if the payment was made bona fide for services bona fide rendered, that sum of money so paid for good consideration actually given cannot be recovered by the trustee in bankruptcy simply because the solicitor had received
G it when aware that an act of bankruptcy had been committed. That case is likened to the case of a debtor, who, his creditors know, has committed an act of bankruptcy, going to one and paying ready money for some article of absolute necessity.

Under these circumstances it is sought to extend that doctrine in two directions, and, as at present advised, I do not think it ought to be extended in either. It is
H sought to extend it, not simply to money in the hands of a debtor and parted with by him in consideration of present services rendered or goods presently handed to him, but to all moneys which are in the hands of other persons, and which undoubtedly would become the property of the trustee in bankruptcy. To extend it in that way appears to me to be unwarrantable, as the man who takes charge under those circumstances knows well that the money belongs to the trustee, and that the person who charges it has no right to do so apart from *Re Sinclair* (1).

I On the other hand, the man who comes with ready money undoubtedly offers something which, although prima facie it may be taken to be the property of the trustee, yet in such a case may not be the trustee's property at all, as it may have been presented to the debtor for the purpose of providing funds for his defence or supplies which are necessities of life. We thought that in such a case the person who was about to render services of such a kind should not be put upon inquiry as to whose money it really was, and be obliged to compel the debtor to satisfy him that the money did not belong to the trustee upon pain of having to refund it in case it

turned out that he was wrong. The case put of a debtor whose credit has gone applying for food shows how extremely difficult such a doctrine would be to work.

On the other hand, if the power is extended not only to charge money in the pocket of the debtor, but also in the hands of other persons, it is difficult to say where the limit could be placed. Undoubtedly, if the solicitors in the present case had chosen to hand over the money to Spackman, they could have been compelled by the trustee to replace it, and had they done so and Spackman had used some in order to instruct them to defend him, so that some of it had gone to Spackman, they would be liable under the section. This case does not fall within the principle of *Re Sinclair* (1) any more than does the case of a man who has committed an act of bankruptcy, and has executed a deed of assignment to a trustee for the benefit of his creditors, as in such a case it is the duty of the trustee under the deed to wait and see if any creditor will within three months take advantage of the act of bankruptcy to present a petition, and until he is satisfied that no creditor will do this he ought not to deal with the money, and if he does do so, and the petition follows, he will have to refund the money received.

It is impossible to say that what the solicitors did was a necessity within the meaning of *Re Sinclair* (1). They were trying to make arrangements by which bankruptcy should be avoided, in order to withdraw the estate from the bankruptcy court, and we have never held that a man is justified in doing that to the extent of charging the estate with the costs incurred in that way. It would be still more monstrous if solicitors who were not trustees under a deed, and must be presumed to know the law, could be allowed to spend the money of the trustee in a case which was not allowed to a trustee under an ordinary deed. The facts do not bring the solicitors within *Re Sinclair* (1), which I will not extend.

A. L. SMITH, J.—I have nothing to add.

Appeal dismissed.

Solicitors: *May, Sykes & Batten; C. P. Jones, Trowbridge.*

[*Reported by* WALTER B. YATES, Esq., *Barrister-at-Law.*]

A

Re SPACKMAN. Ex Parte FOLEY (No. 2)

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), April 18, 19, 21, 25, 1890]

B

[Reported 24 Q.B.D. 735; 59 L.J.Q.B. 306; 62 L.T. 849]

Bankruptcy—Act of bankruptcy—Assignment for benefit of creditors—“Assignment by deed—Assignment of substantially whole of debtor's property—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 4 (1) (a).

C

By the Bankruptcy Act, 1883, s. 4 (1) [now Bankruptcy Act, 1914, s. 1 (1)] :
 “A debtor commits an act of bankruptcy . . . (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.”

The words “a conveyance or assignment of his property” mean a conveyance or assignment by deed of the whole or substantially the whole of the debtor's property, and do not include a declaration of trust for the benefit of creditors, or an agreement to assign by payment or by delivery.

D

Notes. The Bankruptcy Act, 1883, s. 4 (1) has been replaced by the Bankruptcy Act, 1914, s. 1 (1).

Considered: *Re Hughes, Ex parte Hughes*, [1893] 1 Q.B. 595; *Lipton v. Bell*, [1924] 1 K.B. 701. Referred to: *Re Sharp, Ex parte Gundry v. Johnston* (1900), 83 L.T. 416; *Radcliffe v. Abbey Road and St. John's Wood Permanent Building Society* (1918), 87 L.J.Ch. 557.

E

As to assignments for the benefit of creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 260–262; and for cases see 4 DIGEST (Repl.) 52–60. For the Bankruptcy Act, 1914, s. 1, see 2 HALSBURY'S STATUTES (2nd Edn.) 324.

Case referred to:

(1) *Re Sinclair, Ex parte Payne* (1885), 15 Q.B.D. 616; 53 L.T. 767; 2 Morr. 255; 5 Digest (Repl.) 690, 6064.

F

Also referred to in argument:

Re Glanville, Ex parte Jenkins (Official Receiver), Harris v. Hawker (1885), 33 W.R. 523; 2 Morr. 71; 5 Digest (Repl.) 943, 7717.

Whitwell v. Thompson (1793), 1 Esp. 68; 4 Digest (Repl.) 57, 479.

Bowker v. Burdekin (1843), 11 M. & W. 128; 12 L.J.Ex. 329; 152 E.R. 744; 4 Digest (Repl.) 53, 446.

G

Siggers v. Evans (1855), 5 E. & B. 367; 24 L.J.Q.B. 305; 25 L.T.O.S. 213; 1 Jur.N.S. 851; 3 C.L.R. 1209; 119 E.R. 518; 5 Digest (Repl.) 1258, 10095.

Re Wensley, Ex parte Wensley (1862), 1 De G.J. & Sm. 273; New Rep. 183; 32 L.J.Bey. 23; 7 L.T. 548; 9 Jur.N.S. 315; 11 W.R. 241; 46 E.R. 110, L.C.; 4 Digest (Repl.) 54, 452.

H

Smith v. Cannan (1853), 2 E. & B. 35; 22 L.J.Q.B. 290; 17 Jur. 911; 1 W.R. 338; 118 E.R. 682; sub nom. *Cannan v. Smith*, 1 C.L.R. 179; 21 L.T.O.S. 231, Ex. Ch.; 4 Digest (Repl.) 60, 516.

Appeal by Messrs. May, Sykes and Batten, Solicitors, from a decision of the Divisional Court (CAVE and A. L. SMITH, JJ.), dismissing their appeal from an order of Bristol county court in bankruptcy directing them to pay to the respondent, the trustee in the bankruptcy of Spackman, the sum of £56, being part of the proceeds of the sale of his property.

I

In 1886 the bankrupt, Spackman, having got into difficulties, consulted the appellants, Messrs. May, Sykes, and Batten, solicitors, with a view to a settlement with his creditors. On Nov. 9, 1886, he gave to the appellants the following authority and charge:

Dear Sirs,—With reference to the horses, carriages, etc., sent to your Mr. Batten last week, I hereby authorise you to sell them at Tattersall's as soon

as possible, and I authorise you to retain the purchase money on my account. And I hereby charge such horses, carriages, etc., or the purchase money thereof, with the costs and expenses being incurred by me with your firm.

The bankrupt also instructed a Mr. Redway, an auctioneer at Swindon, to sell all his furniture and other effects at Swindon. This came to the knowledge of Mr. Jones, a solicitor, who was acting for several of the largest creditors, and he threatened to take proceedings in bankruptcy unless an undertaking was given that the proceeds of sale should be secured to the creditors. Thereupon Messrs. May, Sykes, and Batten, on Nov. 22, 1886, wrote to Messrs. Eyre & Co., the London agents of Mr. Jones, a letter as follows :

"We have seen Mr. Spackman this morning, and have arranged that all money received from the sale of furniture and other effects shall be retained for the benefit of the creditors, and shall not be handed over to Mr. Spackman. We have, moreover, taken his authority to pay any such moneys into the Wilts and Dorset Bank, at Swindon, in the names of this firm and Mr. Redway, the auctioneer, of Swindon."

On the same day, Nov. 22, 1886, the bankrupt wrote to Mr. Redway a letter as follows :

"Sir,—I hereby authorise you to retain the proceeds of my furniture and effects, and to pay the same into the Wilts and Dorset Bank at Swindon, in the names of Messrs. May, Sykes, and Batten and yourself."

The furniture and effects at Swindon were sold on Nov. 23, 1886, and the proceeds were paid into the bank as directed.

On Dec. 14, 1886, a receiving order was made against Spackman, the act of bankruptcy being an assignment by deed of all his property for the benefit of his creditors generally made upon Dec. 3, 1886, and he was subsequently adjudicated a bankrupt. The trustee in bankruptcy, upon a motion made before the judge of the county court at Bristol, obtained an order directing Messrs. May, Sykes, and Batten to pay over to him the sum of £56 being the balance of the proceeds of the sale of the horses and carriages charged by the letter of Nov. 9, 1886. This balance was arrived at by allowing them all costs incurred on behalf of Spackman up to Nov. 22, 1886, and disallowing all costs subsequent to that date, the county court judge holding that the transaction evidenced by the above letters of that date constituted an act of bankruptcy within the meaning of s. 4 (1) (a) of the Bankruptcy Act, 1883, of which Messrs. May, Sykes, and Batten had notice. Messrs. May, Sykes, and Batten appealed, upon the ground that no act of bankruptcy had been committed on Nov. 22, 1886, and that, even if there had been, they were entitled to retain their costs incurred up to the date of the receiving order, upon the authority of *Re Sinclair, Ex parte Payne* (1). The Divisional Court affirmed the decision of the county court judge, and Messrs. May, Sykes, and Batten appealed.

Henn Collins, Q.C., and *F. Cooper Willis* for the appellants.

Cooper Willis, Q.C., *Poole, Q.C.*, and *Wace* for the trustee.

Cur. adv. vult.

April 25, 1890. **LORD ESHER, M.R.**—The question in this case arises from an application made by the trustee in bankruptcy, that the appellants, a firm of solicitors, should pay over to him a sum of money received by them out of the property of the bankrupt in respect of charges due to them from the bankrupt prior to the bankruptcy. The application was made upon the ground that, at the time when the money was retained by the appellants, the bankrupt had committed an act of bankruptcy of which they had notice. If the transaction in question did amount to an act of bankruptcy, it is clear that the appellants knew of it, for the transaction was carried out through them. The whole question in this case, therefore, is, whether the transaction which took place in November, 1886, amounted to an act of bankruptcy.

- A It is urged that this transaction was an act of bankruptcy within s. 4 (1) (a) of the Bankruptcy Act, 1883, being an assignment of the debtor's property for the benefit of his creditors generally. It is necessary, therefore, to consider the nature of this transaction. The substance of the transaction is alleged to be that the bankrupt agreed that certain persons should take control of his property, should have the whole, or substantially the whole, of it sold, and that the proceeds of sale
- B should be paid into a bank in the names of certain persons, in order that the money might be distributed among his creditors. This agreement was suggested to, if not actually forced upon, the debtor, by the threats of a considerable number of creditors acting through a solicitor who represented them. Assuming, then, that this agreement was made at the instance of creditors, and that it was an agreement that substantially the whole of the debtor's property should be realised
- C and the proceeds distributed among his creditors, the question is, whether the transaction was an act of bankruptcy. I think that it cannot be said to be an agreement with intent to defeat or delay creditors, and fraudulent, so as to be an act of bankruptcy under s. 4 (1) (b). The county court judge found that it was not so.

- D The only question is, whether it is an act of bankruptcy within s. 4 (1) (a). That provision, s. 4 (1) (a), applies to cases where a debtor

“makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.”

- E What is the meaning of those words? I think that they must be construed having regard to the known meaning and acceptance of those phrases in bankruptcy law before this Act. I think that there was, in bankruptcy law, a well-known meaning attached to the term “assignment” as used in relation to this subject. It applied to cases where the debtor executed a deed which assigned all his property to trustees for the benefit of his creditors generally. If the phrase had a well-known meaning in bankruptcy law before this Act, I think that it has that meaning, and that meaning only in this section of the present Act. That being so, no declaration
- F of trust or mere contract is an act of bankruptcy within the meaning of the words “conveyance or assignment” in s. 4 (1) (a). There must be, to constitute an act of bankruptcy, “an assignment for the benefit of creditors” within the well-established meaning of that phrase in bankruptcy law before this Act—that is, an assignment by deed to a trustee for the benefit of creditors.

- G It may be asked why this sub-s. (1) (a) was inserted in the Act of 1883. I think that it was probably inserted in order to prevent any doubt with regard to the necessity for inquiry as to the existence of an intention to interfere with the administration of the debtor's property in bankruptcy, and to make it clear that where a debtor has assigned all his property for the benefit of creditors, such an assignment is, apart from any question of intention, to be considered of itself an act of bankruptcy. If the meaning of the subsection is as I have stated it to be,
- H an assignment of part of the debtor's property will not be within it; there must be an assignment of the whole, or substantially the whole, of his property.

- I It follows from what I have said that, whether this transaction amounted to a declaration of trust for the benefit of creditors, or to a contract that the property should be dealt with in a certain way for their benefit, or whatever it was, unless it was an “assignment” of the whole, or substantially the whole, of the debtor's property, it was not an act of bankruptcy. I am of opinion that it was not an assignment, and, therefore, there had been no act of bankruptcy committed at the time when the solicitors received this money. For this reason the appeal must be allowed.

FRY, L.J.—I will first shortly state the facts of this case as I understand them. In November, 1886, the debtor appears to have been in difficulties. His property consisted chiefly of certain furniture and effects at Swindon, and of books and office furniture at Bradford-on-Avon. He had instructed an auctioneer at Swindon, one

Redway, to sell his property at Swindon, which authority was, of course, revocable. That being the state of affairs, the creditors becoming aware of his intention to sell his property at Swindon, the London agents of Mr. Jones, the solicitor acting for some creditors, had an interview with Messrs. May & Co., the debtor's solicitors, at which he intimated that unless an undertaking was given that the proceeds of the sale should be set aside for the benefit of the creditors he would take proceedings in bankruptcy against the debtor. That interview took place on Nov. 20, and on the 22nd the debtor saw Messrs. May & Co., and an arrangement, as appears from their letter of that date, was come to that the proceeds of the sale of substantially the whole of his property should be paid into a bank to the credit of certain persons as trustees for the creditors. On the same day authority was given by the debtor to Redway to pay the proceeds of the sale of his property at Swindon into the bank to the credit of those persons as trustees for the creditors. The effect of this transaction was, probably, to render the authority to sell given to Redway irrevocable. The sale of the property at Swindon took place on the next day (Nov. 23), and the proceeds of the sale were paid into the bank in accordance with the arrangement. It is clear that on Nov. 22 or 23, Messrs. May & Co. had notice of the transaction, because it was arranged by them.

The question, therefore, is, whether this transaction was an act of bankruptcy. That depends upon the meaning of s. 4 (1) of the Bankruptcy Act, 1883, which provides that:

"A debtor commits an act of bankruptcy in each of the following cases: (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

It was contended that this was a fraudulent transaction within s. 4 (1) (b). That is a question of fact in every case. In this case I do not think it was fraudulent, for it was carried out at the instigation and for the benefit of creditors.

Was it, then, an assignment within s. 4 (1) (a)? I think that the language of s. 4 (1) (a) and (b) must be contrasted in order to arrive at the meaning of the words "conveyance or assignment" in the former; (a) speaks of "conveyance or assignment;" while (b) speaks of "conveyance, gift, delivery, or transfer." Looking at this difference of language, it seems clear that the legislature, when enacting sub-s. (1) (a), must have borne in mind the fact that there were other modes of disposition of property by a debtor besides a conveyance or assignment in the proper sense of those terms. A debtor may declare himself to be a trustee of his property for the benefit of his creditors, which is a mode of disposing of property well known to the law, but is not an assignment properly so called. There are also various other modes in which property may be dealt with, as by agreement to assign, by payment, or by delivery. These are all modes of disposition by which property may be dealt with for the benefit of creditors; but they are not properly speaking assignments.

We find that the legislature, while using the terms "conveyance, gift, delivery, or transfer" in sub-s. (1) (b), only uses the terms "conveyance or assignment" in sub-s. (1) (a). It appears to me, therefore, to be plain that the legislature were only dealing with conveyances or assignments, in the strict sense of those terms, in sub-s. (1) (a). The expression in sub-s. (1) (a), "his property," must, I think, mean the whole, or substantially the whole, of the debtor's property, for in sub-s. (1) (b) the expression is, "his property, or any part thereof." Looking at that difference, I think that, if it had been intended that an assignment of part only of the debtor's property should be within sub-s. (1) (a), it would have been expressly so stated. I am of opinion that the true meaning of sub-s. (1) (a) is, that a formal conveyance or assignment, properly so called, of the whole, or substantially the whole, of the debtor's property to trustees for the benefit of his creditors generally, is to be deemed an act of bankruptcy of itself; without any evidence of fraudulent intention; but that it was not intended to apply to the various other dispositions

A of his property that might be made by a debtor. If they are fraudulent, they are dealt with by sub-s. (1) (b). In this case, therefore, there was no assignment within sub-s. (1) (a), and no fraudulent disposition within sub-s. (1) (b), and no act of bankruptcy before this money was received by the appellants. For these reasons I think the judgment of the court below was wrong, and that this appeal must be allowed.

B **LOPES, L.J.**—It is unnecessary for me to repeat the facts of this case. The question here is, whether what took place was an assignment by the debtor of his property for the benefit of his creditors generally within s. 4 (1) (a) of the Bankruptcy Act, 1883. I am of opinion that it was not. The words of that provision are “a conveyance or assignment of his property for the benefit of his creditors generally.” The words “conveyance” and “assignment” are words of art well understood by lawyers. They are understood to mean an instrument under seal transferring the legal and equitable interest in property, so as to take it out of the assignor, and to vest it in the assignee. In this case the facts do not come within sub-s. (1) (b), which relates to fraudulent transactions; there was no such thing here. I desire to express no opinion as to *Re Sinclair, Ex parte Payne* (1), but it seems to me that the present case would not come within the principle of that case.

D *Appeal allowed.*

Solicitors: *May, Sykes & Batten; Eyre & Co., for C. J. Jones, Trowbridge.*

[*Reported by J. HERBERT WILLIAMS, ESQ., Barrister-at-Law.*]

E

F CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH CO.

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), October 25, 1890]

[*Reported* [1891] 1 Q.B. 79; 60 L.J.Q.B. 295; 63 L.T. 739;
7 T.L.R. 1]

G *Conflict of Laws—Power of attorney—Execution in Brazil by resident in favour of English agent—Power in Portuguese and complying with Brazilian law—Power exercised in England—Construction according to English law.*

Conflict of Laws—Contract—Foreign contract—Construction—Performance in England—Construction according to English law.

H Per LORD ESHER, M.R.: If a contract be made in one country to be carried out in another, it must be concluded, unless anything exists to the contrary, that the law of the country in which the contract is to be carried out is the law which is applicable to it. If a part only of the contract is to be carried out in another country, then that part only is to be carried out according to the law of that other country.

I The plaintiff, who was a resident in Brazil, executed there a power of attorney giving a London stockbroker power to buy and sell shares in all countries on his behalf. The document was in Portuguese and was made in compliance with the forms of Brazilian law. The stockbroker, purporting to act under the power of attorney, disposed of certain of the plaintiff's shares in the defendant company and the shares were registered by the defendant company in the names of the transferees. The plaintiff, who claimed that this transaction had been carried out without his knowledge, issued a summons asking that the defendant company should rectify its register by inserting his name therein as the holder of the shares and the question arose whether the

power of attorney should be construed according to Brazilian or English law.

Held: although the assistance of competent translators and experts, including Brazilian lawyers, might be required in order to ascertain the meaning of the words used, nevertheless the principle stated above applied to a power of attorney and when shares were bought or sold in England in the exercise of the power, then the power of attorney should be construed according to English law.

Notes. Referred to: *Wehner v. Dene Steam Shipping Co.* (1905), 10 Com. Cas. 139; *Ralli Bros. v. Compañia Naviera Sota y Aznar*, [1920] All E.R.Rep. 427; *Broken Hill Proprietary Co. v. Latham* (1932), 49 T.L.R. 137; *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1933] All E.R.Rep. 82; *R. v. International Trustee for Protection of Bondholders Akt.*, [1937] 2 All E.R. 164; *St. Pierre v. South American Stores (Gath & Chaves), Ltd. and Chilian Store (Gath & Chaves), Ltd.*, [1937] 3 All E.R. 349; *Sinfra Akt. v. Sinfra, Ltd.*, [1939] 2 All E.R. 675.

As to the law governing contracts in general, see 7 HALSBURY'S LAWS (3rd Edn.) 72 et seq.; and for cases see 11 DIGEST (Repl.) 420 et seq.

Cases referred to in argument:

Lloyd v. Guibert (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex. Ch.; 11 Digest (Repl.) 423, 722.

Maspons Y Hermano v. Mildred (1882), 2 Q.B.D. 530; 51 L.J.Q.B. 604; 47 L.T. 318; 30 W.R. 862, C.A.; affirmed sub nom. *Mildred v. Maspons* (1883), 8 App. Cas. 874; 53 L.J.Q.B. 33; 49 L.T. 685; 32 W.R. 125; 11 Digest (Repl.) 439, 819.

Jacobs v. Credit Lyonnais (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 11 Digest (Repl.) 432, 775.

Di Sora v. Phillipps (1863), 10 H.L.Cas. 624; 2 New Rep. 553; 33 L.J.Ch. 129; 11 E.R. 1168, H.L.; 11 Digest (Repl.) 430, 763.

Re Missouri Steamship Co. (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri Steamship Co., Monroe's Claim*, 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423, C.A.; 11 Digest (Repl.) 424, 728.

Appeal from an order of DAY, J., at the trial of a preliminary point on a summons issued by the plaintiff claiming that the defendant company should rectify its register by inserting his name therein as the holder of certain of the company's shares. The preliminary point was whether the power of attorney which the plaintiff had granted to the stockbroker was to be construed according to Brazilian or English law.

Finlay, Q.C., W. Graham, and Calvert for the defendant.

H. D. Greene, Q.C., and Alexander Young for the plaintiff.

LORD ESHER, M.R.—In this case a person residing and carrying on business in Brazil wrote down on a certain day something which he intended to be an authority to an agent, and some time afterwards the person to whom he wished to delegate authority accepted the delegation. The question before us is what under these circumstances is the meaning of what the plaintiff wrote. I think it must have but one meaning, not two; and the question is, What is that meaning? How is the court to ascertain it? It must ascertain it from the words that were used on the occasion and also from the circumstances which existed at the time the words were written. There are no stereotyped rules for construing such a document, the only rule is to look at the words used and the circumstances under which they were used.

This document is a business document, written in Brazil in the language of the country, according to the formalities of Brazilian law, and by a business man carrying on business in Brazil. It has now to be construed by an English court, and as an English court cannot be taken to know the Brazilian language, the first thing to be done is to have a translation made. By that I do not mean a mere dictionary translation, but there must be put into English the exact effect of the

A Brazilian words used. You must have a business translation, and you must get words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil in business. Therefore, you want a translator competent to translate in that way, and if the words have a particular meaning in business in Brazil you must have a translator who is an expert in the terms used in business in Brazil. Among these experts you would probably want a Brazilian lawyer who could give the equivalent in English law of what had been said in Brazilian. That is the first thing to be done.

The next thing, after obtaining a correct translation, is for the court to say, as it always has to in the case of any such documents as this, what was the meaning of the party at the time he wrote it, and what is to be inferred from the language he has used. There are certain rules for drawing inferences from language which are used by the court unless a contrary intention appears in the particular case. One inference always adopted is this. If a contract be made in a country to be executed in that country, unless there appears something to the contrary, the parties must be taken to mean that the effect of the contract and the mode of carrying it out are to be according to the law of the country in which it was made. But the business sense of all business men has come to the conclusion that, if a contract be made in one country to be carried out in another, it must be concluded, unless anything exists to the contrary, that the law of the country in which the contract is to be carried out is the law which is applicable, and if a part only of the contract is to be carried out in another country then that part only is to be carried out according to the law of that other country.

Applying those rules to the present case, the first thing to be done is to get at the true construction of the language used in the authority. The plaintiff must have used the Brazilian language in the business sense in which it is used in Brazil, therefore the first thing is to translate the document into the equivalent business language in English. Having got that, you must see what is the meaning of that language, and that must be done according to the rules of construction applied to any English document. If it appears that the contract is to be performed in Brazil, then it is meant to be performed according to Brazilian law; but if it is to be carried out in England, then it is to be inferred that the meaning of the parties is that it is to be carried out according to English law. So that in England the extent of the authority would be its extent according to English law, and in France its extent would be according to French law. That is not a different construction in different countries; the construction is that, in whatever country the authority is to be exercised, it is to be exercised according to the law of that country. There is one meaning, though the authority is to be applied in a different way in different countries.

Therefore, we are of opinion that the authority having been given in Brazil, the meaning of it is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, Brazilian lawyers, as to the meaning of the language used; and if, according to such evidence, the intention of the parties appears to be that the authority shall be acted on in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon. That I consider to be a mere expansion of the judgment of DAY, J. It is the same judgment, but in an expanded form. His judgment, therefore, is not altered, but is held to be correct. Consequently, the appeal fails, and must be dismissed.

LINDLEY, L.J.—This is an appeal from an order made by DAY, J., at the trial before him of a preliminary point. He decided that English law was to govern the construction of this power of attorney, and when his decision is properly understood it appears to me to be right. The expression "construction," when

applied to such a document as this, includes two things; firstly, the meaning of the words, which is more or less a question of fact, and, secondly, the effect of the words, which is a question of law.

A power of attorney is not a contract. It is a one-sided document which expresses the meaning of the person who makes it, but it is not a contract. The court cannot take judicial notice of the Portuguese language, and it must have recourse to translators, and if there are technical expressions, to experts, in order to get a correct translation, which may express to English minds the exact meaning which the words bear in Portuguese. To that extent recourse must be had to Portuguese assistance. Having got that translation, we must consider what is the nature of the document. It is a power of attorney executed by a person resident in Brazil, giving authority to buy and sell shares in all countries. If the agent buys or sells shares in England, he must do so according to English law, and he must produce this document as his authority to do so; but he, and the people he may deal with, must act upon a proper translation of it into English. Therefore, I think the decision of DAY, J., is perfectly correct when properly understood; he does not mean that you are not to have recourse to Portuguese assistance for ascertaining the meaning of the words, but that in buying and selling shares in England recourse must be had to English law. We must, therefore, affirm his decision, expanding his meaning by the words which the Master of the Rolls has used; and the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Flux, Son & Co.; Birchams & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

A

R. v. INCOME TAX SPECIAL PURPOSES COMMISSIONERS
Ex Parte CAPE COPPER MINING CO., LTD.

[COURT OF APPEAL (Lord Esher, M.R., and Lindley, L.J.), May 31, June 23, 1888]

B

[Reported 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776; 57 L.J.Q.B. 513;
 59 L.T. 455; 4 T.L.R. 636; 2 Tax Cas. 332]

Income Tax—Repayment—Proof of overpayment “within or at the end of the year”—Refusal to make order for repayment—Remedy—Mandamus—Income Tax Act, 1842 (5 & 6 Vict., c. 35), s. 133.

C

On Mar. 7, 1887, the applicants gave notice to the surveyor of taxes that they intended to apply under the Income Tax Act, 1842, s. 133, for a return of duties paid for each of the three years ending on April 5, 1884, 1885 and 1886. The district commissioners amended the assessment for these years, and issued three certificates to the Special Commissioners, certifying the amount so overpaid. The Special Commissioners issued their order for repayment only of the amount overpaid in the last year, and refused to do so in respect of the two preceding years, on the ground that the applicants did not, in relation to the two earlier years, find and prove “within a year or at the end of the year current at the time of making” the assessments that their profits fell short of the amounts on which they were assessed, within the meaning of s. 133. The applicants applied for a mandamus to compel the commissioners to issue orders for payment of the amount relating to the two preceding years.

D

E

Held: (i) mandamus was the proper remedy to compel the Special Commissioners to issue orders for repayment of amounts certified to be overpaid; (ii) the words “at the end of the year” in s. 133 meant “as soon after the end of the year as was practicable by the use of due exertion, having regard to the circumstances of each particular case;” the General Commissioners had jurisdiction to decide whether s. 133 had been complied with; and, their certificates having been given, the Special Commissioners were bound to issue orders for payment.

F

Notes. For the present provisions relating to repayment of tax overpaid in error see the Income Tax Act, 1952, s. 66 and Sched. 6, para. 3: 31 HALSBURY'S STATUTES (2nd Edn.) 69, 515.

G

Followed: *Russell v. North of Scotland Bank* (1891), 3 Tax Cas. 14. Considered: *Furtado v. City of London Brewery Co.* (1913), 83 L.J.K.B. 255. Applied: *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K.B. 768. Considered: *R. v. Income Tax Special Purposes Comrs., Ex parte Dr. Barnardo's Homes National Incorporated Association*, [1920] 1 K.B. 26. Applied: *R. v. St. Marylebone Income Tax Comrs., Ex parte Schlesinger* (1928), 13 Tax Cas. 746. Referred to: *L.C.C. v. Galsworthy*, [1917] 1 K.B. 85; *R. v. Board of Trade, Ex parte Derry* (1917), 33 T.L.R. 316; *R. v. Nat Bell Liquors, Ltd.*, [1922] All E.R. Rep. 335; *R. v. Labour Minister*, [1924] 2 K.B. 210; *R. v. Swansea Income Tax Comrs., Ex parte English Crown Spelter Co.*, [1925] 2 K.B. 250; *London and North Eastern Rail. Co. v. Easington Union Assessment Committee and Easington-with-Thorpe Parish Council* (1925), 95 L.J.K.B. 255; *R. v. Weston-Super-Mare Justices, Ex parte Barkers (Contractors), Ltd.*, [1944] 1 All E.R. 747.

H

I

As to when mandamus is available, see 20 HALSBURY'S LAWS (3rd Edn.) 702; and for cases see 28 DIGEST (Repl.) 400.

Cases referred to :

- (1) *R. v. Treasury Lords Comrs., Ex parte Lord Brougham* (1851), 16 Q.B. 357; 16 L.T.O.S. 484; 117 E.R. 916; sub nom. *R. v. Treasury Lords Comrs., Re Queen Dowager's Annuity*, 20 L.J.Q.B. 305; 15 Jur. 767; 16 Digest (Repl.) 345, 1222.

- (2) *R. v. Comrs. of Woods and Forests* (1850), 15 Q.B. 761; 19 L.J.Q.B. 497; 15 L.T.O.S. 561; 15 Jur. 35; 117 E.R. 646; 11 Digest (Repl.) 669, 932.

Also referred to in argument :

R. v. Treasury Lords Comrs. (1872), L.R. 7 Q.B. 387; 41 L.J.Q.B. 178; 26 L.T. 64; 36 J.P. 661; 20 W.R. 336; 12 Cox, C.C. 277; 16 Digest (Repl.) 344, 1214.

R. v. Treasury Lords Comrs. (1835), 4 Ad. & El. 286; 1 Har. & W. 533; 5 Nev. & M.K.B. 589; 5 L.J.K.B. 20; 111 E.R. 794; 16 Digest (Repl.) 344, 1218.

R. v. I.R. Comrs., Re Nathan (1884), 12 Q.B.D. 461; 53 L.J.Q.B. 229; 51 L.T. 46; 48 J.P. 452; 32 W.R. 543, C.A.; 16 Digest (Repl.) 315, 943.

Rustomjee v. R. (1876), 2 Q.B.D. 69; 46 L.J.Q.B. 238; 36 L.T. 190; 25 W.R. 333, C.A.; 16 Digest (Repl.) 271, 388.

Appeal by the applicants from an order of the Divisional Court of the Queen's Bench Division (GRANTHAM and CAVE, JJ.), reported 20 Q.B.D. 549, made on an application for a writ of mandamus directed to the Commissioners for Special Purposes of the Income Tax, commanding them to issue their orders for the payment to the applicants, the Cape Copper Mining Co., Ltd., of two several sums of £81 10s. and £591 17s. 6d., being the amounts overpaid by the said company in respect of income tax for the years ending April 5, 1884, and April 5, 1885, respectively, certified to be overpaid by the Commissioners of Income Tax for the City of London, by whom the assessments were made, in accordance with s. 133 of the Income Tax Act, 1842, and the other statutes in that behalf. The company were duly assessed to income tax under Sched. D., by the Commissioners of Income Tax, acting in and for the district of the city of London, on amounts computed by the company, and the duties were paid for the years ending on April 5, 1884, 1885, and 1886 respectively. On Mar. 7, 1887, the company gave notice by their secretary to the surveyor of taxes for the said district of their intention to apply to the said commissioners for abatements of the above-mentioned assessment on account of diminution of income, under the provisions of s. 133 of the Income Tax Act, 1842. On April 7 and on May 5 the company's secretary appeared before the commissioners, and proved to their satisfaction that the profits and gains of the company under Sched. D. for the before-mentioned three years fell short of the sums computed, and paid by them as aforesaid. The commissioners thereupon on May 19, 1887, issued three certificates addressed to the Commissioners for Special Purposes, certifying the amounts so overpaid in accordance with the provisions of s. 133. The Commissioners for Special Purposes, etc., issued their order for the payment to the company of £1197 4s., being the amount certified to have been overpaid in respect of the year ending April 5, 1886, but they refused to issue any order for the two amounts certified to have been overpaid for the two preceding years, on the ground that the application in respect of these amounts to the district commissioners had not been made within or at the end of the year current at the time of making the assessment for each year, as required by s. 133. On Dec. 2 the company obtained an order nisi for a mandamus. The Divisional Court discharged the order nisi.

Sir Horace Davey, Q.C., Meadows White, Q.C., and Pollard, for the applicants.

The Attorney-General (Sir Richard Webster, Q.C.), the Solicitor-General (Sir Edward Clarke, Q.C.), and Hewitt for the commissioners.

Cur. adv. vult.

June 23, 1888. **LORD ESHER, M.R.**—In this case the applicants having been assessed to and having paid income tax in respect of their trade, asserted a considerable time afterwards, that they had overpaid, and asked for repayment. The Income Tax Commissioners having inquired into and heard the matter, decided that the applicants had overpaid, and gave them the certificates which were proper to be given if they had jurisdiction. But the Special Commissioners, on

A being asked to make an order on the Treasury for repayment, declined to do so on the ground that the General Commissioners had no jurisdiction to give the certificates. Application was, therefore, made to the Divisional Court for a mandamus. The court was divided in its opinion, and GRANTHAM, J., having withdrawn his judgment, the rule for a mandamus was discharged. The applicants have now appealed to this court.

B It has been argued before us, first, that mandamus would not lie, that there was no duty between the Special Commissioners and the applicants, but on this point we are of opinion that these commissioners had a duty towards the public, and that mandamus will lie. The second point argued was, that a certificate was in existence, and that even if it were wrong the Special Commissioners had no jurisdiction to set it aside, but it is unnecessary to decide this. The real question

C is, whether the General Commissioners had jurisdiction to give the certificates, and that depends on the Income Tax Act, 1842, s. 133. The objection is that the applicants did not find and prove the over-payment within or at the end of the then current year. On one side it is said that the end of the year does not mean exactly the very last moment of the year, but that a reasonable time after must be allowed. On the other side it is said the time must be limited as nearly as

D possible to the year, and fixed by the court without any power of altering it to suit the circumstances of any case. Neither of these views is correct; the rule must be made suitable to business. Where assessment is made on a large mercantile business with complicated accounts, and trade carried on in various parts of the kingdom it is impossible that a man should find out exactly the amount of his income as easily as a man out of business. A meaning must be given to the words

E elastic enough to make them applicable to the various cases that may arise; the court cannot lay down one single period within which all cases must be brought. The over-payment must be proved in as short a time after the end of the year in each particular case as it can be said that a man, by exertions, ought to have found it out, that he could have found it by making all necessary exertions. The statute does not simply mean within a reasonable time, but within the shortest

F time in which it can be done by the person making every exertion which he ought to make. If a person delays the examination into his affairs although not unreasonably, still I think he would be too late if he has not made every exertion he ought to have made. But if he has made every such exertion, I do not think that even the lapse of a year from the end of the year will take him out of the section.

G The question is really a matter of inquiry in each particular case, and the General Commissioners are the persons, in the first instance at all events, to decide this in accordance with the rule I have laid down. Can their decision be questioned afterwards? It may be said that, in accordance with a well-known formula, they cannot give themselves jurisdiction by giving a wrong decision, but that formula is in this case, I think, misleading. When an inferior court or tribunal is created by an Act of Parliament, the legislature has to consider what powers it shall give.

H It may say that certain facts must be shown to exist before the court is to have jurisdiction, and in this case if the preliminary facts do not exist the jurisdiction does not exist, and what the court does may be questioned. But again, the legislature may entrust the court with a jurisdiction over two sets of facts, the first being, do the preliminary facts exist which give jurisdiction; and then if the court finds that they do exist it may proceed to inquire into other facts. Further, **I** when the legislature gives jurisdiction to an inferior court, it considers the question of appeal, and if it gives no appeal from such a court the right of appeal does not exist.

In the case before us the Act of Parliament has given jurisdiction over the preliminary set of facts, as well as over the second set of facts, and it has given no right of appeal. I may add that I do not think that the Crown has produced evidence to show that the General Commissioners had decided wrongly on the first question. The judgment of the Divisional Court as given in form must be reversed.

LINDLEY, L.J.—I am of the same opinion. The question in this case turns on the meaning of s. 133 of the Income Tax Act, 1842, as amended by the Revenue Act, 1865, s. 6; though this latter Act and the Income Tax Act, 1860, s. 10, which should also be borne in mind, do not really throw any light on the true construction of s. 133.

The question before us is, what is the meaning of the words, "within or at the end of the year?" It is conceded that they do not mean the moment when the clock strikes twelve on the last day of the year. Such a construction would strike out the words "or at the end of" in the section. We must consider how the section can be worked practically in business. The section applies to all sorts of persons, including those who carry on trade in all parts of the world, or who, like this company, have an office in England and work mines abroad. The applicants in this case satisfied the General Commissioners that they had made an over-payment, and obtained from them the necessary certificates to that effect, which entitled them to repayment. The obtaining of these certificates placed the applicants in a very much better position with regard to the Special Commissioners than before. The Special Commissioners cannot take up any other ground than this, that the certificates were given without jurisdiction. If the General Commissioners have jurisdiction to decide whether the applicants have proved "within or at the end of the year," then the certificates are binding on the Special Commissioners, and there is no appeal. I doubt whether the General Commissioners are the authority finally to decide that question; but, the applicants having satisfied the General Commissioners and obtained from them the certificates entitling them to repayment, the duty was thrown on the Special Commissioners of proving that the General Commissioners had exceeded their jurisdiction.

On this point no evidence is brought forward except dates. All they say is, that the end of one year cannot be the end of another, and on this point as to the meaning of "the end of the year" I think that the Master of the Rolls has stated the rule correctly. The true meaning is, as soon after the end of the year as is practicable, having regard to the circumstances of each particular case and the duty to use diligence. We have no materials in this case for deciding whether or not this copper company did not use due diligence under the circumstances of the case in making their application to the General Commissioners. The view taken by CAVE, J., in the court below is, I think, preferable to that taken by GRANTHAM, J., though the former did not give sufficient weight to the fact of the certificates having been obtained.

Then it was contended that mandamus would not lie; but I think that, though it is difficult to draw the line, this is a case where it will lie. This is not the case of a petition of right, but an application to force the commissioners to make an order by means of which the applicants will obtain the money they want. The case comes within *R. v. Treasury Lords Comrs.* (1) and *R. v. Comrs. of Woods and Forests* (2). The appeal must be allowed.

Appeal allowed.

Solicitors : *J. Sheppard*; Solicitor of Inland Revenue.

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]





